Tax Codes Concepts in the Countries of Central and Eastern Europe

TAX CODES CONCEPTS IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE

Collective monograph edited by

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Part II.
Substantive and Procedural Tax Law Aspects from the Tax Codification Perspective

INTRODUCTION

The book contains articles about different forms of general tax law codification in Central and Eastern European countries. It has been divided into two parts. The first one includes studies presenting the issue of codification in such countries as Belarus, Czech Republic, Hungary, Lithuania, Poland, Russia, Slovenia and Ukraine. The second part contains studies on various aspects of substantive and procedural tax law of the above mentioned countries. A common element thereof is the issue of tax codification. It has been assumed, among others, that the issues presented therein should be analyzed from the perspective of existing or possible codification of tax law.

The studies contained in the first part of the book have a similar internal structure. It means that the same issues concerning tax law codification have been presented in individual articles. Thanks to this, it will be easy to compare solutions applied in these countries. The studies are divided into four basic parts. The first one includes a short presentation of the history of the Tax Code's introduction to the tax system. It contains answers to the following questions: what legal Acts were binding before the Tax Code was introduced; why the Tax Code was introduced; what entity was responsible for the Tax Code's draft preparation. The second part of the studies presents the structure of the Tax Code. The purpose of considerations included therein is to help find the answer to the following issues: what parts the Tax Code consists of; the short characterization of the substantial content of particular chapters; what other legal Acts, if any, cover the tax system in a given country. The purpose of the third part of the studies is evaluation of the Tax Code, which means answering such questions as: how scholars evaluate the existence of the Tax Code; how often the Tax Code was amended and what chapters of the Tax Code these amendments applied to; was the compliance of the Tax Code with the Constitution brought in question by the court (tribunal). The fourth part is devoted to the proposals of

reforms of the Tax Code. This part of the study answers such questions as: are there any legal activities concerning the Tax Code redevelopment; what direction are these activities aimed at; what entity is responsible for these legal activities? Moreover, this part contains the study concerning tax code models drafted by two organizations: International Monetary Fund and Inter-American Center of Tax Administrations.

This work is a part of the research carried out by the Chair of Tax Law of the Faculty of Law at the University of Bialystok. The purpose of the research is drafting an optimal model of the tax code that could be implemented in Poland. This research is not only theoretical but also practical. It is connected with current works carried out in Poland on the preparation of a draft of the new Tax Ordinance Act. Such activities are undertaken by the General Taxation Law Codification Committee, which is the first entity of this type in Poland appointed to prepare a draft of general tax law. The optimal Tax Code should embrace many circumstances, including a given country's background and legal specificity as well as its historical, social and economic conditions. For these reasons, solutions applied in one country should not be introduced in another one by mere copying. Even if in one country specific solutions function properly, it cannot be guaranteed that they could be appropriately implemented or adapted to Polish conditions. The above considerations do not mean that it is useless to research the solutions applied in other countries within the scope of tax codes being in force there. Researching such solutions in other countries, including Central and Eastern European states, may be an excellent point of reference to evaluate solutions due to be adopted in Poland. For this reason, the Chair of Tax Law, among others, have launched the following activities. First of all, on 27th May, 2013 the First International Tax Law Seminar titled "Tax Codes of Central and Eastern European Countries" was held in Augustów (Poland). Its purpose was a presentation of solutions applied within the above scope in the Czech Republic, Lithuania, Poland, Russia, Slovakia and Ukraine. Secondly, an international conference on the above subject matter will be held on 25-27 September, 2016. It will be the 15th International Scientific Conference titled "Concepts of Tax Codes. 15 Years of the Center's Operation". It will be held by the Chair of Public Finance and Financial Law as well as the Chair of

Tax Law of the Faculty of Law at the University of Bialystok together with the Association Information and Organization Center for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. The idea of the Conference is to review thoughts and experiences within the scope of tax law provisions' codification in Central and Eastern European countries. During the discussion panels, leading papers on the solutions applied within the above scope in selected countries will be presented. A key purpose of the Conference is a presentation of achievements of individual countries within the scope of tax law codification – the current state and directions of changes. This book, besides other above mentioned issues, is also a selection of studies concerning the leading theme of the above Conference, i.e. the concepts of tax codes.

Scientific Editors

Leonard Etel, Mariusz Popławski

Part I.

THE TAX CODES. HISTORY, STRUCTURE, EVALUATION AND DEVELOPMENT

TAX CODE MODELS

Mariusz Popławski[1]

1. Introduction

Tax law being in force in a given country is, most of all, established by parliaments (legislative power) of an individual country. These entities exert vital impact on the shape of adopted legal solutions. Nevertheless, tax law is affected by various factors, among others obligations resulting from international law or, in the case of the EU Member States, EU law. For this reason, tax law of a given country should embrace solutions adopted in international double tax agreements or other ratified international agreements a given country is a party to. Additionally, the EU Member States are obliged to adopt to their domestic tax system regulations resulting from the EU primary[2] as well as secondary legislation because the European Union, as a rule, is not competent to enact commonly binding provisions of tax law[3]. Although the above rule, among others, refers to legal regulations concerning individual taxes including VAT and excise tax especially, it is also applicable to direct taxes[4]. The EU Member States' tax systems should also adopt solutions which will enable the enforcement of case law concerning tax law adjudicated by the Court of Justice of the European Union[5] on combating tax avoidance and tax

1 Dr hab. (PhD), Professor of University of Bialystok, Member of General Taxation Law Codification Committee, LL.M. in American Legal System, College of Law, Michigan State University, researcher at the Center of Czech and International Tax Law at Masaryk University, Faculty of Law, Brno, Czech Republic.

2 See, among others, Treaty on the Functioning of the European Union of 25th March, 1957 (consolidated version: Official Journal of 2009, No. 203, item 1569); hereinafter referred to as TFEU.

3 D. Mączyński, Międzynarodowe prawo podatkowe, Warsaw 2015, p. 37.

4 D. Leszczyńska, Od odrębności do harmonizacji – podatki bezpośrednie w Unii Europejskiej, in print.

5 Hereinafter referred to as CJEU.

evasion[6] as well as referring to harmful tax competition between the EU Member States[7].

Non-binding proposals of legal solutions resulting from different models may affect the shape of tax law being established by individual countries. Such samples may regard specified institutions of tax law or even entire tax codes. They are drafted by various entities including international organizations. In general, their purpose is to indicate possible solutions referring to tax law which may support individual countries in establishing tax solutions they are going to introduce. The examples of such models are, *inter alia*, solutions drafted by two organizations, i.e. International Monetary Fund (IMF) and Inter-American Center of Tax Administrations (CIAT). These organizations have presented proposals of tax codes. They will be analyzed in subsequent parts of this study. The solutions to be analyzed in detail herein have not been selected at random. A presentation of different solutions has been assumed to be reasonable. On the one hand, the so called full tax code including both general and special provisions of tax law, i.e. concerning structures of individual taxes, will be studied. On the other hand, a partial code devoted only to general tax law will be presented too.

2. International Monetary Fund Code Model

International Monetary Fund (IMF) drafted a model of a hypothetical tax law in 2000 (IMF Tax Code)[8]. It may be used as assistance to draft legal acts in any country even though, in principle, it is mostly to serve countries undergoing the transition process towards a free market economy. Drafting this document, it has been assumed that each country using this model should make substantial changes thereto to satisfy the needs of a specific country, which is a certain limitation thereof. Due to this, it is suggested that the text be used as a guideline or reference

6 More: J. Szczepański, Unikanie opodatkowania dochodu w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Tax Law Quarterly of 2013, No. 4, pp. 47-63;T. Lipowski, Międzynarodowe prawo podatkowe, [in:], Podstawy finansów i prawa finansowego, ed. A. Drwiłło, Warsaw, 2014, p. 477 et seq.

7 See: D. Leszczyńska, Od odrębności..., op. cit.

8 The information included in this part of the study comes from the website of International Monetary Fund https://www.imf.org/external/np/leg/tlaw/2000/eng/stan.htm as of 23.03.2016.

material, not as a standard. It is not a recommendation from the IMF that certain specific provisions of the IMF Tax Code be directly introduced in any specific country.

The Code is based on the actual experience of IMF employees working with legislation in different countries, in particular in the Commonwealth of Independent States established after the collapse of the USSR. The model is based, for the most part, on the tax codes of Georgia (1997) and Tajikistan (November 1998), which in turn rely on the tax code of Kazakhstan (1995) and Part I of the tax code of Russia (1998). Other legislative tax documents of CIS states, among others Kyrgyz Republic and Uzbekistan, were also reviewed in the preparation of the model.

The IMF Tax Code regulates the principles of organization and operation of the tax system of a given country, the procedure for introduction, change and abolition of national and local taxes, determines the legal status of taxpayers, tax authorities, tax agents and other participants in relations regulated by the tax legislation, institutes provisions for determination of the objects of taxation, fulfillment of tax obligations and implementation of enforcement measures for national taxes and basic provisions on local taxes, tax accounting, responsibility for tax offenses and appeals against action (inaction) of tax authorities and their officials.

In the context of establishing tax law, the IMF Code introduces the rule according to which tax law may be created solely by the Code and other normative acts adopted in accordance with it. Moreover, the Code indicates a catalogue of state taxes: income tax on physical persons, income tax on legal persons, value-added tax, excise tax, social contributions, land tax, taxes on users of mineral resources, tax on enterprise property, tax on proprietors of modes of transportation, and the tax payable by small businesses. What is more, the model covers two local taxes: tax on the property of physical persons and tax on retail sales. The above mentioned catalogue of taxes should be modified and adapted to the needs of individual countries so that it is consistent with the taxes operating in them. The model does not include the issue of allocation of tax revenue between a country and local entities in connection with

differences occurring within this scope in individual CIS countries. The Code introduces a rule according to which new taxes may be introduced but solely by the change of the Code.

As far as the scope of tax law application is concerned, the following principles are introduced, among others: official publication of interpretation and explanation of the provisions by the authority which adopted a given act, application of the meanings of terms appropriate for other branches of legislation (civil law, family law and other) unless otherwise provided by this Code. In case of contradiction between the provisions of this Code and normative (normative-legal) acts pertaining to another area of legislation, the provisions of this Code shall apply and the rule saying that acts of tax legislation do not apply retroactively.

The Code envisaged taxpayers' rights and tax authorities' powers. Nevertheless, a separate catalogue of taxpayers' obligations and tax authorities' duties has not been distinguished. As far as taxpayers' rights are concerned, several basic taxpayers' rights are indicated emphasizing that the Code envisages also other rights within this scope reflected in special provisions. The Code entails that a taxpayer is entitled to: provide documents in evidence of his/her rights to tax reliefs, have access to records of audits that are performed, present explanations to a tax authority with respect to his/her computation and payment of taxes as well as the inspection results, and appeal a decision of tax authorities in the manner stipulated by this Code.

As far as tax authorities are concerned, the IMF indicates a catalogue of their powers which are applicable in every case unless it results otherwise from the Code's special provisions. Tax authorities have the following powers: to examine all financial documents, accounting books, reports, estimates, cash, securities and other assets on hand, settlements, returns and other documents relating to the calculation and payment of taxes, to receive from officials, other employees of enterprises (organizations) and physical persons information and oral and written explanations on questions arising with respect to such examinations, to exercise monetary control including examination of all production, storage, commercial and other premises of enterprises and physical persons which are used to obtain income or are connected with

the maintenance of objects of taxation, to issue mandatory instructions to taxpayers (entrepreneurs and individuals not running business activity) as well as individuals representing them to remedy identified violations of tax legislation, to apply tax sanctions and penalties provided for in this Code and fines envisaged by legislation in effect to taxpayers and their representatives for violations of tax laws, to collect, including by means of court appeal or court, from taxpayers or their representatives taxes, penalties and interest as well as administrative fines that are not paid in a timely manner, to prepare a record and issue binding orders (tax decisions) in cases of violations of tax law by taxpayers, to make test purchases of goods (commodities) and services from enterprises, to receive from banks and other financial enterprises information and documents on business activities and the financial condition of accounts of taxpayers being examined, to undertake action to reverse faulty decisions of these authorities or decisions issued by lower level authorities.

The Code is composed of two basic parts. The first one, i.e. the General Part, contains regulations common to all taxes. Whereas the second part is devoted to the structures of individual taxes. It is composed of 14 divisions, each devoted to a separate allowance. The first division, i.e. General Part, includes two chapters devoted to the tax system as well as definitions of terms used in this Model. The second division contains nine chapters, among others devoted to: contacts with taxpayers, representation and information, tax obligations, assessments, payment, collection and refund of tax, enforced collection of tax, and settlement of disputes. The third division contains provisions concerning tax authorities. It contains separate chapters devoted to the structure of tax authorities, their powers and responsibilities as well as protection of employees of tax authorities.

3. CIAT Tax Code Model

The CIAT Tax Code Model (CIAT Code) was drafted in three versions: of 1997, 2006 and 2015. It has been prepared by Inter-

American Center of Tax Administrations[9] together with international organizations and representatives of various countries. For instance, the CIAT Model version of 2015 was drafted in cooperation with Inter-American Development Bank and the German Federal Ministry for Economic Cooperation and Development Cooperation[10]. Subsequent versions of this Model contain modifications of previous versions, among others resulting from the introduction of new technologies and their use in tax law, e.g. within the scope of the use of electronic communication in the activities of both taxpayers (making payments with the use of such a system) and tax authorities (tax assessment, serving decisions or issuing certificates). The last two versions of the Model adopted a slightly distinct internal structure eliminating a separate part concerning tax authorities' powers and obligations and introducing a part devoted to challenges of administrative acts of tax authorities. It does not mean that the final version of the CIAT Code does not specify authorities' powers and obligations. They are expressed in many special provisions concerning individual institutions regulated in this Code. They were just not presented separately in one part. The size of subsequent versions of the CIAT Code has not increased considerably compared to the original version. The first version of this Code was composed of 185 Articles whereas the subsequent ones – of 198 and 201 Articles respectively.

Similar to the IMF Code, solutions adopted in the CIAT Model are to serve as a general guide for legislation reforms in Member States. It means that in many cases it will be necessary to adjust regulations contained in the CIAT Code to specific legal framework, tax administration structure and tax system of a country wishing to introduce this Code. It has been assumed that the Code is to be applied to all taxes operating in a given country except customs duties, which are considered to be a part of the Customs Code. It is justified by a special nature of customs law. Distinctions of this branch of law manifest themselves in specific issues typical of customs law, among others: customs territory, the security

9 The information included in this part of the study has been based on the CIAT Tax Code Model. Inter-American Center of Tax Administrations, Panama. Executive Secretariat, 1997, p. 17 and next, as well as Jorge R Cosulich, Introduction, in: CIAT Tax Code Model/Inter-American Center of Tax Administrations, Panama. Executive Secretariat, 1997, p. 13 and next.

10 See information concerning this version in Spanish on the website: http://www.ciat.org/index.php/en/products-and-services/ciatdata/tax-rates/145.html?task=view as of 23.03.2016.

(deposit), dispatch of commodities, or smuggling. This specificity does not exclude the application of reference to the CIAT Code in the Customs Code within the scope which shall be useful in customs law provided these regulations will be connected with other regulations of customs law or supplement them.

The subject Code was created on the basis of the synthesis of solutions contained in many sources. It includes, among others, the existing tax law of individual countries of Latin America, general tax law of Spain, tax law operating in Germany as well as the ILADT Model[11] drafted by Inter-American Development Bank (IDB) which was the basis to adopt the solutions referring to tax law for many countries of this region.

The document accompanying the CIAT announcement emphasized that being based on Spanish and German law, the CIAT Code will create a suitable framework that will allow to build a connection between tax administration and taxpayers which needs to be constantly improved with regard to the activity and cooperation of taxpayers to assure the fulfillment of the constitutional principle according to which all citizens must contribute to the maintenance of public expenditure. Fulfilling this objective, it has been assumed that it is particularly important to properly determine the rights and duties of both taxpayers and tax authorities in the CIAT Code. However, drafting the CIAT Code solutions, it has been underlined that legal solutions being launched cannot focus only on strengthening taxpayers' rights as an aim in itself. It should be done with regard to two basic legal rules which are frequently emphasized as constitutional rules, i.e. the principle of equality and the principle of legal transparency. A purpose of the principle of equality in taxation is the assurance of tax justice, which means that individuals encountering the same circumstances are treated in a similar way whereas any existing differences are at the same time taken into account. It is assumed that the principle of equality is not fulfilled when differences resulting from legal provisions and a different treatment ensuing thereof cannot be rationally justified, i.e. when it is arbitrary. Within the context of this principle,

11 More: B. Brzeziński, Problemy kodyfikacji prawa podatkowego w krajach Ameryki Łacińskiej, Tax Law Quarterly of 2014, No. 3.

it is underlined that tax authorities should have any powers necessary to assure effective enforcement of taxpayers' obligations. Otherwise, it may evoke negative phenomena, among others tax evasion which, in turn, embodies a gross manifestation of tax injustice and violation of the above mentioned principle of equality. What is more, equality should involve a balance between individual interests of the parties, i.e. tax administration and taxpayers. Due to this, tax authorities should operate as an entity supervising the fulfillment of tax obligations burdening taxpayers, that is as entities counteracting tax law violation. However, these entities should also assure taxpayers service by supporting them in order to improve the relation between a taxpayer and tax authority. It will be achieved, *inter alia*, by respecting taxpayers' rights and supporting them in the fulfillment of their obligations. In consequence, the provisions should include: clear determination of the scope of operation of tax authorities by indicating, among others, their obligations and taxpayers' duties too. Introduced rules should enable administration to act efficiently while strictly observing taxpayers' rights.

As far as the principle of legal transparency is concerned, it indicates that everyone must be absolutely aware of tax obligations s/he is burdened with. Moreover, tax law should be applied in such a way as to assure consistency of a tax authority settlement with expectations resulting from the provisions of law. Implementation of the principle understood in this way will contribute to building social trust to state institutions as well as protect taxpayers against arbitrary treatment.

The CIAT Code distinguished and described in details a catalogue of taxpayers' rights and duties. Moreover, a catalogue of administration powers and obligations has been distinguished too. Taxpayers' duties include: a duty to fulfill obligations resulting from the provisions of substantive and procedural law (exemption from the obligations of substantive law does not exempt from procedural obligations unless special provisions specify otherwise), obligation of initiative (within the scope of the fulfillment of duties resulting from tax provisions), obligations concerning cooperation in the audit process, the obligation to register, the obligation to inform, obligations of public sector and representatives of other entities (cooperation with tax authorities within the scope of submitting data necessary for taxation), obligations and

formalities connected with registration, estimation and submission of information by taxpayers. As far as taxpayers' rights are concerned, the CIAT Code included the following: the right to tax refund and excess tax refund, the right to correct a tax return, the right to lodge a complaint against omission or delay in receiving an answer, and the right to formulate inquiries. Within the scope of taxpayers' rights, the right to complain about protracting tax proceedings is particularly important. This institution should be supplemented by a possibility of holding an official (clerk) liable and imposing sanctions if s/he fails to fulfill their duties. This solution aims at the assurance of balance within the scope of taxpayers' obligations which are to be fulfilled with due diligence and on time.

Among tax authorities' powers, the CIAT Code indicated the following elements authorizing them to: delegate, make settlements, collect tax, determine tax, issue interpretations, temporarily estimate tax in case of taxpayers who failed to submit tax returns, carry out audits, estimate tax base, take advantage of international administrative aid, use the support of the judiciary (e.g. to receive court writs of payment), apply security measures, apply reliefs to pay tax, remit tax cases due to petty amounts of tax arrears or lack of collection. Moreover, a tax authority has the right to access information that is necessary for the proper performance of their tasks (tax assessment and collection). If tax authorities were not entitled to this, it could result in the concealment of illegal activity and tax evasion as well as commitment of many other tax offences.

In the context of tax authorities' obligations, the following duties have been indicated: within the scope of informing and supporting taxpayers, timely arrangement of motions, the obligation to observe the finality of administrative acts (as a rule, no possibility to modify them without a taxpayer's consent), and observation of fiscal secrecy. Tax authorities' powers and obligations included in the CIAT Code are oriented at the creation of a better balance between the interests of taxpayers and tax authorities, supporting the introduction of programs that use advanced technologies. As far as tax authorities' obligations are concerned, we should pay attention to a precisely depicted obligation of providing taxpayers with information and support in order to fulfill their

tax-related duties. Fulfilling their obligations, administration should be able to enter into and use the instrument of international agreements on the exchange of information due to the growing importance of administrative international cooperation, which is a consequence of economic globalization.

The regulations contained in the CIAT Code should provide tax authorities with efficient and effective fulfillment of their obligations but, at the same time, introduce taxpayer's rights security. For this reason, they should be characterized with the following features: precision (they should not evoke doubts about the solutions resulting from them), coherence (they should be consistent with the logical layout of the act and they should not introduce repetitions), ease of application (they should not be too complex or lead to the prolonged procedure), economical effectiveness (they should bear possibly the lowest additional burden both to the taxpayer and tax authority), comprehensiveness (they should include solutions of different situations which may arise in the relation between a taxpayer and tax authority).

With regard to the rules of substantive law, the following principles have been adopted which should be obeyed during the process of shaping tax solutions on the basis of the CIAT Code. Firstly, certain flexibility elements should be adopted from the principle of legality, for instance within the scope of tax collection fulfillment. Secondly, as far as definitions and types of taxpayers are concerned, three categories thereof have been adopted, i.e. a direct taxpayer (creating events evoking tax consequences), a substantive taxpayer (taking part in the events evoking tax consequences or capable of guaranteeing tax collection on future events), as well as third parties (bearing joint and several tax liability with a taxpayer on the basis of legal provisions or in connection with activities undertaken by these entities due to the connection with the events evoking tax consequences or their scope of powers as representatives or due to their legal succession). Thirdly, substantive law provisions should be connected with the scope of rights and duties of taxpayers as well as powers and obligations of tax authorities. Provisions concerning the above rights and duties should be constructed in such a way as to create relations between the rights and duties of taxpayers and powers and obligations of tax authorities. It means that provisions

creating the rights and duties of taxpayers at the same time establish appropriate powers and obligations of tax authorities.

It has been decided, however, that it is necessary to clearly introduce the rights and duties of taxpayers in order to introduce as great as possible transparency and predictability of provisions referring to the relation between a tax payer and tax authority. It is important for both taxpayers and tax authorities. It is also significant for balancing the indication of powers and obligations of tax authorities even though it may lead to certain repetitions.

Shaping procedural provisions contained in the CIAT Code, the following issues have been found particularly important: flexibility of application of the regulation (excessive formalism should be eliminated so that the form does not prevail over the essence of a given institution, which may lead to the violation of the aim to be achieved), economics and punctuality of a tax authority (elimination of unnecessary activities which may lead to unreasonable delays and excessive formalities increasing the cost of unnecessary procedures), introduction of a proper tax procedure embracing, among others: the right of a taxpayer to submit explanations, i.e. to present explanations before the issue of a tax decision, the right to present evidence, the right to refuse submission of evidence which must be created by a taxpayer, the right to acquire information about the legal basis of tax decisions (all activities of a tax authority should be explained and justified together with the indication of provisions being the basis of their application as a condition of validity of such activities).

The CIAT Code is based on the assumption operating in Latin American countries according to which both kinds of offences and sanctions connected with the failure to fulfill tax obligations are a part of tax law not criminal law. It is connected with a unique character of tax law. In case of tax offences, a necessary element thereof is a guilt of a wrongdoer, e.g. tax frauds, but also failure to follow tax authorities' acts and summons. In case of tax misdemeanors, an objective fact of failure to fulfill a tax-like obligation is sufficient. Apart from the above mentioned violations of law, the CIAT Code distinguishes tax violations

too, which cover delays and failures to report a tax obligation as well as tax offences of tax authorities' employees.

The CIAT Model Code is composed of five parts. However, there are differences in the content of individual parts in the first and the subsequent versions thereof. The 1997 version distinguishes the following parts: preliminary provisions, rights and obligations of taxpayers and third parties, obligations and powers of tax administration, procedure as well as tax offences and penalties. Part I regulates tax principles, definitions of taxes as well as such terms as: tax domicile, tax obligation, individuals subject to tax obligation, joint and several liability, mechanisms causing tax obligation expiry, tax liabilities' extinction and priority of tax claims. Part II regulates obligations and rights of taxpayers and third parties. Part III regulates rights and obligations of tax administration. Part IV embraces general provisions of tax procedure, requirements referring to a decision, evidence, special tax procedures such as: tax audit, estimation, complaints, determining and imposing penalties, tax dues enforcement and principles of challenging tax decisions. Part V covers general provisions referring to tax offences and sanctions, the principle of liability, types of offences and misdemeanors, and sanctions. In 2006 and 2015 versions, part II is devoted to tax liabilities and substantive law tax relations, part III – tax procedures, part IV – tax law violations and sanctions whereas part V – measures to challenge administrative acts of a tax authority.

The CIAT Code has been criticized and the following objections have been raised: the fact is has been based on the archaic authoritative-oppressive model of public powers not adaptable to the contemporary times, contradictions of some legal solutions with constitutional provisions of some countries belonging to CIAT, excessive "flexibility" of the principle of legality through launching solutions favoring tax administration (blurring the system of tax law sources with a considerable participation of not precisely specified acts of a general character issued by tax administration, increasing the efficiency of tax administration operation through developing repressive instruments including penalties in the lead), lack of support for the idea of voluntary performance of

tax obligations by a taxpayer at the expense of demonstrating solutions strengthening tax authorities' powers[12].

4. Conclusions

Tax codes samples presented above may be an important model for many countries which undertake or will undertake actions aiming at changing tax law. What is more, the presented solutions are examples of different directions a country may pursue. On the one hand, it may be an activity aiming at drafting an act within the framework of the so called full codification, which will embrace both general and special tax law provisions, that is structures of individual taxes. In such a case, it is worth referring to the IMF Code. On the other hand, it may be an activity whose basic aim will be codification of general tax law stipulating individual taxes in separate acts. We deal with such a structure in the CIAT Code. Regardless of the adopted direction, both above presented models should be treated rather as a guideline indicating a direction of launched changes and not as a draft of provisions which may be enacted to the system of law in a given country. Developing their provisions, each country should include the specificity of their systems.

Abstract

This paper deals with tax code models drafted by two organizations: International Monetary Fund and Inter-American Center of Tax Administrations. Full tax code including both general and special provisions of tax law, i.e. concerning structures of individual taxes, was analyzed in this article. On the other hand, a partial code devoted only to general tax law was also presented.

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The information included in this part of the study has been based on the CIAT Tax Code Model. Inter-American Center of Tax Administrations, Panama. Executive Secretariat, 1997.

TAX CODE OF THE REPUBLIC OF BELARUS: FORMATION AND REALITY

Abramchik Lilia[1]

1. Introduction

The tax system of the Republic of Belarus has begun to be formed with establishing the state sovereignty. It was necessary for the Republic to create a system of taxation to ensure financial resources for its operation and activity. In this regard, there was a task to define priorities of a tax policy depending on the direction of the state development and branch specifics of national economy. It was necessary to create such tax mechanism which would provide tax sovereignty. For this purpose, it was necessary to develop and adopt tax laws the of the Republic of Belarus for a long period and consider a possibility of development of economic processes in the state, national and branch entities to adjust the level of globalization and integration into the world economy. A draft of the republican budget for 1992 was developed ensuing from the Declaration on the State Sovereignty of the Republic of Belarus adopted by the Supreme Council of Belarus and legal acts ensuring its political and economic independence.

The new tax law was introduced by the acceptance of a number of laws on the taxation of legal entities and individuals (on value added tax, excises, taxes including profit (income) tax real estate tax, fuel tax, and for the use of natural resources, payments for the land, road funds, income tax from citizens) at eighth extraordinary session of the Supreme Council of the Republic of Belarus in December, 1991. The need of tax law development was dictated by a variety of reasons of an economic and political character. The tax system operating before corresponded

1 Head of the Department of Constitutional Law, Yanka Kupala State University of Grodno Candidate of Jurisprudence, Associate Professor (Republic of Belarus).

to a command management system of management economy, rigid state regulation of the prices, and submission of a number of structures and functions to the central power. It was necessary to create own tax legislation which would provide a guarantee of independence of the Republic as a sovereign state in the formation of income of the budgetary system and protection of its economic interests.

General questions connected with types of nation-wide obligatory payments were defined by the law "On Taxes and Fees Raised in the Budget of the Republic of Belarus"[2], which also fixed a legal status of taxpayers and tax authorities and contained types of tax offenses and responsibility for their commission. Tax control and the order of appeal against actions of officials and decisions of the government bodies which they were carrying out, were characterized therein as well.

To ensure implementation of the provisions of the general the part of the tax law contained in the Law "On Taxes and Fees Raised in the Budget of the Republic of Belarus", they were concretized and supplemented in its special part which contains the provisions of law regulating the order of collection of obligatory payments, a catalogue of payers of each tax, objects of taxation, and the order of calculation and payment of taxes. The provisions of the special part of the tax law were enshrined in the laws "On a Value Added Tax"[3], "On Excises"[4] – excises were included into the tax system of the Republic of Belarus as an independent tax and began to play an important role in the formation of budgets of all levels, and "On taxes on income and profit"[5] (this Law provided equal approach to profit taxation on all enterprises irrespective of forms of ownership and departmental subordination whereas unjustified and inefficient

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2 On taxes and fees raised in the budget of the Republic of Belarus: The Law of the Republic of Belarus of 12/20/1991, No. 1323-XII: ed. Zakonaresp. Belarus, 1/5/2008// Sheets of the Supreme Council of the Republic of Belarus, 1992, № 4, p. 75.

3 On value added tax: The Law of the Republic of Belarus of 12/19/1991 No. 1319-XII//Bulletin of the National Assembly of Belarus. – 1999. – № 34-35. – Art. 515.

4 On excises: The Law of the Republic of Belarus of 12/19/1991 No. 1321-XII// Bulletin of the National Assembly of Belarus. – 1998. – № 4. – Art. 22. On income tax from natural persons: The Law of the Republic of Belarus of 12/21/1991, No. 1327-XII: in edition of the Law of the Republic of Belarus, 5/12/2009//National Register of Legal Acts of the Republic of Belarus, 1/16/2006, N 6, 2/1175.

5 On income tax from natural persons: The Law of the Republic of Belarus of 12/21/1991, No. 1327-XII: in edition of the Law of the Republic of Belarus, 5/12/2009//National Register of Legal Acts of the Republic of Belarus, 1/16/2006, N 6, 2/1175.

privileges were liquidated. At the same time, a number of privileges for investment (on development and expansion of production), nature protection and charitable purposes were provided. The rate of a tax was established of 30% of taxable profit. Taking into account the provided privileges, a real rate of a tax on balance profit was estimated at 21,8%. However, since 1993, this order of taxation of separate kinds of activity and managing subjects has changed significantly. Rates differ in a wide range (from 15 to 80%). Legal regulation of the collection of tax on the income of natural persons was carried out by the Law of the Republic of Belarus "On income tax from natural persons".

The new tax system of the Republic of Belarus has for the first time included property taxes of a market type: a real estate tax[6], payment for the land[7], tax on production and use of mineral resources (ecological tax)[8], and tax on fuel[9]. The introduction of a real estate tax has replaced earlier applied payment for funds and the tax on owners of structures raised from natural persons. However, in essence, objects of taxation have remained the same – residual cost of basic funds of enterprises and the cost of buildings and constructions which are property of natural persons. The introduction of payments for the land (land tax) provided transition to new economic relations of the state with owners (users) of the land. Its stage-by-stage assessment of quality (fertility) taking into account capital investments was made (cultivated and natural agricultural grounds which are again under construction and operating production objects in the cities). With regard of real determination of the cost of land, raising (lowering) rates depending on its location, the arrangement of historical and cultural monuments, etc., were provided.

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6 On a real estate tax: The Law of the Republic of Belarus of 12/23/1991 No. 1337-XII//Sheets of the Supreme Council of the Republic of Belarus. – 1992. – No. 3. – Art. 59.

7 On payments for the land: The Law of the Republic of Belarus of 12/18/1991 No. 1314//Sheets of the Supreme Council of the Republic of Belarus. – 1992. – No. 3. – Art. 49. On the amounts of payment for the land: The Resolution of the Council of Ministers of the Republic of Belarus of 12/28/2000 No. 2004//NRPA. – 2001. – No. 35/4918.

8 On tax for the use of natural resources (ecological tax): The Law of the Republic of Belarus of 12/23/1991 No. 1335//Sheets of the Supreme Council of the Republic of Belarus. – 1992. – No. 3. – Art. 57. On the rates of ecological tax, limits of production of natural resources and admissible emissions (dumpings) of polluting substances: The Resolution of the Council of Ministers of the Republic of Belarus of 1/17/2001 No. 62//NRPA. – 2001. – No. 9, 5/5054.

9 On tax on fuel: The Law Republic of Belarus of 12/22/1991, No. 1332-XII: in edition. Law of the Republic of Belarus, 2/24/1994// Sheets of the Supreme Council of the Republic of Belarus, 1992, No. 3, Art. 55.

The application of tax on fuel in the territory of the Republic of Belarus provided coordination of the tax with the amount of consumed fuel and its types (gasoline, compressed diesel fuel and liquefied gas) and attempted to limit a number of intermediaries in fuel sale by the establishment of an extra charge to the price. All resource taxes (land, ecological and tax on fuel), at the same time, had also a special-purpose character, in particular ecological and tax on fuel formed the fund of conservation and road funds whereas funds from the land tax were allocated for the improvement of lands.

By 1996, at least 10 amendments to tax Laws (without changes in the order and methodology of the collection of separate types of tax and collecting, whose number was much larger) were made. Therefore, the question of the need of development of uniform act (tax code) regulating all parties of tax relations for the formation of the integral and balanced tax system was particularly acute.

For streamlining of payments made in favor of nonresidents of the Republic of Belarus, the Decree of the President of the Republic of Belarus of 1/14/2000 No. 17 "On introduction of offshore collecting"[10] provided the introduction of collecting of 15% of the sum of money transferred in payment for work and services rendered by nonresidents into accounts of these nonresidents registered in offshore zones or into the accounts opened in these zones.

According to the Decree of the President of the Republic of Belarus of 12/23/1999 No. 43 "On taxation of income received in separate fields of activity"[11], payers of tax on income are banks, non-bank financial institutions, insurance and reinsurance companies, and also other legal entities with regard to income gained from implementation (repayment) of securities.

In recent years a lack of general and, in particular, special tax laws adapted to the requirements of changing social and economic relations

10 On the introduction of offshore collecting: The Decree of the President of the Republic of Belarus of 1/14/2000 No. 17//NRPA. –2000. – No. 8, 1/930. On the approval of the list of works and services from which payment of offshore collecting is raised: The Resolution of the Council of Ministers of the Republic of Belarus of 2/11/2000 No. 196//NRPA. – 2000. – No. 21, 5/2609.

11 On taxation of income gained in separate fields of activity: The Decree of the President of the Republic of Belarus of 12/23/1999 No. 43//NRPA. – 2000. – No. 4, 1/87.

became noticeable. And though the tax law annually undergoes essential changes, a sharp need for its codification has ripened. The uniform Tax Code of the Republic of Belarus could replace a set of existing regulations. During this period, regulations issued by the President of the Republic of Belarus played a role of regulators of the tax policy of the state.

These acts, depending on the norms which are contained in them, can conditionally be divided into three groups: providing the system of measures for ensuring effectiveness of the state tax policy (the decree of the President of the Republic of Belarus of 8/4/1997 No. 14 "On some measures for streamlining of economic relations"); defining actions for ensuring a receipt of tax payments in the budget (The decree of the President of the Republic of Belarus of 9/10/1999 No. 530 "On restructuring of debt of economic societies on payments in the budget", etc.); implementation of tax sanctions containing mechanism to the taxpayers having a debt on payments in the budget (the decree of the President of the Republic of Belarus of 10/26/1998 No. 16 "On additional measures for collecting debt from subjects of managing", the decree of the President of the Republic of Belarus of 7/24/1995 No. 285 "On a temporary order of collection of a penalty fee", of 5/6/1996, etc.).

Further legal regulation of this tax found reflection in the Law "On Tax on the Income from the Implementation of Lottery Activity"[12]. The tax on gambling business was imposed in 1999[13].

For the ten-year period of legal regulation of tax relations, the tax legislation developed so rapidly that it was difficult for a taxpayer to observe and apply it. On the other hand, tax authorities have a large number of tax Laws and Decrees of the President of the Republic of

12 On some measures for streamlining of lottery activity: The Decree of the President of the Republic of Belarus of 5/12/1998 No. 6//SDUP. – 1998. – No. 14. – Art. 347. On the establishment of tax on the income from implementation of lottery activity: The Decree of the President of the Republic of Belarus of 4/23/1999 No. 19//NRPA. –1999. – No. 33, 1/289. On tax on the income from implementation of lottery activity: The Law of the Republic of Belarus of 1/1/2000 No. 356-Z//NRPA. – 2000. – No. 7, 2/131.

13 On the statement of rates, order and terms of payment of tax on gaming: The Resolution of Council of Ministers of the Republic of Belarus of 12/10/1999 No. 1930//NRPA. 2000. No. 3, 5/2220. On measures for streamlining of gaming in the Republic of Belarus: The Decree of the President of the Republic of Belarus of 12/1/1998 No. 21//SDUP. 1998. No. 34. Art. 853.

Belarus and Resolutions of the Council of Ministers of the Republic of Belarus creating inconvenience in law-enforcement practice.

Expenses on tax administration, including expenses on the observance of tax law, have increased. Attracting foreign investments with the elaborated number of tax and legal acts was difficult because the tax device in any state assumes preservation of the principle of unity of tax system as defined at its initial organization and in the course of further reforming. This principle assumes elaboration of a uniform strategy of taxation, unification of national approaches to the organization of tax relations and their compliance with international standards.

In this regard, the need for systematization of the tax law of the Republic of Belarus by codification has ripened. Codification is unity of all legal material by processing its internal content in a harmonious, logically integral and internally coordinated system. Codification is a result of both internal and external processing of the current legislation during preparation and adoption of a new codification act[14].

For further improvement of the legislation of the Republic of Belarus and to increase the efficiency of a law-making process, the Decree of the President of the Republic of Belarus of April 10, 2002 No. 205 approved the concept of improvement of the legislation of the Republic of Belarus[15], which, as the main way of development of the system of legislation, calls for the codification allowing to reach uniform and legally integral regulation in the branches and certain institutes of the law.

Thus, in the process of improvement of the tax law there was a natural requirement of its codification at the level of the greatest significance as to the most effective way of the achievement of stability and efficiency of the tax law attached to both legislative and executive power. It should be noted that in the Republic of Belarus a lot of things have already been made in this respect, and without exaggeration, it is

14 K.E. Sigalov, Codification and legal time, K.E. Sigalov, History of state and law. – 2007. – No. 23. – p. 35-37.

15 On the concept of improvement of legislation of the Republic of Belarus: the Decree of the President of the Republic of Belarus, 10 Apr. 2002, No. 205, Reference databank of legal information of the Republic of Belarus, The National Center of Legal Information of the Republic of Belarus. – Minsk 2014.

possible to say that in the former Soviet Union the Republic of Belarus takes a leading position in the issue of tax law codification.

In 2002 the General Part of the Tax Code of the Republic of Belarus[16] and in 2009 the Special Part of the Tax Code of the Republic of Belarus were accepted[17].

2. The Structure of the Tax Code of the Republic of Belarus

In the Republic of Belarus the main legal document regulating tax law is the Tax Code of the Republic of Belarus which "installs the system of taxes, collecting (duties) collected in the republican and (or) local budget, basic principles of taxation of the Republic of Belarus, regulates imperious relations on the establishment, introduction, change and cancellation of tax payments and the relations arising in the process of execution of the tax obligation, implementation of tax control, the appeal of decisions of tax authorities, and also establishes the rights and duties of payers, tax authorities and other participants of the relations regulated by the tax law".

The general part of the Tax Code has been effective since January 1, 2004, and the Special Part has been in force since January 1, 2010. Under Art. 3 of the General Part of the Tax Code of the Republic of Belarus, the term of "tax legislation" represents "the system of legal acts accepted on the basis and according to the Constitution of the Republic of Belarus" and includes:

- The Tax Code of the Republic of Belarus and the laws adopted according to it, which regulate taxation issues;
- decrees and orders of the President of the Republic of Belarus containing taxation issues;

16 Tax Code of the Republic of Belarus (General Part): The Code of the Republic of Belarus of 12/19/2002 No. 166-Z: the text of the code as of 12/30/2015//the National Register of Legal Acts of the Republic of Belarus, 1/13/2003, No. 4, 2/920.

17 Tax Code of the Republic of Belarus (Special Part): The Code of the Republic of Belarus of 12/29/2009 No. 71-Z: the text of the code as of 12/30/2015//the National Register of Legal Acts of the Republic of Belarus, 1/7/2010, No. 4, 2/1623.

– international contracts of the Republic of Belarus;
– the resolutions of the government of the Republic of Belarus regulating issues of the taxation and the laws adopted on the basis and in pursuance of the Tax Code of the Republic of Belarus;
– the regulations of republican state bodies, local authorities and self-government regulating the issues of taxation and issued in the cases and limits provided by the Tax Code of the Republic of Belarus.

Inclusion of the provisions regulating taxation issues in other acts of legislation is forbidden unless otherwise provided by the Tax Code of the Republic of Belarus or the President of the Republic of Belarus.

S.K. Leshchenko specifies that "The practice of inclusion of tax norms in non-tax laws creates additional difficulties in the realization of these norms. It is difficult for a taxpayer to monitor changes of tax norms; regulations, adopted for the purpose of an explanation of legislative innovations, as a rule, are issued after their introduction in force. As a result, there is a set of mistakes at calculation of the taxes and fees caused by ignorance or wrong interpretation of tax norms. Therefore, a short section of the General Part of the Tax Code about the inclusion of tax law norms only in tax law acts is submitted necessarily and timely"[18].

In December, 2002 in the Republic of Belarus the Tax Code of the Republic of Belarus was adopted. The General Part of the Tax Code of the Republic of Belarus is the main document comprehensively regulating all directions of tax relations in the state. The Tax Code has systemized acts existing in the tax sphere. It installs the system of taxes, collecting, duties collected in the budget of the Republic of Belarus, basic principles of taxation governing imperious relations on the establishment, introduction, change, cancellation of tax payments and the relations arising in the course of execution of tax obligations, implementation of tax control, the appeal of decisions of tax authorities and also the

18 S.K. Leshchenko, The system of tax law of the Republic of Belarus, S.K. Leshchenko, Right and democracy: Collection. Scientific works, issue 15., Editorial board: V.N. Bibilo (editor-in-chief), etc. – Minsk 2004.

rights and duties of payers, tax authorities and other participants of the relations regulated by the tax law.

With the introduction of the Tax Code (the General Part) in the Republic of Belarus work on the creation of the tax law of the state, settlement of divergence of provisions of existing legal acts and the achievement of their compliance with each other is finished. The Code has defined validity of all legal acts existing in the tax sphere, their hierarchy in relation to other documents or, speaking in other words, their place in the legislative hierarchy.

The Tax Code (the General Part) of the Republic of Belarus consists of four sections. Each section regulates a certain sphere of tax relations. The maintenance of these spheres is directly reflected in the name of these sections:

- Section 1. "General provisions";
- Section 2. "The tax obligation";
- Section 3. "Tax accounting and tax control";
- Section 4. "Tax and customs authorities of the Republic of Belarus. Appeal of decisions of tax authorities".

As a part of the above sections eleven chapters which concretize standard legal information are selected: each chapter of the Tax Code contains several articles in which specification of separate directions of tax relations designated in the name of the title is continued.

Thus, chapter 1 "Basic provisions" gives legal characteristic to such fundamental components of the process of taxation as tax relations, principles of taxation, types of tax and collecting, the order of introduction, and changes and cancellation of republican and local taxes.

In chapter 2 "Payers of taxes, collecting duties", a legal definition of all possible payers of taxes, collecting and duties is given: domestic and foreign managing subjects, collective and individual entrepreneurs, taxpayers and their tax agents, and other lawful representatives of taxpayers, etc.

Chapter 3 "Objects of the taxation" contains explanations of each possible object to which tax rates can be applied: property, income, works, services, goods, etc.

In chapter 4 "Tax obligations", an accurate definition is given to the concept of "tax obligation" and the procedure of its execution of various tax situations: liquidation of enterprise or its reorganization, incapacity, or unknown or absent payer, etc. Here a definition is given to such concepts as "a tax base", "a tax rate", "a tax period", "tax benefits", "terms" and "the order of payment of taxes".

In chapter 5 "Ways of ensuring the execution of tax obligation, payment of a penalty fee", the ways of ensuring the execution of tax obligation are established in the Republic of Belarus by means of the pledge of property, the guarantee, the use of a penalty fee, holding transactions on the accounts of a taxpayer in a bank and seizing his property are accurately regulated therein.

Chapter 6 "Compulsory execution of tax obligation" contains instructions on collecting a penalty fee for the account of the money which is on the accounts of a taxpayer at the expense of his cash, and also at the expense of means of debtors of the taxpayer, at the expense of the property of the taxpayer, etc.

Chapter 7 "Offset, tax refund" regulates the procedure of return of excessively paid and excessively collected tax sums.

Chapter 8 "Tax accounting. The tax declaration", for the first time in the tax law, defines the concept of "tax accounting" and states its purposes and mission. The introduction of tax accounting is connected with the fact that the operating order of the taxation of profit assumes, besides registration and systematization of economic operations on accounting methodology, the performance by the accountant of the whole complex of registration – even actions for the correct calculation of tax obligations of the organization.

In this chapter, also a definition of the tax declaration as a written statement of the taxpayer containing a broad aspect of information on the taxpayer and his income is given.

In chapter 9 "Tax control" a definition of this category is given, the object of control, types of control, the list of measures which tax authorities apply to control are defined: test purchases of goods, tax posts, personal inspection of officials. They are established by separate articles:

- the order of statement and removal of tax accounting, the assignment of a registration number to the taxpayer;
- the procedure of carrying out tax audits;
- directions of the use of results of tax audits, etc.

In chapter 10 "Tax and customs authorities of the Republic of Belarus" the structure of tax and customs authorities is given, their functions and the rights and duties as well as the measures and ways of execution of responsibility of these bodies for the losses caused to taxpayers for illegal decisions or illegal actions (inaction) of their officials are formulated.

In chapter 11 "Order and terms of the appeal of decisions of tax authorities and actions (inaction) of their officials" next procedural steps are regulated:

- the right to the appeal;
- the appeal order;
- the order and terms of the complaint to a higher tax authority or a higher official of a tax authority;
- consideration of the complaint by a higher tax authority or a higher official of a tax authority.

The main directions of the tax policy of the Republic of Belarus and the improvement of the tax law at the present stage is simplification of the tax system and a decrease of the tax burden. After the acceptance of the General Part of the Tax Code of the Republic of Belarus, the following has occurred:

– the reduction of quantity of the applied taxes and collecting (duties). In 2006-2009, 17 tax payments were cancelled and 34 in-

dependent collecting and payments were included in the structure of the state tax;

– the appeal of the simplified system of taxation has been increased. Rates at use of the simplified system of taxation have been lowered and the account and reporting have been simplified.

Completion of tax law codification is the Special Part of the Tax Code of the Republic of Belarus which has become a uniform tax law which has united in itself the order of application of all republican and local taxes, collecting (duties) and also specific modes of taxation, which was introduced on January 1, 2010. On each tax payment, all obligatory elements of a legal design of a tax are established: the structure of payers, objects of taxation, the tax base, the sizes of tax rates, the lists of tax benefits, and also the order of calculation of taxes, collecting (duties), terms of their payment and providing tax declarations (calculations) to tax bodies about the sums which are subject to payment in the budget.

Procedures of tax control and tax administration have been simplified. For this purpose, payers have been given a chance of granting tax declarations (calculations) in electronic form to tax bodies, the duty of submission of "empty" declarations (calculations) in the absence of objects of taxation has been cancelled, and the quantity of cases of submission to tax authorities of data and documents has considerably been reduced.

Globalization of modern economy and expansion of international economic relations have demanded in the long term standardization of the national tax law with the legislation of other countries, first of all, with Russia. There are current issues of the implementation of relevant provisions of international law in the tax law demanding further improvement.

Laws of the Republic of Belarus of 7/22/2003 N 225-Z, of 1/1/2004 N 260-Z, of 8/3/2004 N 309-Z, of 10/29/2004 N 319-Z, of 11/18/2004 N 338-Z, of 12/31/2005 N 80-Z, of 5/16/2006 N 110-Z, of 6/29/2006 N 137-Z, of 12/29/2006 N 190-Z, of 1/4/2007 N 205-Z, of 26.12.2007N 302-Z, of 11/13/2008 N 449-Z, of 12/29/2009 N 72-Z, of 10/15/2010 N 174-Z, of 12/30/2011 N 330-

Z, of 10/26/2012 N 431-Z, of 12/31/2013 N 96-Z, of 12/30/2014 N 224-Z, of 12/30/2015 N 343-Z "On modification and additions in some laws of the Republic of Belarus concerning business activity and taxation" made essential changes to the Tax Code of the Republic of Belarus.

Since 2015, tax authorities do not demand confirmation by the notary or the Belarusian Chamber of Commerce and Industry of the translations of documents provided by nonresidents and confirming their constant location in the foreign state for application of provisions of international treaties of the Republic of Belarus concerning taxation any more. At the same time, rules about the need of appropriate legalization of submitted documents continue to work.

1. The last most essential changes have concerned both the General and the Special Parts of the Tax Code of the Republic of Belarus. We will present the main changes, in our opinion. As of 1/1/2016, a group of affiliated persons has expanded. Since 2016, interdependent persons include:

- the organizations where one person directly and (or) indirectly participates in these organizations and the share of such participation in each of these organizations makes not less than 20 percent;
- the organizations as a part of collegiate executive body or board of directors (supervisory board) of which there are more than 50 percent of the same natural persons together with affiliated persons by the criterion of close relationship or property.

It should be noted that interdependence in the tax law influences several situations, in particular, a possibility of reference to costs of separate types of controlled debt (the rule of thin capitalization) and transfer pricing.

2. The right to use tax benefits by legal entities which have resulted from transformation (legal form change) of legal entities of one type to legal entities of other types as affirmed.

3. In 2015, payment of taxes and collecting (duties) at the choice of the payer could be carried out both in Belarusian rubles and foreign currency.

Since 2016, payment of taxes in foreign currency has been allowed only if regulations on a concrete tax provide such an opportunity. For example, under the Tax Code it is fixed that offshore collecting is paid in foreign currency in which the payment was made, or in Belarusian rubles at the official rate established by the National Bank of the Republic of Belarus as of the date of their transfer. Payment of a charge for a journey is made in Euro, US dollars, Russian rubles or Belarusian rubles. Payers not being tax residents of the Republic of Belarus and being outside the Republic of Belarus have been given an opportunity to pay the state tax in foreign currency.

4. The general Part of the Tax Code of the Republic of Belarus has been extended by a new chapter devoted to the change of the terms of payment of taxes, collecting (duties) and a penalty fee established by the legislation in an individual order.

The change of the term of payment of taxes is carried out for a period of up to 1 year according to the decision of the President, regional, Minsk city, regional, city council of deputies or on their assignment by local executive and administrative organs.

5. Since 2016, the sphere of electronic declaring has expanded. The average number of employees of the organization when payers are obliged to submit tax declarations in the form of an electronic document is reduced from 50 to 15. At the same time, it is directly provided that if the declaration is on paper, it is not considered provided when the payer is obliged to submit the declaration in the form of an electronic document. Respectively, in such a situation consequences of non-presentation of the declaration in time will come for payers and will be subject to administrative responsibility under Art. 13.4 of the Administrative Code[19].

19 The code of the Republic of the Belarus about administrative offenses: The code of the Republic of Belarus from 4/21/2003 of, № 194-Z: the text of the code as of 7/15/2015//the National register of legal acts of the Republic of Belarus", 6/9/2003, N 63, 2/946.

6. Since 2016, banks have been obliged to provide information to tax authorities on opening, closing and renewal of e-wallets within one working day after opening, closing or renewal thereof. It is remarkable that banks have to provide information on opening of e-wallets both of the organizations, individual entrepreneurs and natural persons. Before, data on opening of e-wallets were provided only in accordance with the request of supervisory authorities and in exceptional cases.

3. The Assessment of the Tax Code of the Republic of Belarus

For the interests of all society, the efficiency of accomplishment of economic, social, political and other functions of the state firstly depends on the correct and effective building and functioning of the taxation system. For a long period of time, at the national level, close attention has been paid to the problem of search of a reasonable tax mechanism.

T. Rogozhkina believes that rather big merit for the preparation of offers on the simplification of the taxation system has been made by a working group headed by the deputy Prime Minister of the Republic of Belarus, with some representatives of various state bodies, public associations, entrepreneurial structures and Belarusian scientists, where each of the aforesaid have had an opportunity to provide suggestions for the improvement of the tax legislation (in operation since 2006). It is enough to say that according to their offers, transition to the application in the Republic of Belarus of the linear (single) income tax rate on natural persons in the amount of 12%, which is an advanced type of the simplified taxation system, has been entered. The active part of fixed business assets has been excluded from taxation objects on a real estate, and the tax is extended only to objects of real estate whereas payers have been given an opportunity to submit tax declarations (calculations) in electronic form[20].

20 T. Rogozhina, The tax code of the Republic of Belarus – the next stage of simplification of tax system, T. Rogozhina, Yustytsyya Belarusi_. – 2010, № 2 (95), p. 35-39.

The confirmation to the above is the scale of the complete work on the preparation of the Special Part and changes in the General Part of the Tax Code of the Republic of Belarus. As a result of codification, a quantity of binding laws and resolutions of the Supreme Council of the Republic of Belarus have become invalid. The Presidential Decree of the Republic of Belarus has been corrected, about 100 acts of the Head of State have become invalid.

With the acceptance of the Special Part of the Tax Code of the Republic of Belarus, work on the simplification of taxation system has not ended. The working group for the preparation of offers on the simplification of the taxation system continues to work. There is an aspiration to approach the leading countries of the world under the terms of the taxation to improve the position of the Republic of Belarus in the annual report of the World Bank "Vedeniye Businessa", to create simple and clear tax legislation answering both to the interests of each payer and the interests of the state connected with the achievement of socially useful aims[21].

Estimating the Tax Code of the Republic of Belarus, A. A. Pilipenko specifies that it follows from the contents of item 7 of Art. 3 of the Tax Code of the Republic of Belarus that in case of ambiguity or illegibility of instructions of the acts of the tax legislation, decisions shall be made by state bodies and officials for the benefit of payers. The presumption of correctness of the checked subject (payer) is a part of a presumption of innocence. However, within control (supervising) activities classical reception of a presumption of innocence of the checked subject (payer) of the administrative and penal legislation is impossible because of non-use of measures of legal responsibility to them within the Decree № 510 and the Tax Code of the Republic of Belarus and, respectively, determination of guilt (innocence) in making of an offense (crime)[22].

According to the legal concept of the Constitutional Court of the Republic of Belarus, the inclusion in the Tax Code of the Republic of

21 T. Rogozhina, The tax Code of the Republic of Belarus – the next stage of simplification of tax system, T. Rogozhina, Yustytsyya Belarusi_. – 2010, № 2 (95), p. 35-39.

22 A.A. Pilipenko, Presumption of innocence in the sphere of control (supervising) activity: problems of standard designing, A.A. Pilipenko, Industrial commercial law, 2011, № 2, p. 25-30.

Belarus of a presumption of correctness of the taxpayer means that the legislator allows a possibility of availability of not clear or indistinct instructions in acts of the tax legislation which for participants of the tax relations, and first of all taxpayers and charges (duties), are often difficult for perception and their application in practice[23].

It is important that in the Republic of Belarus the system of law is created according to the fundamental law of the state. Considering a question of compliance of regulations of the Tax Code of the Republic of Belarus with the Constitution of the Republic of Belarus, the principles of legal definiteness, assumed clarity, accuracy, consistency and logical coordination of precepts of law have been specified by the Constitutional Court of the Republic of Belarus in their decision[24].

It is rather difficult to create absolute tax legislation and it is very important that the technology of tax rule-making is clear to the law enforcement official and that the tax law is accurately and clearly formulated, and then the desirable will be reached by the state.

However, this tendency has restrictions owing to the impossibility to create ideal legislation that is postulated by most representatives of financial and legal science[25]. A.V. Dyomin believes it is objectively impossible to achieve absolute definiteness of the law; any regulations always have only relatively a certain character[26]. O.O. Zhuravleva considers that the rule of law is abstract and is often incomplete[27]. Certain

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23 On the compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On the introduction of the Special Part of the Tax Code of the Republic of Belarus, modification and additions in the General Part of the Tax Code of the Republic of Belarus and invalidating of some acts of the Republic of Belarus and their separate provisions about taxation: The decision of the Constitutional Court of the Republic of Belarus of 12/23/2009 N P-412/2009//the National Register of Legal Acts of the Republic of Belarus, 2/2/2010, No. 27, 6/831.

24 On the compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus. "On the introduction of Special Part of the Tax Code of the Republic of Belarus, modification and additions in the General Part of the Tax Code of the Republic of Belarus and invalidating of some acts of the Republic of Belarus and their separate provisions about taxation: The decision of the Constitutional Court of the Republic of Belarus of 12/23/2009 N P-412/2009//the National Register of Legal Acts of the Republic of Belarus, 2/2/2010, No. 27, 6/831.

25 A.A. Pilipenko, Presumption of innocence in the sphere of control (supervising) activity: problems of standard designing, A.A. Pilipenko, Industrial commercial law 2011, № 2, p. 25-30.

26 A.V. Dyomin, Russian Tax law: education guidance, A.V. Dyomin. – Moscow 2006, p. 424.

27 O.O. Zhuravleva, Principles of legal definiteness and person's legal status in the tax law, O.O. Zhuravleva, The Tax law in decisions of the Constitutional Court of the Russian

researchers consider uncertainty of precepts of law from the point of view of jurisprudence: "It is necessary to also recognize that sometimes the content of tax acts is written in a way as if their authors specially set before themselves the purpose that ordinary citizens in these texts have understood nothing"[28].

Considering a question of the system of tax legislation, S.K. Leshchenko draws a conclusion that the creation of the effective taxation system, forming favorable conditions for productive activity and attracting foreign investments are possible in case of realization of scientific concepts on the basis of which codification of the tax legislation must be carried out; that the system of tax legislation must be based on the principle of strict hierarchy of legal acts, on the basis of full compliance of all acts of the tax legislation with the regulations of the Constitution and Tax Code[29].

The Tax Code of the Republic of Belarus, first of all, must correspond to the Constitution of the Republic of Belarus. By consideration of a question of interrelation and interference of the constitutional values in rule-making, T.V. Voronovich notes that the pro-rata rule of restriction of the rights is applied to ensuring balance of the constitutional values in lawmaking, the fact that the Constitutional Court paid attention in a number of decisions. At the same time, we should take into account the revealed constitutional legal meaning of the rules, which was inspected in the order of obligatory preliminary review according to the constitutionality of laws. The balance of constitutional values can be reached by various methods, including modification and additions to the legislation. The Constitutional Court has paid attention of the legislator to the need of the principle of legal definiteness based on it, which assumes the creation of such a system of law in which regulatory legal

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Federation 2009: materials of VII International Scientific and Practical Conference April 23-24, 2010, Moscow: M.V. Zavyazochnikova; under the editorship of S.G. Pepelyaev. – Moscow 2011, p. 51-55.

28 A.I. Khudyakov, Taxation bases: education guidance, A.I. Khudyakov, M.N. Brodsky, G.M. Brodsky, St. Petersburg: European house 2002, p. 432 – "The Law and Economy" Series.

29 S.K. Leshchenko, The system of tax law of the Republic of Belarus, S.K. Leshchenko, The law and democracy: scientific collection, ed. 15/Redkol.: V.N. Bibilo (editor-in-chief), etc. – Minsk 2004, p. 141-154.

acts are interrelated and approved, and also clarity, accuracy, consistency and logical coordination of precepts of law are provided[30].

4. Proposed reforms of the Tax Code of the Republic of Belarus

Reforming the tax legislation, features of the economic relations of the Republic of Belarus with the partner states and the need of internal economic development of the state are considered. Since July 1, 2016 the new order of the acceptance of VAT will be applied to a deduction which assumes that each entity in case of sales of goods (works, services) will be obliged to arrange the invoice on a portal of the Ministry of Taxes and Tax Collection of the Republic of Belarus, arranged electronic invoice is sent to a buyer of goods (works and services) and is the basis for the acceptance of the deduction of the value added tax. Thus, electronic invoice is a unique document which forms the basis for the implementation of calculations for the value added tax between the seller and the buyer, and the acceptance to a deduction of the sums of a value added tax from the buyer.

What goal is pursued by the state when entering a new order of acceptance to the VAT deduction? In our opinion, having received complete control over movement of goods (works and services) in online mode, the state will exercise tax control more effectively. On the other hand, the mechanism of fight against structures under the guise of enterprise, as unfair entities will be afraid to be registered on a portal, and respectively the deduction of unreasonable VAT will be minimum, and as a result, the implementation of tax control over VAT will increase overall economic transactions. Thus, it will be difficult to evade paying taxes and timeliness and completeness of forming of the income of the budget system of the state thereby will be achieved.

30 T.V. Voronovich, Interrelation and interference of the constitutional values in rule-making, T.V. Voronovich, Valuable paradigm of the Basic law of the Republic of Belarus: materials of the Republic International Scientific and Practical Conference March 14, 2013, Minsk, editor.: G.A. Vasilevich [etc.], Minsk 2013, p. 148.

On December 23, 2015 the resolution of the Council of Ministers of the Republic of Belarus "On reforming the management system of public finances of the Republic of Belarus"[31], which determined the strategy of reforming of the management system of public finances of the Republic of Belarus, was accepted. This strategy provides reforming and enhancement of administration of taxes and implementation of tax accounting and control:

- implementations of effective remedies of automation allowing to enhance the existing planning processes and income analysis of the budget with a possibility of providing information exchange with state bodies and the organizations and local financial bodies;
- review of tax preferences. Provision of tax exemptions and releases have not only a direct effect, which is expressed in reducing tax budget revenues, but also indirect, which is not always reduced to losses (jobs preservation, production growth in volumes, stimulation of economic development and other). The assessment of indirect effect cannot be unambiguous as during the entering or cancellation of any tax exemptions the behavior of payers can change in such a way that will mention coverage of other measures of the tax policy. Besides, it is impossible to establish a strict compliance between a tax exemption and the purposes of social and economic policy. As a rule, the package of measures is applied to achieve any purpose, and the same measure can serve different purposes[32];
- it is necessary to realize the measures allowing to provide full integration of the tax policy (regarding provision of tax exemptions) and the general directions of efficiency increasing the use of budgetary funds. For this purpose, it is necessary to analyze the ope-

31 "On the reforming of a control system of public finances of the Republic of Belarus" ("The provision on interdepartmental council concerning realization of strategy of reforming of a control system of public finances of the Republic of Belarus"): The Resolution of the Council of Ministers of the Republic of Belarus of 12/23/2015, № 1080//the National Legal Internet Portal of the Republic of Belarus, 1/9/2016, 5/41476.

32 "On the reforming of a control system of public finances of the Republic of Belarus" ("The provision on interdepartmental council concerning realization of strategy of reforming of a control system of public finances of the Republic of Belarus"): The Resolution of the Council of Ministers of the Republic of Belarus of 12/23/2015, № 1080//the National Legal Internet Portal of the Republic of Belarus, 1/9/2016, 5/41476.

rating tax exemptions and preferences on types of tax, categories of payers and nature of privileges. For the purpose of carrying out tax administration, the strategy provides to consider the analysis of practice of application of tax benefits.

At the same time, it is necessary to keep the term of application of the operating tax exemptions, and entering of new tax exemptions must be performed only after carrying out a preliminary analysis of the influence of result of the provided tax exemptions on the financial and economic provision of the subject of business activity with determination of a validity period of a privilege.

In the course of further enhancement of the tax legislation it is necessary to correct a forming order of tax accounts. For this purpose, it is necessary to make changes to operations or to adopt new regulatory legal acts regulating accounting, reporting and analyzing tax exemptions as tax expenses of budgets.

Being in the center of Europe, the Republic of Belarus should consider the international practice of reforming of taxation systems.

The financial activities of the state are provided with various subjects of the government and management. Between these bodies must be an accurate interaction, coordination of their functions directed to the implementation of a single purpose of the state – providing the budget system with the necessary quantity of income. For this purpose, it is necessary to provide information exchange of databases on tax exemptions and preferences of the Ministry of Taxes and Tax Collection, the State Customs Committee, Ministry of Finance and its territorial authorities, other bodies and participants of the budget process.

Abstract

This paper deals with the Tax Code of the Republic of Belarus. The formation and general characteristics of this Code were presented in this article. The paper also depicts the structure of the Tax code of the Republic of Belarus. Attention is also paid to the evaluation of this Tax Code and to some aspects of its reform and development.

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TAX CODE IN SLOVAKIA

Vladimír Babčák[1]

1. On the way from the statute on proceeding in tax and fee matters up to the current Tax Code

1.1. The period between 1962 and 1992

There were two diametrically different periods with the last 55 years as it concerns the development of legal regulation of tax administration, specifically with regard to tax proceeding. The dividing point between periods mentioned above could be represented by the year 1992 in which legal regulation which was considered to be the basis of then tax reform together with legal regulation on tax administration was adopted. This, however, only reflected a legal state in this field of social relations with respect to legal force and diversity of particular legal regulations.

The first period is connected with the application of various legal regulations that fall within the system basis not only financial law, resp. currently tax law, but within administrative law as well.

The development in the period between 1962 and 1992 was marked by special characteristics, which had its basis in former legal regulation of tax administration (speaking clearly, it should be referred to legal regulation of tax proceeding). Tax administration issues were not represented in a complex way in this period and procedural matters of taxation were mainly regulated by legal regulation of tax proceeding. Legal regulation in itself was even determined by understanding of tax proceeding as a separate kind of administrative proceeding in this period. This view on tax proceeding with its normative sense was kept by the

1 Prof. JUDR, Pavol Jozef Šafárik University in Košice, Slovakia, Dr.h.c. University in Rzeszów (Slovak Republic).

end of 1992. It should be, however, mentioned that even currently (but only rarely) we can meet opinions in the legal theory and legal practice which present the connection of tax proceeding with administrative proceeding in the way of a "particular to general" relation.

The abovementioned connection was a result of the following characteristics of tax proceeding in the past:

a) ***the fragmentation*** of legal norms regulating tax proceeding and
b) ***the absence of law (statute)*** which would regulate in a complex way issues of imposing, collection and enforcement of taxes and which would be an original source of financial/tax law at the same time[2].

Until the start of the realization of a tax reform in 1993 three basic groups of legal acts regulating tax proceeding were applied in the tax practice:

The first group was represented by ***special legal acts***. This group involves particular laws on taxes and fees (and respectively other similar payments) which were considered, firstly, as substantive legal regulations with incorporation of a few provisions of a procedural nature. Particular laws on taxes have even currently a special position in the area of tax administration (tax proceeding).

The second group was represented by ***general legal acts***. This group consisted of:

– the statute on proceeding in tax and fee matters[3] and
– the law on administrative proceeding[4].

This group of legal acts represented the basis of legal regulation of procedural tax-law relations. The main characteristics, however, was that the statute regulated almost exclusively issues connected with imposing and collection of taxes and fees whilst the law on administrative proceeding was applied by tax authorities in case that the statute was

2 See more: V. BABČÁK, Daňové právo na Slovensku ("Tax Law in Slovakia"), Bratislava 2015, p. 596.
3 Vyhláška č.16/1962 Zb. o konaní vo veciach daní a poplatkov.
4 Zákon č.71/1967 Zb. o správnom konaní (správny poriadok) v znení neskorších predpisov.

"silent" with its provisions about a particular tax issue (e.g. the issue of representation in tax matters, the issue of probation, etc.). In this respect, the statute could be considered as a special legal act with respect to the law on administrative proceeding in these cases which were not specifically regulated by its provisions. From the statute point of view, the law on administrative proceeding was considered as a supplementary (supporting) legal regulation.

It should, however, be noted that the statute on proceeding in tax and fee matters was repealed on 1 January 1993 by the law on administration of taxes and fees from 1992, and the competence of law on administrative proceeding which was in force from the same date (1 January 1993) was excluded. This is currently specified by the valid Tax Code as well.

The third group was represented by ***supplementary legal acts***. These regulations supported general legal acts with respect to the realization of some procedural institutes in tax proceeding for which other public authorities of the state than tax administration authorities have better conditions. In this respect, the application of civil proceeding order by the enforcement of a decision in tax proceeding could be mentioned[5].

The tax reform constituted significant changes for procedural matters of the tax scheme as well. The very beginning of its realization (the year 1993) has started ***the second, current period*** of development of legal regulation in the field of tax administration. In this respect, it is important to emphasize that since 1993 legal regulations have already perceived tax administration in a complex way. This fact is subsequently demonstrated by particular titles of these legal regulations.

1.2. The period between 1993 and 2012

Since the establishment of autonomous Slovak Republic, legal regulation of tax administration was contained in the law n.511/1992 Zb. on administration of taxes and fees (shortly presented)[6]. This law

5 See more: V. Babčák, Daňové právo na Slovensku, Epos, Bratislava, 2015, p. 596-601.
6 Zákon č.511/1992 Zb. o správe daní a poplatkov a o zmenách v sústave územných finančných orgánov v znení neskorších predpisov.

replaced former legal regulations of various legal force which were a source of not only financial law/tax law but even administrative law as well[7]. The efficiency of the law on administration of taxes and fees was, at the same time, consistent with the date of establishment of the Slovak Republic (hereinafter "SR") as well as with the beginning of the realization of a tax reform after social and political changes which were brought by November 1989.

Before the enactment of the law n.563/2009 Z. z. on tax administration (Tax Code or Tax Ordinance Act)[8] (hereinafter "Tax Code") in the period between 1993 and 2012 (which is the year when the Tax Code entered into force), there were some other legal regulations applicable to the tax administration apart from the law n.511/1992 Zb. There were mainly:

1. ***competence legal acts***, with the most important position of law n.150/2001 Z. z. on tax authorities[9]. This law was valid until Tax Code became efficient;
2. ***legal acts on particular taxes***, which as substantive law legal regulations incorporated procedural law provisions as well. In relation with the law n.511/1992 Zb., they are deemed for special legal acts which did have application priority with respect to provisions of general procedural law – legal act n.511/1992 Zb.;
3. ***supplementary (supportive) legal acts***, which supplemented the law n.511/1992 Zb. and which were applied by tax administration, mainly by tax proceeding in connection with the realization of some procedural operations (acts) for which other authorities of the state than tax authorities had better conditions. In this respect, the application of civil proceeding order[10] by the enforcement of a decision in tax proceeding could be mentioned. Even currently the provisions of this law are still applicable within

7 Vyhláška č.16/1962 Zb. a zákon č.71/1967 Zb.
8 Zákon č.563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.
9 Zákon č.150/2001 Z. z. o daňových orgánoch a ktorým sa mení a dopĺňa zákon č. 440/2000 Z. z. o správach finančnej kontroly v znení neskorších predpisov.
10 Zákon č. 99/1963 Zb. Občiansky súdny poriadok v znení neskorších predpisov. Civil Proceeding Order will be abolished by 1 July 2016 and will be replaced by law n.160/2015 Z. z. Civilný sporový poriadok.

tax administration, but only when it comes to tax enforcement proceeding in the case of municipalities as tax administrators;

4. some legal regulations ***from the area of international tax relations***, such as the law on international cooperation and assistance within tax administration from 2002 and 2007 may be mentioned in a broader extent.

The law n.511/1992 Zb. has become the first, quasi procedural code of tax law. In this respect, the law represented fundamental break into former fragmentation of legal regulation of tax administration, specifically with regard to tax proceeding. It was the very first regulation of many issues of tax proceeding in one single legal act; thus not only those which create a particular nature of tax proceeding, such as, e.g., the beginning, continuance and result of tax proceeding, principles of tax proceeding, discretionary remedies, the way and terms for payment of taxes, etc., but as well of such issues as e.g., delivering, probation, representation in tax proceeding, etc.

Radical changes in legal regulation of tax proceeding which were brought by law n.511/1992 Zb. were reflected together with the approach of a tax law community with respect to the understanding of the role of tax proceeding within other legal proceedings. Tax proceeding has started to be perceived by a tax law community as **an autonomous and equivalent relevant legal proceeding** and not as a special kind of administrative proceeding. It is a direct consequence of the fact that since 1 January 1993 the general legal act of administrative procedural law, the law on administrative proceeding, does not apply to tax proceeding at all. The law n.511/1992 Zb. has thus excluded a possibility of application of law on administrative proceeding on its provisions[11].

The Tax Code, which has replaced the law n.511/1992 Zb., was a part of the "Reform of tax and customs duty administration with a perspective of unification of collection of taxes, customs duties and insurance levies", which is currently realized by the program UNITAS

11 See § 101 zákona č. 511/1992 Zb.

(UNITAS I. and UNITAS II). The reasons for the adoption of a new legal regulation may be illustrated in the following points:

1. the reaction to the reform of tax and customs duty administration which resulted in the first stage in the unification of tax and customs duty administration into one unit under the title Financial Administration of SR. From the organizational and. institutional perspective, this happened by the merger of Tax Directorate of SR and Customs Duty Directorate of SR and by creating Financial Directorate of SR. Tax and customs duty authorities shall be, however, united and new financial authorities (offices) as first instance bodies of tax administration shall be created in the next stage of the reform;
2. an attempt to optimize and make more effective the performance of processes of tax administration. It was demonstrated by the concentration and unification of some processes on a central level in the first place (e.g. as regards methodic and internal administration and governance);
3. electronization of financial administration and connected with it form of communication between a tax administrator, second instance authorities and tax subject;
4. enhancement and limpidity of legal regulation of tax administration.

Particular preparation of a proposal on the Tax Code was made under the Ministry of Finance of SR with the collaboration of the whole tax and customs duty administration.

2. The Structure of the Tax Code of 2009

The basic legal act which regulates the area of tax administration is the Tax Code which came into force on 1 January 2012. Compared to the former legal act, the law n.511/1992 Zb., which was titled as the law "on administration of taxes and fees", the Tax Code refers only to "administration of taxes". Not only taxes but other mandatory financial payments as well are included under the competence of the Tax Code.

That refers mainly to both existing local fees (a local fee for communal waste and the small building waste and a local fee on development) and special levies which are collected by virtue of particular legal acts by which these levies are imposed and collected as well. In this respect, the provisions of Tax Code refer to administration of not only both local fees, but adequately also to:

- specific levy of selected financial institutions if this is stipulated by the law on specific levy of selected financial institutions[12] and
- specific levy from entrepreneurship in regulated industries if this is stipulated by the law on specific levy from entrepreneurship in regulated industries[13].

For the sake of completeness, it should be mentioned that from a procedural point of view, under current wording of the Tax Code, a tax is perceived also as a fine, interest on delay and interest as well as both mentioned local fees. For this reason, the competence of the Tax Code refers to these financial payments as well.

Compared to the former legal act, the title of law n.563/2009 Z. z. is marked as a "tax code", as it already is in other states of the region (e.g. Czech Republic). From a formal point of view, it emphasizes more the importance of this field of social relations and supports the opinion that the Tax Code represents a ***procedural code of tax law***.

As concerns the object of legal regulation in the Tax Code, the law regulates the administration of taxes, together with entitlements and legal duties of tax subjects and other persons that are connected with administration of taxes.

The internal structure of the Tax Code is divided into parts containing main parts (divided then into sections and divisions). Finally, seeing it more detailed, particular structural parts divide into paragraphs.

First three parts of the Tax Code regulate issues referring to the whole tax administration (with some minor exceptions).

12 Zákon č.384/2011 Z. z. o osobitnom odvode vybraných finančných inštitúcií a o doplnení niektorých zákonov v znení neskoršieho predpisu.

13 Zákon č.235/2012 Z. z. o osobitnom odvode z podnikania v regulovaných odvetviach a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

The first part of the law deals with ***Fundamental and general provisions (§§ 1 to 35)***. Fundamental provisions of the law deal mainly with defining the object and the scope of competences of the law together with basic definitions (such as, e.g., administration of taxes, tax, tax proceeding, tax overpayment, arrear of tax, etc.), defining basic principles of tax administration, classification of tax administrators and the persons participating in tax administration, rules for determining of material and local competence, delegacy, representation, tax confidentiality, and costs of tax administration.

The character of general provisions may be assigned to issues referring to tax files (the way of its filing, its nature, form and kinds, the institute of tax declaration (including correcting and additional) which represent in itself the most important kind of tax file, the institute of cession (of tax file), etc.

Within general provisions, in the first part thereof, the following legal regulation under separate sections is included:

- acts (operations) by which the continuance and the purpose of tax administration is ensured (provisions on records and official statements, on subpoena and exposition, on requesting some operations between tax administrators, on preliminary ruling, on access to documents, on probation, on witness, on adviser as well as on providing information by a tax administrator);
- terms (counting of terms, prolongation of term, default and remission of terms);
- delivering of papers (personal delivering, delivering by electronic means, provisions on electronic services, delivering outside the territory of Slovakia and on delivering by public announcement, etc.).

The second part of the Tax Code includes a part marked as ***Activities of tax administrator (§§ 36 to 54)***. These activities refer to the preparation of tax proceeding, – which constitutes in itself the first and the only part of the Tax Code consisting of five sections.

The Tax Code, among activities of a tax administrator includes investigation activity (first section), local detection, assurance and

forfeiture of property (second section), procedure by tax control (third section), procedure by determining tax by a tax administrator (fourth section) and, lastly, other activities of a tax administrator, such as issuing of preliminary measures, imposing record duty, publishing registers and lists, providing information, issuing binding standpoints, etc. (fifth section).

The third part of the Tax Code is the part titled ***Payment of taxes (§§ 55 to 57)***. Various ways of tax payment, use of payment on tax, personal account of tax subject, suspension of tax payment and permission to pay tax in installments are presented within this part.

The most extended part of the Tax Code is ***the fourth part*** titled ***Tax proceeding (§§ 58 to 153)***, consisting of:

1) first part (General provisions);
2) second part (Special tax proceedings);
3) third part (Tax overpayments and arrears on tax);
4) fourth part (Tax enforcement proceeding).

The first part thereof regulates general provisions referring to tax proceeding. In this respect, the Tax Code regulates issues of the beginning of tax proceeding, parties to the tax proceeding, the issue of elimination of an employee of a tax administrator from tax proceeding, obstacles of tax proceeding (interruption and stop of tax proceeding), decisions and its essentials, the issue of validity, effectuality and enforcement of a decision as well as a provision on nullity of tax decision and terms for issuing a decision.

The second part deals with special (particular) tax proceedings. A particular title of this part is, however, not appropriate – evoking that there are more than one tax proceedings. A more adequate title would therefore be "Special kinds of tax proceeding", which would be in mutual interaction with the first part, which basically refers to general tax proceeding.

The Tax Code deals with registration proceeding, levies proceeding and discretionary remedies (legal remedies proceeding) in this part. Especially the matter of levies proceeding is very controversial when

answering the question if levies proceeding truly represents a special tax proceeding. If we follow the Tax Code provisions, then we can claim that a tax is levied either by:

a) a decision of a tax administrator or
b) submitting a tax declaration (including an additional tax declaration) or
c) real payment of tax when there is no duty to submit a tax declaration under the law.

The abovementioned means that every single submitted tax declaration is considered as a levy of the tax at the same time. Having in the mind the registration proceeding with registration of a tax subject as a result, then the result of levy proceeding should be a levy of the tax. The fact is that this will happen either through the activity of a tax administrator based on performed tax control or through the fulfillment of the tax duty of a non-financial nature. Levy proceeding should not be, therefore, appropriately considered as a special tax proceeding.

The third section the fourth part of the Tax Code regulates the issue of tax overpayments and tax arrears. We are, however, of the opinion that this part, due to its content, should be logically incorporated into the third part of the Tax Code which deals with paying of taxes. There is no need to put the issue of payment of taxes separately from the issue of tax overpayments and tax arrears because of the fact that tax overpayments or tax arrears are, in the first place, the result of particular fulfillment/ non-fulfillment of tax duties.

The last, fourth section of this part is represented by legal regulation of tax enforcement proceeding. Legal regulation given by the Tax Code was basically without any significant changes adapted from the law n.511/1992 Zb. Despite this fact, we are of the opinion that the legislator reduced the importance of this procedural institute by including it into the part that deals with tax proceeding. The former law n.511/1992 Zb. regulated tax enforcement proceeding in a separate (seventh) part. The Tax Code, however, contains separate legal definitions of tax proceeding and tax enforcement proceeding and even many provisions differ significantly between these two institutes. As an example we

can state that not all principles which are applicable to tax proceeding may be applicable to tax enforcement proceeding at the same time. We are personally of the opinion that a legal solution of tax enforcement proceeding is a step backward and this is one of the negative facts of actually quite high quality of legal regulation of administration of taxes.

The fifth part of the Tax Code is devoted to ***Liability for breach of obligations (§§ 154 to 157)***. In this part legal regulation of particular administrative torts and sanctions for them is presented, it concerns the issue of imposing fines including total fine and delay interests as well.

The issues of entitlements of competent authorities of financial/tax administration to grant remission of sanctions or to pardon sanctions are included within this part as well.

A separate, **sixth part** of the Tax Code is presented by ***Special provisions applicable within insolvency procedure and restructuring (§§ 158 to 159)***.

Finally, the last, seventh part of the law regulates ***Uniform, enabling, transition and closing provisions (§§ 160 to 167)***.

We are of the opinion (as it is presented in the next) that particular parts as basic pillars of the construction of the Tax Code are exceedingly unbalanced. For example, the most extensive part consists of 96 paragraphs, whereas the third, the fifth and the sixth part only of two/ three paragraphs. As we have already presented above, this formal-law aspect (construction aspect) of internal structuralizing of the Tax Code should be rather solved in favor of some "natural balance" matters – by incorporation of the issue of tax overpayment and tax arrears into the third part (which would, consequently, reduce the most extensive part of the current Tax Code up to 9 paragraphs). Moreover, by removing tax enforcement proceeding into a separate part of the law in the fourth part (tax proceeding) would again reduce 65 paragraphs. We completely understand that this is more our subjective imagination on a structural division of the Tax Code which would not be able to influence practical application and realization of its provisions in the tax practice. On the other hand, we are, however, of the opinion that every single legal act should represent ***a symbiosis of formal and material qualitative characteristics***.

As a formal reflection (comment) we may mention another fact – it is quite unusual to have a separate part of the legal act divided only into one section, which is, in addition, marked as the "first one".

The Tax Code shall be considered (despite its extent) as a general legal act in the field of tax administration. The Tax Code applies when other special legal acts do not provide otherwise. The relation of the Tax Code and other legal acts (substantive legal regulation on particular taxes) is based on the ***subsidiary*** principle, which means that the provision of the Tax Code may be used only in the case when there is no legal regulation of a particular tax issue of tax administration in the other legal act. It means, in consequence, that many references to legal regulations shall additionally apply. We could divide them into the following groups:

The First group is represented by legal acts on particular taxes (including legal acts on local fees). This group has an application priority amongst many groups of tax law norms. These legal acts are in relation with the Tax Code considered for **special legal acts** because of having some procedural tax law norms despite its substantive law importance. Therefore, they have an application priority compared to the provisions of the Tax Code. The law on income tax even represents some kind of a quasi tax code containing both substantive and procedural tax law norms referring to the taxation of income.

The second group is represented by **legal acts** which regulate **organizational basis of tax administration**. This group represents ***competence tax law norms*** with its nature, consisting of the following legal acts:

- the law on state authorities in the field of taxes and fees[14];
- the law on state authorities in the field of taxes, fees and customs duties[15];
- the law on state authorities in the field of customs duties[16] and

14 Zákon č.479/2009 Z. z. o orgánoch štátnej správy v oblasti daní a poplatkov a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.
15 Zákon č.333/2011 Z. z. o orgánoch štátnej správy v oblasti daní, poplatkov a colníctva v znení neskorších predpisov.
16 Zákon č.652/2004 Z. z. o orgánoch štátnej správy v colníctve a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

– the law on municipalities[17].

The third group consists of **legal acts** which regulate **electronic communication within tax administration**, particularly:

– the law on electronic version of performance of competences of public authorities (the law on e-Government)[18] and
– the law on administration, operation and using of information system of central electronic folder by import, export and transit of goods[19]. This law refers mainly to indirect taxation. The law regulates legal relations referring to the information system of central electronic folder for the performance of competences of public authorities in the area of public administration regulated by customs duty regulation, legal regulation of VAT and consumption taxes in connection with import, export and transit of goods between customs territory of the EU and the third states in the territory of SR. In this respect, the law deals with the way of management and operation of central electronic folder, determinates the scope of obliged persons and defines its obligation against central electronic folder.

The fourth group is represented by **laws on special levies**, particularly

– the law on specific levy of selected financial institutions and
– the law on specific levy from entrepreneurship in regulated industries.

Abovementioned laws incorporate some provisions which express their relation with the Tax Code. It should be, however, noted that the Tax Code does not treat special levies as taxes (compared to its explicit wording by fines, delay interests, interests and both local fees), on

17 Zákon č.369/1990 Zb. o obecnom zriadení v znení neskorších predpisov.

18 Zákon č.305/2013 Z. z. o elektronickej podobe výkonu pôsobnosti orgánov verejnej moci a o zmene a doplnení niektorých zákonov (zákon o e-Governmente) v znení neskorších predpisov.

19 Information system of central electronic folder is an information system of public administration which provides electronic services to ensure electronic official communication via the access point between natural or legal persons and public authorities in carrying out their tasks under the rules governing the import, export and transit of goods as well as ensuring interoperability of electronic official communication between public authorities regarding the fulfillment of their tasks under the rules governing the import, export and transit of goods.

the other hand, the provisions of the Tax Code will adequately refer to administration of specific levies if the laws on specific levies do not provide otherwise.

The fifth group is represented by **legal acts** which regulate **international aspects of performance of tax administration**. This group consists of:

- the law on international assistance and cooperation by tax administration[20];
- the law on international assistance by recovery of certain financial claims[21] and
- the law on automatic exchange of information on financial accounts for purposes of tax administration[22].

3. The Evaluation of the Tax Code

We are of the opinion that the Tax Code was basically accepted by a tax law professional community in a positive way. The first positive factor that may justify this conclusion is that there was a quite long legisvacation period for professional encompassment of procedural relations regulated by the Tax Code. The abovementioned period extended the amount of two years, which is, in our view, a sufficient time frame for changing the approach to the philosophy and purpose of the law, and it provided a proper time to study its particular provisions as well. That refers not only to tax administrators and second-instance tax authorities but to tax subjects and persons participating in the tax proceeding as well (representing the mandatory group of subjects by tax administration). Potential practical application problems were reduced within this period by four novelizations of law at the same time, respectively, it may be said that the wording of particular provisions of the Tax Code was improved. Mainly the first novelization in 2011 (the law n.331/2011

20 Zákon č.442/2012 Z. z. o medzinárodnej pomoci a spolupráci pri správe daní.
21 Zákon č.466/2009 Z. z. o medzinárodnej pomoci pri vymáhaní niektorých finančných pohľadávok a o zmene a doplnení niektorých zákonov v znení neskoršieho predpisu.
22 Zákon č.359/2015 Z. z. o automatickej výmene informácií o finančných účtoch na účely správy daní a o zmene a doplnení niektorých zákonov v znení neskoršieho predpisu.

Z. z.) brought within 99 points many changes and supplements of then already non-efficient provisions of law.

Between 1 January 2012 and 1 January 2016, the Tax Code was novelized 22 times with some cases by which particular novelizations included more dates of efficiency of its provisions. This amount is, however, too high (considering a short time period of only 4 years efficiency). That actually means up to 6 novelizations per year. Trying to be objective, on the other hand, it should be mentioned that only four cases of novelizations were direct novelizations (in 2011, 2012, 2013 and 2015), other novelizations were indirect – caused by the adoption of new legal regulation or by amendments or supplements of existing legal acts (not only from the field of tax law).

As concerns the issue which novelizations brought significant changes into the Tax Code, we could demonstrate them by the following:

a) introduction of new procedural institutes:

- implementation of the provision on adviser (expert) (by law n.331/2011 Z. z.) into the Tax Code in 2011, according to which "for the professional assessment of facts important for proper tax determination a tax administrator is entitled to ask an adviser (expert) for submitting an expert opinion or standpoint";
- implementation of the provision referring to the issue of ***binding standpoint*** (by law n.435/2013 Z. z.) into the Tax Code in 2013, according to which a tax subject is entitled to demand Financial Directorate of SR in writing for binding standpoint referring to the application of particular provisions of tax law regulation. The scope of tax law norms to application of which binding standpoint could be issued is provided by a generally binding legal act issued by Ministry of Finance of SR;
- introduction of the institute of partial protocol (by law n.218/2014 Z. z.) into the Tax Code in 2014, the nature of which lies in the fact that a tax administrator is entitled to issue a ***partial protocol*** (under specified conditions by law) during tax control, which consequently enables to return

the sum of controlled part of excessive deduction on VAT before the end of tax control (so up to the amount specified in partial protocol);

– implementation of the institute of ***aggregate fine*** (by law n.269/2015 Z. z.) into the Tax Code in 2015. The nature of the institute lies in the fact that to the person who has committed more than one administrative tort pursuant to the Tax Code for which the fine is imposed, the entitled tax administrator will impose aggregate fine according to the provision referring to the administrative tort with the highest upper scale limit of fine. There is one condition, however, that the fine may be determined under the abovementioned scale and, moreover, this situation is effective and possible at the same time.

This is only a basic presentation of new institutes in the current Tax Code, not accompanied by its exhausting characterization by some other legal aspects;

b) *supplementing and strengthening* of tax law provisions. Most often, novelizations of the Tax Code referred to the following issues:

– *the first part*: provisions on basic principles of tax administration, on tax confidentiality (mainly with regard to extending subjects entitled to get information on tax confidentiality), the way of submitting of file, the way of submitting corrective or additional tax declaration, on providing information by a tax administrator, on calculation of terms, on delivering of documents (by electronic delivering in the first place) and electronic services;

– *the second part*: provisions of some procedural steps of tax administration the result of which was issuing the decision (e.g. by local investigation, by ensuring property, by tax control, by determining tax by a tax administrator) and provisions on publishing mandatory information by Financial Directorate of SR, resp. by the other competent authority;

– *the third part*: provisions on a manner of paying taxes and the use of payments as well as provisions on the suspension of tax payment and permission to pay tax in installments;
– *the fourth part*: provisions on the interruption of tax proceeding and on its stop, on procedural steps by registration, on procedural operation of appellate authority, provisions on tax overpayments and on interest;
– *the fifth part*: provisions on particular administrative torts and on particular sanctions (fine and delay interests).

As we have already emphasized, the reason for the adoption of a new Tax Code was to precise and try to improve a qualitatively higher level of tax administration regulation. In this regard, the new Tax Code has successfully eliminated some ambiguous, uncertain and vague definitions.

The Tax Code ensures faster communication with a tax administrator as well as reduces to minimum the need of personal communication of a taxpayer with tax/customs duty authorities. This refers to the preference of electronic delivering rather than delivering of written documents (provided the conditions stipulated under the law are fulfilled).

Delivering files by an electronic way of communication refers to selected tax subjects (mostly to taxpayers of VAT, tax advisors and attorneys representing tax subjects by tax administration) and compared to the law n.511/1992 Zb., it represents a new duty of these tax subjects.

The Tax Code, at the same time, entitles the other than materially competent (even locally incompetent) tax administrator to arrange some tax files of tax subjects.

Compared to the former legal condition, from the material point of view, (which is connected with the formal point of view) many provisions of the Tax Code are not considered as a part of tax proceeding but, in the broader sense, as a part of whole tax administration. As an example thereof, provisions on basic principles of tax administration or provisions on determination of tax by a tax administrator or issuing preliminary measures may be given, etc.

A very positive sign of the new legal regulation is the fact that the Tax Code has started to distinguish between material and local competences of a tax administrator. In this respect, there is a new provision[23] according to which if the Tax Code or special legal acts do not provide which tax administrator is materially competent, tax authority (tax office) will be materially competent for tax administration. With this provision, the Tax Code emphasizes the role (dominant status) of tax offices within tax administration.

We can evaluate positively the fact that apart from tax proceeding and tax enforcement proceeding the Tax Code regulates many other procedural operations of a tax administrator, the result of which is issuing a decision – these procedural operations are regulated, however, outside the fourth part of the law. On the other hand, there is uncertainty of tax administrators and tax subjects about the application of legal instruments regulated by the fourth part of the law on abovementioned procedural operations of a tax administrator.

The strengthening of the legal protection of tax subjects should be evaluated positively – as an example thereof, a possibility of a tax subject to ask for a binding standpoint may be given.

A positive sign of new legal regulation brought by the Tax Code is, for example, a possibility to ensure tax arrears through establishing lien under the decision of a tax administrator. Tax arrears could be ensured either by the property of a tax debtor, debtor's claim or the object of lien which will be acquired by a tax debtor in the future. The change referring to the extension of the object of lien to objects acquired in the future by a tax debtor was needed in order to assure a more effective use of the institute, e.g. by leasing situations, where it is impossible to capture the acquisition of property and infliction of a tax debtor this way on time.

However, there are not only "positive" provisions. Apart from the abovementioned weaknesses (mostly of a formal character), we can even mention those provisions which could be characterized by material ambiguity. It could be demonstrated by the fact that the Tax Code

23 See § 6 p. 1 of the Tax Code.

limits the application of the institute known as *measures against passivity of a competent authority* only to passivity during tax proceeding. In relation with the abovementioned, the legislator should rethink if this measure should not refer to other components of the performance of a tax administrator because of the fact that a tax administrator issues a decision even when s/he decides about other procedural operations within tax administration (even if these operations do not represent tax proceeding).

An important issue within the field of realization and application of the provisions of Tax Code in tax practice is compatibility of its provisions with the Constitution of SR. Pursuant to Art. 125 p. 1a), Constitutional Court of SR decides on compatibility of legal acts with the constitution, constitutional acts and international treaties which were declared by National Council of SR and which were ratified and announced by virtue of the law. There was, however, no reference to submitting a file to the Constitutional Court of SR on the efficiency of the Tax Code till now on the issue of non-compatibility of the Tax Code with our constitution. There were, however, realized other files referring to non-compatibility of other tax law norms, e.g. referring to some provisions of the law on income tax or the law on local taxes (shortly presented).

4. The Proposals of Tax Code reforms

There were no radical activities observed by the representatives of tax law community (university representatives from the field of financial/tax law) which would deal with the issue of the necessity of changes within our currently valid Tax Code. Some issues are partially reasonably criticized, but Slovak tax practice was characterized by the fact that neither Ministry of Finance of SR nor Financial Directorate of SR took into account critical opinions of a part of professional community on the quality of Tax Code or other tax law norms. That circumstance has led to the fact that professional community started to refrain from these activities (on the other hand, a new phenomenon is that proposals of particular political parties which are very often a result of political lobbying are still more taken into account). Tax law science community is not involved in the legislation process at all; the current trend is that

tax law community is mostly excluded from this process. We may claim that even the results of grant projects in the field of tax law relations including *de lege ferenda* proposals are not really taken into account by the legislator.

Therefore, the criticism about low enforceability of law may be seen as some kind of a paradox compared to relatively stable legal regulation of tax enforcement proceeding which is as a separate tax institute valid from 1999. Particular tax law regulation including Tax Code contains many institutes and instruments which should lead to the strengthening of tax discipline; seemingly, it still does not meet the wished (desired) effect. Most weaknesses are, therefore, still represented by insufficient encompassment of tax law measure by competent financial/tax law authorities and by an ineffective and very complicated organizational structure of tax and customs duties regulation.

Abstract

This paper deals with general tax law in Slovakia. It presents the way from the statute on proceeding in tax and fee matters up to the current Tax Code. The article also analyses the structure of the currently binding Tax Code of 2009. Moreover, the paper depicts an evaluation of this Tax Code and proposals of its reforms.

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Babčák V., Daňové právo na Slovensku, Bratislava 2015.

POLISH TAX CODE

Leonard Etel[1]

1. From 1934 Tax Ordinance to 1997 Tax Ordinance

In Poland, general tax law was for the first time organized and unified in the form of a single legal act in 1934. On 15th March, 1934 Tax Ordinance Law was passed, which partially codified tax law[2]. It was one of the first legal acts of such type in Europe[3]. A specific name of this act is worth emphasizing here, i.e. "ordinance", which, according to the principles of legislative technique, is equivalent to a code. As a rule, it embraces all regulations concerning the operation of a tax system (general tax law) excluding provisions regulating individual taxes. It is an example of partial codification of tax law which, in principle, excludes Acts on the structures of individual taxes composing a tax system. Tax Ordinance of 1934 regulated the most important institutions of general tax law in 212 Articles. It was composed of five parts: general provisions, tax assessment procedure, mandatory provisions, criminal law provisions, and transitional and final provisions. For the first time, this act regulated the following institutions that are still in force: tax obligation and liability, limitation, excess tax, tax assessment, reliefs to repay tax obligations, and many more. Moreover, the Ordinance contained a part on the issues concerning tax criminal law, which is currently regulated in the Fiscal Penal Code. A high legislative level of this Ordinance is worth emphasizing, which can be easily seen in its content.

Nevertheless, this modern legal act did not survive for long due to the complete change of the social and economic system in Poland

1 Professor, Chairman of General Taxation Law Codification Committee, Rector of University of Bialystok, Head of Tax Department at Faculty of Law University of Bialystok.
2 Journal of Laws of 1934, No. 39, item 346 as amended.
3 Such acts were adopted earlier in Germany (1919) and Czechoslovakia (1927).

after the World War II. 1934 Tax Ordinance did not fit a new reality of socialist economy and expired in 1946. Since then, we can talk about a progressive process of general tax law de-codification. It started with the implementation of three Government Decrees of: 16th May, 1946 on Tax Obligations[4], 16th May, 1946 on Tax Procedure[5], and 11th April, 1947 on Fiscal Penal Law[6]. The Tax Obligations Decree was replaced by the Decree of 27th October, 1950 of the same name[7], which was in force until the implementation of the Act of 19th December, 1980 on Tax Obligations[8]. The Tax Procedure Decree expired in 1980, when tax procedure was encompassed by the amended Code of Administrative Procedure. The Decree on Fiscal Penal Law was replaced with the Act of 13th April, 1960 – Fiscal Penal Law and then, after numerous changes, this subject matter was codified in the Act of 10th September, 1999 – Fiscal Penal Code[9]. The Act on Tax Obligations of 1980 composed of 55 Articles had been a basic legal act regulating general tax law until the currently binding Tax Ordinance was introduced. The 1980 Act regulated general rules of tax obligations' arising, performing and expiring. Tax procedure, tax enforcement and audit were not included in this Act. By no means could this Act fulfill the function of an act that was comprehensively regulating general tax law. And this was mainly the reason for undertaking works in autumn 1993 on organizing and unifying tax law provisions in the form similar to 1934 Tax Ordinance[10]. It was emphasized that due to numerous amendments, the Act on Tax Obligations became unclear and unfit for new solutions resulting from the tax system's reforms launched at the beginning of the 1990s[11]. The provisions regulating tax proceedings encompassed in the Code of Administrative Procedure were also negatively assessed. It was argued that these provisions were adapted to constitutive decisions whereas most tax obligations arise under the

4 Journal of Laws of 1946, No. 27, item 173.
5 Journal of Laws of 1963, No. 27, item 174.
6 Journal of Laws of 1947, No. 32, item 140.
7 Journal of Laws of 1950, No. 49, item 452.
8 Journal of Laws of 1980, No. 27, item 111.
9 Journal of Laws of 1999, No. 83, item 930.
10 See: Tax Ordinance. Government's reasoning, Bielsko-Biała 1998.
11 Ibidem, p. 117.

law. The Code of Administrative Procedure lacked solutions including the course of tax collection without issuing a decision[12].

The ground for undertaking works on drafting a new Tax Ordinance was Polish Parliament's Resolution of 5th March, 1994 on Increasing State Revenue[13]. Study works on general tax law codification were carried out by the Committee for Tax System Reform appointed in the Ministry of Finance and presided over by Prof. Witold Modzelewski. The first draft of the Law was presented to Sejm in 1995 and was vigorously discussed until it was passed, which occurred on 29th August, 1997. Starting from 1st January, 1998, general tax law in Poland has been codified again in the form of the Act called Tax Ordinance, which has been in force until now.

2. The structure of the binding Tax Ordinance of 1997

The Act of 29th August, 1997 – Tax Ordinance, came into force at the beginning of 1998[14]. It results from Art. 1 thereof that this Act shall regulate in 344 Articles: tax obligations, tax information, tax proceedings, tax inspection and investigation activities, and fiscal secrecy. Actually, the scope of the Act is larger, which clearly results from the titles of individual sections. The Ordinance is composed of 11 sections, i.e.: I – General Provisions (Art. 1-12); II – Tax Authorities and Their Competence (Art. 13-20); IIa – Agreements for Setting the Transaction Prices (Art. 20a-20r); III – Tax Obligations (Art. 21-119); IV – Tax Proceedings (Art. 120-271); V – Inspection Activities (Art. 272- 280); VI – Tax Audit (Art. 281-292); VII – Fiscal Secrecy (Art. 293-305); VIIa – Exchange of Tax Information with Other States (Art. 305a-305o); VIII – Criminal Provisions (Art. 306); VIIIa – Certificates (Art. 306a-306n), and Section IX – Amendments to the Provisions in Force, Transitional Provisions and Final Provisions (Art. 307-344).

Section I – General Provisions, which is not too excessive, regulates such issues as: the scope of application of the Ordinance provisions, the

12 Ibidem, p. 118.
13 M.P. No. 18, item 134.
14 Journal of Laws of 1997 r. No. 137, item 926.

principle of resolving doubts in taxpayers' favor, definitions of basic terms used in the Act in the form of a statutory glossary (tax acts, tax law provisions, tax books, declarations, tax reliefs), the principles of submitting declarations in an electronic form, system definitions (tax obligation, tax liability, taxpayer, tax remitter, tax collector, fiscal year) and principles of determining tax deadlines.

Section II – Tax Authorities and Their Competence, whose title does not match its scope, contains three chapters: 1 – Tax Authorities, 1a – Interpretations of Tax Law Provisions, 2 – Competence of Tax Authorities. The most extensive is chapter 2, whose location is not too fortunate there, which regulates principles of issuing official interpretations of tax law provisions by Minister of Finance and self-government tax authorities. It goes without saying that such subject matter should be included in general provisions in the form of a separate chapter.

Section IIa – Agreements for Setting the Transaction Prices, is mainly implementation of the EU law tax provisions regulating prices applied between affiliated entities.

As far as the content of tax law general provisions is concerned, Section III – Tax Obligations, is the most significant. It contains 17 chapters whose titles reflect their content quite accurately. Chapter 1 is titled Arising of a Tax Obligation, 2 – The Liability of the Taxpayer, Tax Remitter and Tax Collector, 3 – Securing the Performance of Tax Obligations, 4 – Payment Deadlines, 5 – Tax Arrears, 6 – Default Interest and Extension Fee, 7 – Expiry of Tax Obligations, 7a – Tax Payment Reliefs, 8 – Limitation, 9 – Overpayment, 9a – Signing a Tax Return, 10 – Tax Return Adjustment, 11 – Tax Information, 12 – Bills, 13 – Joint and Several Liability, 14 – Rights and Obligations of Legal Successors and Transformed Entities, 15 – Tax Liability of Third Parties.

Section IV – Tax Proceedings, is very extensive. It encompasses the following chapters: 1 – General Rules, 2 – Exclusion of the Employee of the Tax Authority and the Tax Authority, 3 – A Party to the Tax Proceedings, 3a – A Power of Attorney, 4 – Settling Cases, 5 – Deliveries, 6 – Summons, 7 – Restoration of Deadlines, 8 – Initiating Proceedings, 9 – Data Sheets, Minutes and Annotations, 10 – Making Files Available, 11 – Evidence, 11a – Hearing, 12 – Suspension of the Proceedings,

13 – Decisions, 14 – Rulings, 15 – Appeals, 16 – Complaints, 16a – Implementation of Decisions, 17 – Resumption of Proceedings, 18 – Ascertaining the Invalidity of a Decision, 19 – Reversal or Amendment of a Final Decision, 20 – Expiry of a Decision, 21 – Liability for Damages, 22 – Penalties for a Breach of Order, 23 – The Costs of Proceedings.

Section V – Inspection Activities, regulates issues concerning verification of the correctness of settlements made by taxpayers without launching a tax audit or tax proceedings. Within this scope, tax authorities may, among others, check the correctness and promptness of submitted declarations and verify documents submitted by taxpayers during tax registration.

Section VI – Tax Audit, embraces provisions regulating the process of tax inspection pursued by tax authorities auditing the fulfillment of taxpayers' duties resulting from tax law provisions. Under these provisions, tax audit may also be carried out by fiscal audit offices as part of their inspection activities. Fiscal audit offices operate on the basis of the Act on Fiscal Inspection, which refers to the Tax Ordinance in matters not regulated therein yet connected with the pursuit of inspection proceedings and tax audit. The principles of entrepreneurs' inspection are regulated in the Act on Freedom of Business Activity, which contains, among others, restrictions regarding total time of inspection within a year and a ban on pursuing several audits of a taxpayer simultaneously.

Fiscal Secrecy is the title of Section VII. It contains provisions aiming at the protection of individual data contained in declarations and other documents submitted by taxpayers, tax remitters or tax collectors.

Section VIIa – Exchange of Tax Information with Other States, is divided into three chapters: 1 – General Principles for the Exchange of Tax Information, 2 – Detailed Principles for the Exchange of Tax Information with the European Union Member States, and 3 – Detailed Principles for the Exchange of Information about Revenue (Income) from Saving.

Section VIII – Criminal Provisions, contains one Article envisaging penalties for disclosing fiscal secrets. Provisions regulating liability for

fiscal offences and crimes are comprehensively regulated in the Fiscal Penal Code.

Section VIIIa – Certificates, regulates proceedings connected with the issue of certificates by tax authorities at the request of a taxpayer.

The last Section IX – Amendments to the Provisions in Force, Transitional Provisions and Final Provisions, regulates issues connected with the entry into force of the Tax Ordinance as of 1st January, 1997.

The above presented structure of Polish Tax Ordinance indicates that it is merely partial codification of tax law. Above all, it lacks provisions regulating individual taxes, which has already been mentioned before. This is the assumption of Ordinance as an act codifying only general tax law. However, it can be pointed out that the currently binding Ordinance also lacks regulations traditionally classified as a general part of tax law.

Discussing the shape of Tax Ordinance, the need to regulate the procedure of tax enforcement therein has been indicated. It is undeniably the matter which is frequently the subject of tax codes. In Poland, this issue is regulated in the Act of 17th June, 1966 on Administrative Enforcement Proceedings[15]. It contains provisions regulating enforcement of all public debt including taxes. Thus, there is no sense in dividing enforcement proceedings into two parts, i.e. tax enforcement (Ordinance) and provisions regulating enforcement of other pecuniary claims and intangible obligations.

1934 Tax Ordinance regulated the issue of liability for committed offences and crimes connected with the violation of tax law provisions. At present, this matter is comprehensively regulated in the Act of 10th September, 1999 – Fiscal Penal Code[16]. It is not reasonable to transfer it to the Tax Ordinance and this way de-codify fiscal criminal liability.

In my opinion, postulates to regulate the principles of operation and competence of fiscal inspection bodies in Tax Ordinance are not satisfactorily justified. Fiscal inspection bodies operate under the Act of 28th September, 1991 on Fiscal Inspection[17]. They are appointed not only

15 Uniform text: Journal of Laws of 2014, item 1619, as amended.
16 Uniform text: Journal of Laws of 2013, item 186, as amended.
17 Journal of Laws of 2011, No. 41, item 214, as amended.

to inspect tax obligations but also several other matters within the scope of public finance. They are not tax authorities even though they may carry out inspection proceedings finishing with the issue of a decision determining tax obligation. At the moment, works on a profound system reform of fiscal bodies, including both tax and customs authorities as well as fiscal inspection office, are carried out in Poland. This issue, however, will be regulated in a separate Act, not in Tax Ordinance. This solution should be approved of because Tax Ordinance should not contain provisions regulating the system of fiscal administration.

The currently binding Tax Ordinance lacks the institution of Taxpayers' Ombudsman, which characterizes other codes. It results from the fact that in Poland the Polish Ombudsman (Commissioner for Human Rights) operates as a constitutional body and his/her competence encompasses taxpayers too. The appointment of Taxpayers' Ombudsman would lead to the duplication of the tasks of these two bodies.

What is more, Polish Tax Ordinance lacks the institution of a "reliable taxpayer", which more and more often occurs in other codes. One can reasonably doubt whether the introduction of this institution to Tax Ordinance would not entail granting special privileges to a specific group of taxpayers, which may lead to the violation of the constitutional principle of equality and, in effect, evoke the division of taxpayers into "reliable" and other, i.e. "unreliable".

As one can see, the content related scope of Polish Tax Ordinance departs from the traditionally regulated scope of such acts. The lack of provisions regulating tax enforcement, criminal liability for the violation of tax law provisions or those stipulating the system and competence of tax authorities, i.e. the issues considered as general tax law, is a result of historical development of the system of law. I believe that because of just this circumstance, we still do not have and will not have universal models of tax codes for a long time[18]. The content of such acts must

18 There are attempts at creating such universal models of tax codes – see: Code of the Republic of Taxastan. A Hypothetical Tax Law. Prepared by the IMF Legal Department, September 29, 2000 and CIAT Model Tax Code (Centro Interamericano de Administraciones Tributarias (http://www.ciat.org/index.php/en/products-and-services/ciatdata/tax-rates/145.html?task=view).

correspond to other areas of the legal system being in force in a given country. Due to this, it can be stated that each tax code is specific and there cannot be two the same codes.

3. The assessment of the binding Tax Ordinance's operation

The doctrine almost commonly indicates the need of a profound reform of Tax Ordinance. It has been in force for already 18 years and during this time it has been amended over 80 times. In 2016 a subsequent extensive amendment thereof came into force and next ones are already in progress[19]. The constantly amended Ordinance has lost its original structure, which was not free of defects too. In result, the current system arises even more reservations or objections than the original one. A constant addition of new provisions could not have improved its structure. In some parts this Act has become unclear, that is difficult to understand and apply. This, in turn, results in further changes which are difficult to impose on the "original" text.

What causes permanent amendments of the binding Tax Ordinance? I think a decisive reason thereof is the fact that tax law is developing very dynamically. Different kinds of phenomena and processes that are regulated by it are constantly evolving. Tax Ordinance must keep pace with them. Otherwise, it may lead to negative consequences, most of all to the budget. The best example thereof are incessantly introduced new legal instruments in economic transactions not always used to improve them. Sometimes, they are created only for the purpose of not paying tax (aggressive tax optimization). Until recently, such understood tax optimization has not been applied as commonly as today. It must be reflected in a new ordinance in the form of regulations which may be applied in order to counteract this negative phenomenon.

What is more, the Ordinance undergoes changes due to the impact of court case-law. This and Constitutional Tribunal's rulings in particular

19 Drafted changes concern the introduction of a tax avoidance clause and a changed model of tax audit within works on a new structure of State fiscal administration.

impose a new normative shape on individual legal institutions. Persistent court disagreements about understanding of individual provisions of Tax Ordinance may be finally settled only in effect of their change. Moreover, courts continue to indicate new legislative defects that cannot be eliminated by interpretation. In this context, an attention should be drawn to numerous judgments of the Constitutional Tribunal with regard to the compliance of Tax Ordinance provisions with the Polish Constitution[20]. There were quite many of them and some of them indicated considerable defects of the Ordinance provisions.

Moreover, the Ordinance requires changes due to the lack of institutions typical of codified parts of general tax law. Among them, the most important is the need to organize and systemize general rules of tax law in the Ordinance. They are partially formulated but in a wrong place, i.e. in Section IV – Tax Proceedings. They were included there because they were rewritten from the Code of Administrative Procedure, which until 1998 had regulated tax procedure as well. They (or at least some of them) must be transferred to general provisions because the principles of legality, trust and provision of information or persuasion cannot be binding merely within the scope of tax procedures, which is implied by their very placement. The observance of these rules is also necessary in all relations occurring between taxpayers and tax authorities, not only within the scope of pursued proceedings. This postulate is best justified by the works on the introduction of the principle of resolving doubts in taxpayer's favor into the Ordinance. As it could not be included in the section on tax proceedings, it was placed at the beginning of the Ordinance, in Art. 2a, as the only rule of general tax law. In result, some principles of general tax law are regulated in Art. 120- 120 whereas one of them – in Art. 2a. By all means, it is not a system-oriented manner of expressing general rules of tax law.

The Ordinance lacks a catalogue of taxpayers' rights, which is indicated by organizations representing taxpayers. It may be done in the

20 The Constitutional Tribunal has indicated the compliance of the analyzed provision of Tax Ordinance with the Polish Constitution 19 times and 18 times adjudicated its inconsistence thereto.

form of a Charter of Taxpayers' Rights[21] or by expressing these rights in the Ordinance. It is indicated that exposing taxpayers' rights in one place (the Charter or Act) serves the improvement of relations between taxpayers and tax authorities. In Poland, on 18th May, 2011 Taxpayers' Rights Declaration was enacted but its impact on the improvement of relations between these entities is not great[22]. Due to this, the new Ordinance should specify taxpayers' rights that are the most important and already well-established in the literature and case-law.

What is more, the currently binding Tax Ordinance lacks other institutions which occur in most modern acts of this kind. Apart from the general rules of tax law mentioned earlier and taxpayers' rights and duties, we can list here the following as an example thereof: forms of tax authorities' activities not exercising their powers (consultations, negotiations, mediation), modern means of electronic communication, anti-avoidance tax clause, an order imposed on a taxpayer to cooperate with a tax authority, and simplified tax proceedings.

It is apparent that after 18 years Tax Ordinance has "grown old". Some solutions introduced at that time require profound reconstruction because they do not adjust to contemporary conditions. Good examples thereof are regulations concerning the use of electronic communication to contact a taxpayer. Who could think back in 1997 that it would be one of the most convenient and cheapest means of serving decisions, summons, submitting returns or providing information? At present, it is one of the more important problems to regulate in the Ordinance. It will be difficult to achieve the way it has been done so far, i.e. by adding subsequent regulations to already binding provisions to make the operation of e-communication more precise. It must be regulated comprehensively and in an organized way, which is not possible by means of launching next amendments of the provisions.

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21 E.g.: "Taxpayers' Rights and Obligations – Practice note" of 2003, "Tax Intermediaries study dealing with the role of tax adviser" of 2008 and "Cooperative Compliance Report" of 2013. It is also worth paying attention to "Action plan against tax fraud and evasion: idea of "An EU Taxpayer´s Code" of 2012 and the project "European Taxpayer's Code" submitted in 2013 for public consultation.

22 A quarter after the announcement. Taxpayers' Rights Declaration – what next?, "Prawo i Podatki" 2011, No. 9.

Another example is the institution of tax obligation's limitation. For different reasons, these provisions are developed in such as way that, on the one hand, tax authorities may prolong limitation period incessantly (interruption of the period) whereas on the other hand, taxpayers easily prolong proceedings and cause the expiry of obligation in result of limitation.

What is more, the problem of an increasing number of individual interpretations of tax law provisions must be promptly resolved. Annually, Minister of Finance and municipal tax authorities issue app. 38 thousand official tax law provisions' interpretations of this kind. They can be challenged in an administrative court, which taxpayers often take advantage of. In result, courts, Supreme Administrative Court in particular, are not able to examine complaints about interpretations in a reasonable time and one must wait for about 2 years for a verdict. Such a manner of providing tax information is very expensive and slightly effective – it must be changed.

4. Works on a new Tax Ordinance

The above mentioned flaws of the binding Tax Ordinance decided about undertaking works on preparing a draft of a new Tax Ordinance. General Taxation Law Codification Committee (GTLCC) was entrusted with the preparation of the draft. The Committee was appointed by the Council of Ministers' Regulation of 21st October, 2014 on the creation, organization and operation of General Taxation Law Codification Committee[23]. It was composed of: 5 representatives of tax law science, 3 judges of administrative court, 3 representatives of tax authorities, 3 representatives of tax advisory or counseling institutions and a representative of President of Poland. It was assumed that such a composition of the Committee would assure that all significant problems connected with the operation of general tax law regulations identified by science, judicature and practice would be included in the works on the reform thereof.

23 Journal of Laws of 2014, item 1471.

Pursuant to § 8 of the above quoted Regulation, the Committee's tasks embrace: preparation, within 4 months from their first meeting, assumptions of a comprehensive statutory regulation of general tax law as well as preparation, within 2 years from the day of adopting the assumptions, a draft bill containing comprehensive provisions on general tax law together with implementing acts. The purpose of GTLCC is regulation (clearing up) tax law's general part in the form of a new legal act titled "Tax Ordinance". It is a form of the so called partial codification of tax law. Comprehensive codification is not possible at the moment and the creation of a Tax Code comprehensively embracing tax law regulations (general and special part of tax law) in a predictable period of time is quite unlikely. Placing all these regulations in one Act is not justified. It would be an artificial and totally unreasonable activity.[24]

The first stage of the Committee's works was preparation of the assumptions of a future Tax Ordinance, which were submitted to Minister of Finance on 11th March, 2015. Minister of Finance decided to refer them for social consultations, which finished in August, 2015. During the consultation process, over 300 remarks were submitted, which were profoundly examined by the GTLCC and partially incorporated. The Assumptions of the new Tax Ordinance were accepted by the Council of Ministers on 13th October, 2015[25]. Since then, the GTLCC has had 2 years to prepare a draft of a new Tax Ordinance.

Pursuant to the adopted Assumptions, a new Tax Ordinance will entirely embrace provisions encompassing a general part of tax law[26]. It will contain general tax law provisions including, as it was indicated above, specificity of the Polish legal system. It means that solutions commonly applied in other systems cannot always be introduced to the Polish Tax Ordinance. It is important to assume a rational structure of the Ordinance's substantial content. The Ordinance's structure will be based on 4 parts: general provisions, substantive law provisions, provisions on bodies, and provisions on procedure. Drafted general

24 See: L. Etel et al., Tax Ordinance. The Assumptions of a New Ordinance, Bialystok 2015.
25 The list of legislative works of the Council of Ministers (ZA 35) http://bip.kprm.gov.pl/kpr/form/r1879
26 Main assumptions of the new Tax Ordinance presented below on the basis of: L. Etel et al., Ordynacja…, op. cit., p. 23 et seq.

provisions will include, among others, the following topics: the subject and scope of regulations, principles of general tax law, taxpayers' rights and duties, basic terms, definitions, representations, solidarity in tax law, principles of determining deadlines, fiscal secrecy, and means of electronic communication. Substantive law provisions should include two topics: tax obligations' assessment, enforcement and expiry, and succession and liability in tax law. The next part of the Ordinance will embrace provisions on bodies which will regulate issues regarding tax authorities and their competence. Provisions on procedure will, most of all, regulate tax proceedings, tax audit and inspection activities and other tax procedures (among others agreements on setting transaction prices, the issue of certificates, mediation, and estimation of a tax base).

Codified general tax law provisions are to realize two fundamental objectives:

- protect taxpayers' rights, and
- increase tax assessment and collection efficiency.

The first objective will be accomplished, among others, through mitigation of excessive rigor and formality of Tax Ordinance with regard to taxpayers as well as other entities that are either obliged or authorized to specified activities by virtue of tax law provisions (remitters, collectors, legal successors and third parties). Legal mechanisms protecting taxpayers' position in their contact with tax administration should be introduced to the new Act. Regulations contained therein should be based on the presumption that a taxpayer is a reliable person who does not consciously aim at tax law violation. Moreover, it is necessary to statutorily determine taxpayers' rights and assure their observation through the introduction of legal instruments allowing their enforcement. What is more, regulations that are excessively or unreasonably restrictive towards taxpayers should be abolished. A new Ordinance should introduce facilitations in contacting a tax authority to settle or arrange tax matters[27].

27 Ibidem.

The second fundamental purpose of the new Tax Ordinance is an increase in the efficiency and efficacy of tax obligations' assessment and collection. Tax Laws, including Tax Ordinance as well, should serve the acquirement of tax revenue. This purpose requires introduction of several mechanisms and procedures increasing possibilities of tax authorities in the fulfillment of tax obligations resulting from the Acts. It is particularly important when the phenomenon of aggressive tax optimization and tax frauds resulting in considerable decrease of budgetary income from tax is increasing. Greater efficiency of tax authorities, however, cannot entail infringement of taxpayers' rights. The shape of a new Tax Ordinance should account for the fact that public interest is often not contradictory to taxpayers' interest. What is more, it should provide the grounds for an appropriate balance between the two interests when they are contradictory. This purpose will be fulfilled by the placement of general tax law principles in the Ordinance which, among others, will impose obligatory consideration of both taxpayers' rights and public interest in the process of tax law interpretation[28].

Increased efficiency and efficacy of tax assessment and collection will be assured, among others, by: the establishment of a legal framework for better cooperation between tax authorities and taxpayers, the introduction of solutions encouraging taxpayers to correct their mistakes, the introduction of a tax anti-avoidance clause, increased efficiency of tax audit and inspection activities, the introduction of simplified tax procedures, and modernization of institutions regulated in Tax Ordinance (electronic means of arranging and settling tax matters).

5. Conclusion

To conclude, it should be stated that preparation and then adoption of a new Tax Ordinance will certainly contribute to the fulfillment of the above mentioned objectives, that is protection of taxpayers' rights in their relations with tax authorities and increased efficiency of tax collection. We hope that the draft prepared by the GTLCC will be approved by the Parliament and the new Ordinance will be passed in the shape proposed

28 Ibidem.

by the Committee. It will be a great step towards clarification of the Polish tax law. A step which will enable works on the full codification of tax law, which is now impossible.

Abstract

This paper deals with general tax law in Poland. It presents the history from 1934 Tax Ordinance to 1997 Tax Ordinance. The article also depicts the structure of the currently binding Tax Ordinance of 1997. Attention is also paid to the evaluation of its operation. Works on a new Tax Ordinance undertaken by General Taxation Law Codification Committee were also analyzed within the frames of this article.

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HUNGARIAN TAX CODE

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1. The short presentation of the history of the Tax Code's introduction to the tax system

1.1. The Tax System in Hungary

The Hungarian tax system currently consists of approximately 60 types of taxes or quasi-fiscal charges. The basis of today's tax system was formed upon the emergence of the 1988 tax reform, when the socialist tax system was exchanged by a Western-type tax system. Personal income tax and the taxation of businesses as well as VAT emerged those days in the Hungarian tax system

The current tax system is multi-layered; besides "classic taxes" such as personal income tax, corporate tax, value added tax and excise tax, several smaller special taxes have also been introduced such as simplified business tax or surtax on financial institutions. Therefore, the Hungarian tax system corresponds to OECD's and IMF's expectations regarding tax systems, perhaps only one thing, the number and role of property taxes, is lower than the average. Among taxes on consumption, valued added tax with its 27% and the Hungarian innovation called financial transaction tax must be highlighted.

1.2. History

The first tax reform which can be considered the economic baseline of new economy is dated in the beginning of 1988. It was executed

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through complex tax legislation (income tax, value added tax, company tax, social insurance payments, tolls, various fees, etc.) and represented a switch of philosophy: the socialistic system of planned economy was overridden by market economy[4], representing the financial groundwork for political regime change. The main aims of this tax reform can be summarized as follows[5]:

- To create a unified, normative regulation (based on statues) of the tax system; the structure of the net incomes of various tax subjects was changing and the tax incomes connected to them should be raised, the proportion of consumption taxes in the system should get higher;
- To decrease fiscal centralization and increase autonomy of private companies while simplifying cost-calculation of private enterprises. An important requirement was to clearly separate and calculate costs and income were;
- To form a socially fairer system of public burdens introducing consolidated tax bases for taxpayers that subjects with similar incomes should pay similar taxes;
- to bring the Hungarian tax system closer to developed countries' tax systems promoting opening up of economy.

In short, the aim was to create a fairer system of public burdens, solve the taxation of covered incomes (black economy, gray markets, etc.) and create EU conformity.

The realization of the above stated aims was afterwards evaluated quite promptly after the implementation of the new regulation by the Institute for Economic Research (*Gazdaságkutató Intézet*). According to its report[6], the declared aims were fulfilled only partially as it can be considered as successful in that regard that the tax burdens of households have been raised (which was favorable for companies and

4 The broadened "second economy", new types of taxpayers emerged as the result of the reforms, beside the 9.000 traditional taxpayers in 1987 around 40.000 new company or private entrepreneurs arose, whose taxation required a new approach.

5 1987. évi V. és VI. törvények általános indoklásai. Törvények és Rendeletek Hivatalos Gyűjteménye. Közgazdasági és Jogi Könyvkiadó. Budapest, 1988. p. 73-77, 83-93.

6 Az 1988. évi adórendszer közgazdasági értékelése. KSH Gazdaságkutató Intézet. Budapest 1989, p. 78.

the state budget) [7], and the whole system of public burdens became more equitable. However, numerous aims were not reached, or at least their implementation was arguable, for instance:

- the level of the budgetary centralization was not decreased nor the redistribution character of the state budget was lowered;
- the reform did not have any effect on the economy which would improve the effectiveness of companies in general, or which would force the companies to more rationalized labor use;
- the new tax system generated inflation effects, which further raised the financial burdens of households.

As to the regulation itself, the legal basis of the reforms was divided into several laws. This segmented regulation is retained up to the present in some extent. The core of the regulation was implemented by the following main statues: Act XCI of 1990 on Tax Ordinance, Act C of 1990 on Local Taxes, Act XLV of 1989 and Act XC of 1991 on Income Tax, Act V of 1987 and the following acts (Act XIX of 1990 and Act LXXIV of 1992) on value added tax. As to the regulation itself, it was segmented, often changed and amended. Naturally, the change of the regime brought more complex and widespread changes to various branches of law, which had also direct and indirect effects on the tax system.

Changes reached the organization of regulative administrative organs as well; in 1987 the Office for Tax and Financial Control (*Adó- és Pénzügyi Ellenőrzési Hivatal*) was created, with the expectation to create an organ corresponding to the expectations of market economy, capable of adjusting to domestic and foreign markets as well. The latest change of the system of administrative organs is the formation of the National Tax and Customs Administration of Hungary (*Nemzeti Adó- és Vámhivatal*) in 2011 as the legal successor of the Offices for Tax and Financial Control.

Also an important concept was the introduction of so called "small taxes", which were special taxes or fee-type public payments, such as employee's contribution, employer´s contribution, rehabilitation contribution, vocational education contribution, environmental

7 The direct tax burdens of citizens grew in 1988 from 9% up to 17%. The growth was generated through income taxes mainly.

impact fee, tax on lottery games, etc. – the whole list would make up approximately hundred items[8].

Based on this the present-day tax system was formed, which is characterized by numerous minor changes (sometimes even haphazard and random-like ones) in the past 20 years[9]. These changes inflicted serious effects on the whole tax system – while a significant portion of changes considered income taxation[10].

A more global recodification is represented afterwards by the passing of Act XCII of 2003 on the Rules of Taxation or Tax Procedure Act (hereinafter " Tax Code"). The main aim of this new regulation was to regulate the rights and obligations of taxpayers and organs of tax administration, and to create a unified normative system according to all tax types and lay down basic principles of tax procedures. A comprehensive novelization of the Tax Code was implemented in 2009, which modified numerous legal institutes (rules according to the obligation to use a bank account, to undeclared work, to late appeal, to individual entrepreneurs, to student loans, client portals, e-declaration, etc.). The last changes are dated to 2015 and 2016, among which the institute of taxpayer´s evaluation on "good" and "bad" taxpayers can be outlined, according to which to unreliable taxpayers stricter procedural rules apply – but this is only one of several changes from the last year [11].

Nowadays it is not only an aim but more a basic condition that tax procedures should be simplified, so less administration is required from the taxpayers as well the administrative organs to decrease the number of various taxes, to simplify tax controlling procedures, to fight against tax avoidance, evasion or abuse, with respect created to a self-oriented taxpayers' attitude, to radically decrease the tax burdens of families with children[12] and to create an effective tax administration system[13].

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8 I. Juhász, Az adózás története. p. 16. http://5mp.eu/fajlok/msc/adotortenelem_2_www.5mp.eu_.pdf

9 M. Bencsik – Andrea, Szentkirályi, Adózás alapjai, (Elektonikus jegyzet.) Óbudai Egyetem Keleti Károly Gazdasági Kar, Budapest 2011, p. 22.

10 A. Semjén, A mai magyar adórendszer. Jellegzetességek, problémák, kihívások, p. 216-217. http://econ.core.hu/doc/parbeszed/semjen.pdf

11 See in detail: E. Kovács, Az adózás rendjéről szóló 2003. évi XCII. törvény Nemzeti Adó és-Vámhivatal (NAV) eljárásait érintő 2016. évi változásai. In.: Adóvilág, vol. XIX., issue no. 13-14.

12 Bencsik-Szentkirályi, p. 22.

13 Gergely, p. 17.

2. The Structure of the Tax Code

The legislation of taxes in Hungary, that is tax law, is not a separate branch of law but it is a part of financial law. Having regard to the fact that taxes and tax-like liabilities collected besides taxes form the income side of public finance, this field of law is mostly referred to as "Law on Public Revenue" in Hungarian special literature. Public revenues are enumerated in 6. § (3) c) of Act CXCV of 2011 on Public Finances[14]. Furthermore, 28. § (1) of Act CXVIV of 2011 on the Economic Stability of Hungary presents similar enumeration on payment liabilities for the covering of common needs[15].

Hungarian tax law is also characterized by that it does not have a separate law which comprehensively regulates the legislation of the whole field. Only a law regulating the procedural rules of tax law exists, which we can regard as procedural code. "Coherent regulation makes the situation of participants of legal relations in the process of taxation visible."[16]

Consequently, this act contains the procedural rules of taxation. Tax rules in Hungary can be grouped into substantive and procedural norms. Under the term substantial norms we basically mean acts which introduce certain taxes, rights and liabilities of taxpayers, first of all, tax payment liabilities. Therefore, separate acts regulate private people and businesses' income tax, certain taxes on consumption and local taxes. A common characteristic of these substantial legal norms is that they generally do not contain their own procedural rules; these rules are prescribed to them, even to levies, contributions and fees by the Tax Code.

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14 6. § (3) b) official incomes coming from taxes, levies, contributions, subscriptions, penalties, fees and other payment liabilities.

15 28. § (1) In Hungary, all natural persons, legal persons and other legal entities with the fulfillment of a) tax, contribution, subscription, capital transfer tax, allowance or other similar – lacking the direct counter service of the state – regular or extraordinary payment liabilities, furthermore, b) supervision fee, procedural and supervision duty, administrative service fee, surcharge paid for service done in the exercise of State authority; [point *a)* and *b)* furthermore referred to as: payment liabilities] contribute to the coverage of common needs.

16 G. Földes, Az adózás rendje. In István, Simon (ed.): Pénzügyi jog II., 2007, Osiris Kiadó, Budapest, p. 26.

2.1. Procedural rules of the Tax Code

As a procedural code the Tax Code is not independent from other procedural laws. Therefore, Act CXL of 2004 on the general rules of administrative proceedings and services (hereinafter "Administrative Procedure Act") and Act LIII of 1994 on Judicial Enforcement also serve as background materials during the application of the Tax Code. Due to the possibility of tax authority resolutions' supervision at court, for the initiation and carrying out of such tax lawsuits, Act III of 1952 on Civil Procedure also has to be taken into consideration.

As to procedural rules, the Administrative Procedure Act and the Tax Code´s mutual relationship has to be clarified. The Administrative Procedure Act serves as a general rule of proceedings for administrative organs, defines basic principles and core rules of proceedings where organs solve so called "official matters of administrative nature", where this term is defined as all actions where the administrative authority defines any right or obligation concerning a client, verifies any data, fact or entitlement, maintains official records and registers or conducts a regulatory inspection and procedures for admission into and removal from the register for engaging in activities, where engaging in a specific profession is rendered subject to membership in a public body or other organization of the like, not including disciplinary and ethics proceedings[17]. The Administrative Procedure Act defines also the administrative organs as such (for the purposes of administrative proceedings) among other organs of state administration while the National Tax and Customs Administration is considered as such.

Put simply: the Administrative Procedure Act applies in cases where organs of public administration are deciding about the rights and/or obligations of civil persons in the form of individual decisions.

There are, however, numerous exceptions where the Administrative Procedure Act does not apply whatsoever, or is applied only to some extent. As the relation of general and special administrative proceedings goes, there are several types of special procedures depending on the extent the Administrative Procedure Act applies to. As far as the Tax Code

17 Section 12 of Administrative Procedure Act.

goes, Administrative Procedure Act applies to it under the condition that the Tax Code does not provide otherwise[18]. Thus, in a way, the lex speciali derogat legi generali rule applies.

Concerning the core rules of the Tax Code in this matter, it states that unless otherwise provided for by the Tax Code or by other legislation pertaining to taxes, tax liabilities or central subsidies, the provisions of the Administrative Procedure Act shall apply in respect of tax matters, with the exceptions (meaning that the provisions of the Administrative Procedure Act shall not apply): 1) to the opening of proceedings, reopening procedures, regulatory services, and – with the exception of the operative dates of resolutions – to enforcement proceedings; 2) to the rules pertaining to preferential arrangements in terms of administrative time limits relating to taxpayers of minor age; 3) to the rules of conditional decision. Based on this core regulation several procedural rules are scattered along the Tax Code (or other tax legislation) concerning mainly particular legal institutes and regulating them differently from the general procedural code. This regulation creates another layer of procedural rules as the Tax Code itself states that in case of taxes other legislation (different from the Tax Code) pertaining to taxes can regulate differently – can be considered the Tax Code lex generalis in this case, and if so, what is the status of the Administrative Procedure Act then? Frankly, this is more a theoretical question, however, it shows exemplary how mazy the tax procedure´s regulation can be.

The individual procedural rules can be found in several places of the Tax Code, often not clearly separated from the substantial rules which – in the light of the above stated – represent the lex specialis regulation, complemented subsidiary by the Administrative Procedure Act. The regulation of tax procedure is, therefore, segmented, some parts are regulated by the Administrative Procedure Act and some by the Tax Code (or some other type of special statue containing procedural

18 See Section 13 subsection 2) letter b): "This Act (Administrative Procedure Act) applies to... proceedings related to compulsory payments to the central budget as prescribed by law, or to be shared with the budget of the Communities, and to subsidies paid from the central budget or from extra-budgetary funds under the conditions set forth in legal regulations... only if the act pertaining to the type of case in question does not provide otherwise."

rules to a special tax type), and oftentimes criticized as it is far from clear and understandable regulation. Moreover, it puts a lot of administrative burden on the taxpayers' shoulder as it is oftentimes not unambiguous which rule to apply. This is, however, a general problem of the Administrative Procedure Act: the number of special procedural rules has grown to an enormous extent; the number of exceptions under the lex generalis is so high that a new codification of the Administrative Procedure Act seems unavoidable on a long run, as a matter of fact, at the present time, a complex recodification is under preparation. The question remains how to regulate the relation of tax procedures to this new general administrative procedure to achieve a more unequivocal and systemic regulation.

2.2. Overview of the individual chapters of the Tax Code

The structure of the lengthy Tax Code – 10 chapters, 215 §-s and 9 attachments – justifies that lawmakers tried to regulate all questions of taxation in this Act. Its chapters proceed from general to special content.

2.2.1. The first chapter is titled "General provisions"

It contains the basic principles of taxation as well as regulations referring to the Act's effect. The basic principles of taxation are normative principles assisting the application and execution of laws. Rules referring to the limitation of tax authority procedures such as the principle of legality, or the principle of the common application of legality and efficiency appear among them. Besides these limitations, the tax authority is obliged to proceed in cases of taxation without discrimination.

A significant tax authority's obligation and at the same time taxpayer's right is the principle of due course of the law, which can be read in the same paragraph with taxpayers' cooperation in case of liability with the tax authority.

The right to fair procedure is also among the basic principles, which can be applied upon the authorization of the Act.

The principle of judgment according to real content is a significant tool of the tax authority with regards to contracts, businesses and other

acts. This principle empowers the tax authority to re-qualify disclaimer contents known by them. In private law, invalid contracts do not have legal effect, however, in the field of taxation this would mean the exemption of tax evaders, therefore, according to the principle, invalid contracts shall be qualified according to their economic result. This rule has to be applied to rules conflicting the Act or good morals.

As for the application of corporate taxation and value added tax, the question of price applied among businesses being in proprietary or management relationship with each other is a common problem. The Tax Code prescribes the application of customary market price with regard to these situations.

The principle of intended legal action was only included in the then procedural code of 1st January 1999, then in the current one after the Supreme Court ruled on a uniformity of law. This principle is the real general clause of taxation as it regards all contracts or other legal acts aiming to avoid the resolutions of the Act as not intended legal action.

Hungary does not exempt such legal relations and incomes which are not regarded as taxable in inland at any state from being taxed, either.

Finally, the tax basis in the previous two cases may be estimated by the tax authority if it cannot be judged otherwise.

People covered by the Act are legal people or private people having their seat or premises, or carrying out economic activity in Hungary as well as other people whose habitation, habitual residence or any other residence, income, wealth is in Hungary, or who are involved in Hungarian public administration procedure or court proceeding. Special rules affect those people who provide media service and electronic service to Hungarian citizens without having a seat or premises in the European Community.

As far as we are concerned, the Act's substantive effect is even more crucial than the previous one. The reason is that the notion of tax, budget aid and taxation is laid down here, of course only from a procedural point of view:

4. § (1) This Act shall apply to:

a) mandatory payments related to taxes, contributions and duties payable – pursuant to the relevant legislation – to the central budget, extra-budgetary funds, to the Pension Insurance Fund, Health Insurance Fund or to municipal governments (hereinafter referred to collectively as "tax");

b) subsidies paid from the central budget or from extra-budgetary funds under the conditions set forth in this Act of Parliament, in government or ministerial decrees (hereinafter referred to collectively as "central subsidies");

c) procedures related to such payments and central subsidies, if the assessment, collection, enforcement, refund, disbursement or control of such taxes and subsidies falls within the competence of the tax authority (the activities described in paragraphs a)-c), hereinafter referred to collectively as "taxation").

Additionally, this Act shall also be applied to certain public debts as well as juridical and court service fees with respect to execution and connected administration. This Act generally does not cover social insurance procedures, community customs and connected payments (penalties). Besides, lawmakers also define administration deadlines here, which is basically 30 calendar days.

2.2.2. The second chapter is titled "Taxable persons and tax authorities"

This chapter basically defines tax procedures' two subjects. A taxable person shall mean any person whose tax liability and tax payment obligation is prescribed by any legislation on taxes and central subsidies, or by this Act, and in certain cases handled wealth is also regarded as a taxable person.

The latest modification – being in effect since 1st January 2016 – has supplemented the act with rules referring to the reliable taxpayer. The definition of a reliable taxpayer is the following: a person who has not had tax debt and the tax authority has not initiated any execution procedures against him for a longer period of time and the tax authority has registered him/her. If a taxpayer becomes entitled for the reliable

status, s/he becomes entitled to shorter inspection procedures, more favorable sanctions, shorter VAT back referral time and payment in installments.

At the same time, the category of a risky taxpayer has also emerged in the Act, which primarily refers to taxpayers having a great amount of debt and employing employees without announcement. In their cases the VAT transfer deadline increases to 75 days instead of the usual 30 days, inspection period for them becomes 60 days longer and late payment surcharge becomes higher than usually which is the double of the interest rate of the central bank, however, for risky taxpayers it becomes five times more. Furthermore, in their case penalties also become higher.

In this chapter the Act also denotes the circle of incidental representatives of taxpayers who may represent them in front of the ministry led by the minister in charge of taxation. We cannot find Hungarian specialty here, hence, we basically get information about legal representatives, lawyers, tax experts, tax advisors, auditors and accountants here.

The enumeration of tax authorities can also be found in this chapter. Hungary has only four, in reality only two, tax authorities: the National Tax and Customs Administration of Hungary (hereinafter referred to as: NAV), its taxation branch functioning as the state tax authority, customs branch of the NAV functioning as the customs authority, notaries of municipal governments as local authority's tax authority, and Budapest and county government agencies, if acting as the superior authority of a municipal tax authority.

The supervision of tax authorities is carried out by the minister in charge of the supervision of tax policy (Minister for National Economy).

A little illogically, chapter 2 presents two types of taxpayer's rights, namely the availability of documents and the right to self-audit. This is followed by the enumeration of taxpayers' liabilities[19], which are the followings:

19 In Section 14.

a) registration, filing formal statements;

b) tax assessment;

c) filing of a tax return;

d) payment of taxes and tax advances;

e) issuing and retaining accounting documents;

f) keeping records (bookkeeping);

g) disclosure of data;

h) deduction and collection of taxes;

i) opening a payment account and effecting payments related to taxable activities by way of the means prescribed in this Act; [Paragraphs a)-i) hereinafter referred collectively to as "tax liability"].

2.2.3. The third chapter presents certain previously listed tax payment liabilities and detailed rules of connected procedures

This part of the statue contains in depth regulation of various institutes (registration procedures, registration of value added tax liability, tax registration procedure, types of tax assessment, tax return, payment of tax, deadlines and methods of payment and disbursement, several rules on accounting documents, books and records, etc.), while a relevant part of this chapter includes various procedural rules (deadlines, methods, workflow and processes, etc.). As the main aim of this study is not to provide detailed analysis of individual tax institutions but a more general view, this chapter is not analyzed in details in this study.

2.2.4. With comparison to the previous one, the act's fourth chapter is also about certain tax payment liabilities and tax secrecy

With regards to tax liabilities, the regulation of data registry and data service primarily contains rules of the tax authority's data handling, furthermore, we get a long list from point a) to w) on that who, to which authorities and with what content is obliged to serve data on taxpayers.

This chapter[20] contains the definition of tax secrecy as well: *All tax-related facts, data, circumstances, resolutions, rulings, certificates and other documents shall be deemed confidential information. The regulations on tax secrets and the provisions of Subsection (9) of Section 16 of the Act on the Implementation of Community Customs Laws shall apply to procedures for the issue and registration of VPID codes.*

The regulation henceforward is about tax secrecy: which people and organizations are entitled to receive information about them and when and to what extent can data regarded as tax secrecy be made public.

2.2.5. Chapter 5 of the Act on the application of the European Community's rules of cooperation was overruled on 21st April 2013 given that these rules have already been included in a separate act[21]

2.2.6. Chapter 6 of the Tax Code regulates tax authorities' competence and jurisdiction

Yet with general content, the Act also regulates the competence and jurisdiction of the national tax authority and the customs authority operating in one organization with it, furthermore, the competence and jurisdiction of local tax authorities as well. Detailed competence and jurisdiction rules are regulated in relevant special acts[22].

2.2.7. Chapter 7 of the Tax Code rules on the procedural rules of tax administration

This chapter concludes the rules on the procedural rules of tax administration in 80 paragraphs. During these proceedings the tax authority determines taxpayers' rights and liabilities, inspects the fulfillment of liabilities, the legality of the practice of rights, keeps a record on facts, data and circumstances connected to taxation, and also

20 Section 53.

21 Act XXXVII of 2013 on the Rules of International Public Administration Cooperation Related to Taxes and other Public Duties.

22 Act CXXII of 2010 on the national tax and customs administration 485/2015. (XII. 29.) government decree on the national tax and customs administration bodies' competence sphere and competency 4/2012. (II. 14.) Ministry for National Economy's decree on the appointing of significant taxpayers and the determination of taxpayers having the highest tax capacity. Act LXXXII of 1991 on the Motor Vehicle Tax.

affirms data[23]. The tax authority's tax administration activity lasts from the investigation of tax returns to the termination of execution.

Though the above mentioned tasks, proceedings can generally be matched with other public administration body's proceedings, tax authority proceedings differ from general public administration proceedings a lot, therefore, a separate chapter describes them in the Tax Code. Their specialty prevails in the form of investigation, their deadline and in the proceeding itself as well.

2.2.8. Control

Control carried out by the tax authority is basically the declaration of the tax liability's fulfillment or violence. Hungarian taxpayers usually make self-assessment, therefore, their control is crucial. In the case of self-assessments the tax authority only gets information on the realization of state of affairs from tax returns made by taxpayers, hence, the tax authority only enters the procedure actively with control, until the tax return is made, it only registers.

During the investigation the tax authority's task is to reveal and prove the violation of law or the abuse of law. In order to fulfill this obligation, there is a need for the tax authority's control.

The following types of investigation exist: they may aim at the follow-up investigation of tax returns, the fulfillment of national guarantees, the fulfillment of certain tax liabilities, the collection of data, and at certain economic events' authenticity, the fulfillment of levies and the repeated control of periods closed after control[24].

However, the tax authority is not able to control all taxpayers, therefore its most significant aim is to investigate those taxpayers who are very likely to hide the most tax as the circle of high danger[25].

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23 Section 85.

24 In Section 87.

25 A. Varga, Az adóigazgatás alapjai, az adózás rendjéről szóló törvény szabályai,[The bases of tax administration, rules of the Act on the order of taxation] in L. Csaba (ed.), Adózási pénzügytan és államháztartási gazdálkodás, Közpénzügyek és államháztartástan II., [Taxation financial law and central budget economy, Public Finance and central budget]. 2015, Nemzeti Közszolgálati Egyetem (National University of Public Service), Budapest, p. 464.

Therefore, the Tax Code differentiates among cases of obligatory control and control carried out according to the information annually issued by the tax authority's leader.

Cases of obligatory control:

- in the case of risky taxpayers if one is under a liquidation procedure;
- upon the request of the President of State Audit Office of Hungary,
- upon the order of the Minister in charge of taxation;
- in the case of local authority taxes, upon the resolution of local authorities' representative body.[26]

In the information on control proceedings issued by the tax authority in 2016,[27] the highlighted aims were the followings: controls of investigations based on taxpayers' life path with which risky taxpayers can be filtered, controls of the fulfillment of tax liabilities on taxes on consumption, controls connected to excise duty and tax liability of wealth, and the fulfillment of tax payment connected to employment. Among these the investigation of commercial vehicles, the application of online cash registers, the investigation of public services and internet commerce is also going to be highlighted. It becomes clear from this enumeration that they aim at the whitening of the economy this year as well.

The act also contains the deadline of control (generally 30 days), rules on the initiation and carrying out of controls, taxpayers' rights and liabilities in the control procedure and the termination of control. Partially separate rules refer to the follow-up control of returns as well as estimations applicable during this as ways of proof to the so called over-control, controls connected to the redemption of state guarantee, the control of certain tax liabilities, and control of data collection and certain economic events' authenticity.

26 In Section 89.

27 Information no. 4001/2016 on the main field of direction connected to the control tasks of 2016, released by the National Tax and Customs Administration.

2.2.8. Authority (official) proceedings

If besides control, or in cases of ascertaining violation, the tax authority initiates or carries out authority proceedings in cases set in law[28], procedural rules can also be found in the Tax Code. The authority proceeding is also accompanied with the announcement of authority tax assessment based on the tax return, follow-up tax assessment, tax's exceptional determination, tax's conditional determination, and the determination of usual market price.

Payment delay, authorization to pay in installments, tax reduction, modification, cancellation of resolution, and legal remedies' main rules can also be read in this chapter (appeal, supervisory measurement, court supervision of tax authority resolutions), however, we must note that substantive rules are set in Act III of 1952 on the Code of Civil Procedure and CXL of 2004 on the General Rules of Administrative Proceedings and Services. Chapter VII of the Tax Code also includes special rules of tax execution, of which general rules are found in Act LII of 1994 on Court Execution. Furthermore, this chapter also contains rules on the limitation periods of tax assessment law and execution law[29].

2.2.9. Chapter VIII of the Tax Code is on applicable legal consequences in connection with tax administration proceeding

Among these we can find the followings: default penalty, self-audit surcharge, tax penalty, default fine, and measures: confiscation of goods, closure of premises, prohibition of duty, and the suspension or cancellation of tax number. All legal consequences can be applied in the case of certain taxes, however, excise duty has its own, very serious sanction: excise penalty.

2.2.10. Chapter IX of the Tax Code contains mixed rules

It contains technical regulations with regards to blanks, electronic forms as well as authorization on releasing them, whose addressee is the

28 In Section 120.
29 In Section 164-164/A.

minister in charge of taxation. This chapter also lays down regulations that are significant from the point of view of the application of law as well as basic rules of national tax and customs authority administration.

2.10. Chapter X of the Tax Code is about the Act's closing and temporary regulations

They show us that most parts of the Act entered into force on 1st January 2004, and the demonstration of compliance to the European Union's legal acts is also expressed in this part.

3. The Evaluation of the Tax Code

The above mentioned system and content of the Hungarian act on tax proceedings clearly presents lawmakers' constant strive for making the law up-to-date. This reasoning has a strong background as in the past 12 years a lot has changed in the Hungarian tax system. Currently, Hungary has approximately 60 types of taxes, and it is itself a huge challenge to fulfill tax policy aims in order to make the Tax Code suitable for all of them. The other reason for frequent modifications[30], which are often referred to as "the inflation of tax law making" is legal harmonization required by the European Union. The third and again crucial reason is the fight against tax fraud and abuse, which has been significantly highlighted in the last four years in Hungary. Let us mention only a few examples: the introduction of online cash registers, the application of Electronic Public Road Trade Control System (EPRTCS)[31], the widening of the rules of reversed taxation, electronic billing; all such measures which require a frequent change of tax procedure rules.

As for the relationship of the Tax Code and the Constitutional Court, according to the current constitution in effect (Fundamental Law of Hungary), 34 § (4) says that in tax cases the Constitutional Court exclusively has competence in connection with the rights to life

30 So far approximately 133.

31 See further: L. Pardavi, New Tools against VAT Fraud in Hungary, in V. Babcak, A. Románová, I. Vojníková (eds.), Tax Law vs. Tax Frauds and Tax Evasion II., 2015, Pavol Jozef Safarik University, Kosice, p. 113-124.

and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights while the state debt exceeded half of the Gross Domestic Product, (currently approximately 78%). Resolutions issued by the Constitutional Court prior to 1st January 2012 were overruled according to point 5 of the Fundamental Law's closing provisions. However, a lot of them are connected to the previously analyzed Tax Code. Such as: Constitutional Court's resolution no. 1189/D/2007, which does not consider the limitation of access to file in connection with other taxpayers' data unconstitutional; or a later Constitutional Court's resolution no. 3/2014. (I. 21.), according to which 35. § (3) of the Tax Code being in effect from 10th July 2005 until 31st December 2006, which ruled about the tax authority's verification of tax debt's take over, stands against 2. § (1) of the Constitution on the rule of law (especially safety of law as its crucial part) and the requirement of equal treatment stated in 70/A. § (1).

As far as we are concerned, the current act's major default and deficiency lie in its proof system. Though the Tax Code declares the proof liability of the tax authority (97. § (4), in practice it primarily inverts it with the application of taxpayers' assessment liability. Therefore, if during the investigation the tax authority considers some data or fact as incorrect, it calls upon taxpayers to present their assessment in connection with it in a short period of time. Taxpayers usually do not have the possibility to refuse assessment. After the assessment has been made by the taxpayer, the tax authority usually ignores it (i.e. it is regarded as unreal) and hence, its own authority viewpoint is considered as justified. In the past few years the Court of the European Union has many times condemned this proof procedure, mainly in connection with VAT (judgments in case no. C-80/11 and C-142/11 Mahagében-Dávid combined case and case no. C-324/11 Tóth), prescribing the tax authority's burden of proof, however, Hungarian practice and law, nevertheless, have not changed. It makes the situation more interesting and the problem more serious that the Hungarian civil procedure law

prescribes plaintiffs' (in these cases taxpayers') burden of proof[32] and requests it in suits aiming at the tax authority' supervision as well, reversing the burden of proof determined by the European Union.

We believe that – not taking the law application practice's anomalies into consideration – the Tax Code contains adequate guarantee for the limits of taxpayer's rights and tax authority's actions.

4. The Proposals of reforms of the Tax Code

The actual Hungarian state reform affects the currently effective procedure rules in many ways. The Magyary Zoltán Public Administration Development Program issued in 2011 aimed at the simplification and quickening of procedures (in point III/3.3.); a change has occurred from 1st January 2013 in court systems, the so called public administration and labor courts have been operating since then in the capital city and county seats, belonging to the 'ordinary' court system also dealing with tax procedures. In February 2015 the Hungarian Government established the codification committee of the Public Administration Procedures and individual Public Administration procedural law as well. The concept of the two new laws has also been established, their main aims are the quickening and simplification of procedures. In the new concept, appeal will be exceptional, instead, a two-level court system has been worked out, therefore, public administration will have stricter court procedure. Its further improvement could be the establishment of separate public administration courts.

Besides all these, Government decree no. 1631/2014. (XI. 6.) on "Digital Nation Development Program" also wishes to increase the number of tax procedure's electronic elements.

The latest news[33] present that the Hungarian government plans to simplify tax procedures mainly with the termination of useless

32 164. § (1) of Act III of 1954.
33 http://www.kormany.hu/hu/nemzetgazdasagi-miniszterium/hirek/szemleletvaltas-a-nemzeti-adohivatalnal

bureaucratic rules. Therefore, the tax authority will operate along new principles, in frames of a new system.

On the top of it, the government also plans the modification, upgrading of the EPRTCS system, and the widening of online cash-registers in order to improve taxation.

5. Conclusion

As a conclusion, we would like to note that the currently effective Tax Code is coherent with the today's Hungarian tax system's requirements, its frequent modifications also justify the need for improvement. At the same time, it does not adjust to the public reform plans of the Hungarian government that well. Therefore, the shortening of the whole regulative concept, especially deadlines, would be justified as well as the widening of electronic procedures and the revision of legal remedy and public administration activity connected to taxation.

Abstract

This paper deals with the Hungarian Tax Code. The history of the Tax Code's introduction to the tax system was also presented. The article also depicts the structure of this Tax Code. Attention is also paid to the evaluation of its operation and proposals of reforms of the Tax Code.

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THE TAX CODE OF THE RUSSIAN FEDERATION: HISTORY, STRUCTURE AND REFORMING PROBLEMS

Marina Karaseva[1]

1. Tax codification in Russia: preconditions and general characteristics

Tax codification in Russia that took place at the end of the 20th century was prepared by the economic, political and legal factors which developed over this period.

The transition of Russia to the market economy in the early 1990s demanded reorganization of the financial and tax system due to the fact that in market economy taxes are a key source of the budget revenues. In these conditions, at the end of 1991, the Supreme Council of the Russian Federation passed a series of legal acts which cardinally reformed the tax system. The most important of these acts was the Law of the Russian Federation № 2118-1 of December, 27th 1991 «On the Bases of the Tax System in the Russian Federation».

This law had a general character and included structurally "general provisions", "types of taxes", the competence of public authorities as well as the issues of the control over collection of taxes and international aspects of taxation.

Along with the above-stated law, some other laws were also passed in 1991 such as the Law of the Russian Federation «On the Value Added Tax», the Law of the Russian Federation «On Excises», the Law of the Russian Federation «On the Taxation of Incomes of Banks», the Law of the Russian Federation «On the Investment Tax Credit», the Law of the Russian Federation «On the Profit Tax of Enterprises», the Law of RF

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«On Securities Transaction Tax», the Law of the Russian Federation «On Personal Income Tax», the Law of RF «On Personal Property Taxes», the Law of RF «On Inheritance and Gift Tax», the Law of the Russian Federation «On Corporate Property Tax», the Law of RF «On Payments for Land» and some others.

The series of tax laws passed in 1991 marked the first stage of tax reform in Russia as the state transiting to market economy. Thanks to the above-named laws, the tax system of Russia acquired the following characteristics:

1. The tax method became a core method in forming the revenues of the state treasury.
2. The system of taxes related to enterprises was unified, irrespective of the type of property on which they were based.
3. Taxes were differentiated into three levels:
   – federal taxes,
   – taxes of republics as parts of the Russian Federation, areas and autonomous regions,
   – local taxes.

Besides, taxes became a source of the revenues of the state and local off-budget specialized funds.

4. The quantity of taxes increased. There appeared a number of taxes common for legal and natural persons.
5. Tax payments of the population were unified. In particular, a common approach to taxpayers was developed irrespective of the form of business and industry[2].

At the same time, VAT became a largest source of the budget revenues, as in most European states. For the first time in the Russian tax system there was introduced an excise on particular kinds of goods, which made the tax system of Russia similar to the world practice. Finally, as in most countries, not monthly earnings but aggregated yearly revenue became the object of the income tax paid by individuals.

2 See: N. Khimicheva, Tax law of the Russian Federation. Saratov 1993, p. 7-9.

Despite the fact that the series of the tax laws passed in 1991 meant transition of Russia to a market tax system, the relevance of further reformation of tax legislation gradually became clearer. First, the laws did not mention numerous registration and license fees which took place in practice. Secondly, the President of the Russian Federation and the Government ORF in 1993-1996 imposed or allowed regions of the RF to impose taxes which were not provided for by the above-named law. Thirdly, the legislator sometimes forgot to provide the taxes and fees introduced in different laws in the Law of the Russian Federation «On the Bases of the Tax System in the Russian Federation»[3].

Besides, the tax legislation of the early 1990s did not correspond to the Constitution of the Russian Federation passed on 12th December, 1993. The taxation legal base was to be restructured on the basis of its positions. Finally, the series of the tax laws of the early 1990s did not contain a variety of legal rules necessary for effective taxation. In particular, the Law of the Russian Federation «On the Bases of the Tax System in the Russian Federation» left procedural aspects of taxation and also a number of necessary legal institutions undeveloped. Special tax laws considerably suffered anachronisms. In particular, questions of terminology, construction of particular legal institutions, definitions, etc. were based on the old, Soviet tax legislation[4].

All the circumstances stated above indicated the necessity of reforming tax legislation.

Reformation of Russian tax legislation started in 1992. After the Constitution of the Russian Federation was passed in 1993, the first drafts of the Tax Code of the Russian Federation appeared, taking into account the provisions of the Constitution of the Russian Federation and the tax legislation of the countries with market economy[5].

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3 See: O. Borzunova, Codification of the tax legislation of Russia, Moscow, 2010, p. 106.

4 See: Concept of development of the Russian legislation. Edited by L. Okunkova, Yu. Tikhomirov, Yu. Orlovsky, Moscow 1994, p. 124.

5 See: Comment to the Tax Code of the Russian Federation, first part (article-by-article), Moscow 2004.

First drafts of the Tax Code of the Russian Federation were prepared in 1993 under the guidance of first deputy Minister of Finance of the Russian Federation Sergey Shatalov.

At the same time, during this period the work on tax codification was not limited only to the governmental version of the draft. In 1994, a group of experts of the «Taxes of Russia» Association under the guidance of professor V.N. Frolov prepared and published the draft of the Tax Code of the Russian Federation, the first in Post-Soviet Russia.

In 1994 the Government of the Russian Federation announced a competition for the drafts of the Tax Code of the Russian Federation. This competition could not take place until there were some drafts of the Tax Code of the Russian Federation. In these conditions active development of the governmental versions of the drafts of the Tax Code of the Russian Federation began. From 1995 this work was directly assigned to the Ministry of Finance of the Russian Federation. The governmental draft of the Tax Code of the Russian Federation was ready by February 1996, however, its further passing was rather complicated.

In 1997 the President of the Russian Federation in his message to Federal Assembly specified the directions of Russian tax legislation revision according to the standards of the western countries.

By 1998 ten drafts of the Tax Code of the Russian Federation, including the governmental one, were submitted to the State Duma. Among the basic drafts of the Tax Code of the Russian Federation, besides the governmental one, there were the following:

- The draft developed by «Taxes of Russia» Association;
- The draft prepared by "Yabloko" parliamentary faction;
- "Chernozem region" Association draft;
- The LDPR draft (Liberal Democratic Party of Russia);
- The draft of the Federal law «On the bases of taxation and fees in the Russian Federation» was submitted as an alternative to the Tax Code of the Russian Federation. It was prepared by the Institute of Philosophy and Law of the Ural Branch of the Russian Academy of Sciences and the Ural Institute of Regional Legislation.

The State Duma adopted the governmental draft of the Tax Code of the Russian Federation. At first the State Duma passed the first part of the Tax Code of the Russian Federation. It happened on 16th July, 1998 and this part was enacted from January 1st, 1999. The second part of the Tax Code of the Russian Federation was passed on 19th July, 2000 and enacted from January 1st, 2001.

2. The structure of the Tax Code of the Russian Federation and other legislation on taxes and fees in the Russian Federation. Legal acts of municipal entities on taxes and fees

The basic legal act about taxes and fees in the Russian Federation is the Tax Code of the Russian Federation. It provides not only taxes, but also fees.

The legislation on taxes and fees in the Russian Federation is not limited only to the Tax Code of the Russian Federation.

According to Article 1 of the Tax Code, the legislation on taxes and fees in the Russian Federation includes two levels. The first level is the legislation of the Russian Federation on taxes and fees. This legislation includes the Tax Code of the Russian Federation and the federal acts about taxes and fees passed according to it. The second level is the legislation of the constituent entities of the Russian Federation on taxes and fees. This legislation includes laws of the constituent entities of the Russian Federation on taxes which are passed according to the Tax Code of the Russian Federation.

Besides, according to the Constitution of the Russian Federation (Art. 130), there is local government in Russia. Accordingly, it passes its own legal acts (but not laws) about taxes and fees. These acts should be passed according to the Tax Code of the Russian Federation.

Thus, the Tax Code of the Russian Federation is a basic law to which the legislation of the constituent entities of the Russian Federation on taxes and fees and also legal acts of municipal entities about local taxes and fees should correspond.

The Tax Code of the Russian Federation consists of two parts. The first part of the Tax Code of the Russian Federation outlines general principles of taxation and fee collection in the Russian Federation. The second part of the Tax Code of the Russian Federations sets forth particular taxes.

The first part of the Tax Code of the Russian Federation consists of seven sections. The first section is "general provisions" and it consists of two chapters. Chapter 1 establishes the system of legislation on taxes and fees and standard legal acts of local government about taxes and fees (Art. 1 of the Tax Code of RF). Besides, it determines the system of relations regulated by the legislation on taxes and fees (Art. 2). These are four groups of relations: relations on imposition and collection of taxes and fees, relations on tax control, relations on the appeal of acts of tax authorities and actions of officials, and relations on liability for tax offences. This chapter also defines the notion of tax and fee.

The second chapter of the Russian Tax Code lays down the system of taxes and fees in the Russian Federation. It includes federal taxes and fees, regional taxes, and local taxes and fees. Federal taxes and fees include: value-added tax, excises, personal income tax, profit tax, severance tax, water tax, fees for using fauna and water biological resources, and a state duty. Regional taxes include: corporate property tax, gaming tax and transport tax. Local taxes and fees include: land tax, personal property tax and trading fee.

The second section of the Tax Code determines taxpayers, tax agents, and the procedure of tax representation.

The third section of the Tax Code of the Russian Federation is devoted to tax, customs and financial agencies as well as responsibility of these agencies. In particular, this section establishes the rights and obligations of tax authorities which are represented today by Federal Tax Service of the Russian Federation.

The central place in the first part of the Tax Code of the Russian Federation belongs to section four in which the rules of fulfilling a tax obligation are established. This section contains the following chapters: about paying taxes and fees (Ch. 8), about a change of the term of

payment of taxes and fees (Ch. 9), about methods of provision of fulfilling a tax obligation, about offset and return of unduly paid and unduly collected sums and so on.

Section 5 of the Tax Code is devoted to legal regulation of tax control. It contains legal requirements to a tax return and a procedure of the tax control.

Section 5-1 of the Tax Code of the Russian Federation contains the rules regulating tax relations in connection with transactions by mutually dependent persons.

Section 5-2 contains the rules regulating tax monitoring as the form of tax control. The essence of tax monitoring consists of the enforcement of tax control by a tax authority after the application of a taxpayer. The criteria of the taxpayers having the right to tax monitoring are specified in this section of the Tax Code of the Russian Federation.

Section 6 of the Tax Code of the Russian Federations specifies tax offences and liability for them. Chapter 16 of the Tax Code specifies tax offences committed by taxpayers, and chapter 18 of the Tax Code specifies tax offences committed by banks in connection with transfer of taxes to the budget.

The first part of the Tax Code of the Russian Federation is finalized by section 7 which provides the procedure of appealing the acts of tax authorities and actions of their officials.

The second part of the Tax Code of the Russian Federation provides taxes and fees constituting the system of taxes and fees in the Russian Federation according to Chapter 2 of the Tax Code of the Russian Federation. This system includes general system of taxes and fees and special types of tax treatments.

Section 8 of the Tax Code of the Russian Federation contains rules about federal taxes and fees.

Chapter 21 determines the value-added tax,

Chapter 22 – excises,

Chapter 23 – personal income tax,

Chapter 25 – profit tax of the organizations,

Chapter 25-1 – fees for using fauna and water biological resources,

Chapter 25-2 –water tax,

Chapter 25-3 – state duty,

Chapter 26 – severance tax.

Section 8-1 of the Tax Code describes special types of tax treatments. Among them are:

The system of taxation for agricultural commodity producers (the uniform agricultural tax – chapter 26-1);

The simplified system of taxation (chapter 26-2);

The system of taxation in the form of the uniform tax on imputed earnings for particular kinds of activity (chapter 26-3);

Taxation system connected with execution of production sharing agreements (chapter 26-4);

Patent system of taxation (chapter 26-5).

Section 9 of part 2 of the Tax Code of the Russian Federations describes regional taxes, such as transport tax (Ch.28), gaming tax (Ch.29), and corporate property tax (Ch. 30).

The Tax Code of the Russian Federation is finalized by section 10 in which local taxes and fees are described. Among them are:

- land tax (Ch.31);
- personal property tax (Ch. 32);
- trading fee (Ch. 33).

3. The evaluation of the Tax Code of RF

The codification of tax legislation which took place in Russia at the end of the 20th century played a very important role in the development of the Russian market economy. The adoption of the Tax Code provided orderliness of tax relations and stimulated systemic development of the legislation in this sphere.

Tax codification in Russia immediately received positive resonance in the scientific community. First of all, the codification gave an impulse to the development of Russian tax law as an independent scientific theory.

The adoption of the Tax Code of the Russian Federation in 1998 did not stop the process of its enhancement. It was caused by a number of massive faults and unresolved problems in taxation sphere.

First, the Tax Code of the Russian Federation suffered from vagueness of the legal notions and uncertainty of the terminology. It concerned, in particular, such concepts as property, organization, the goods price, etc. Problems in this segment have remained today and are especially evident in tax enforcement.

Secondly, the Tax Code of the Russian Federation had a large quantity of references that created complexities in its use both for the taxpayer and tax authorities.

Thirdly, the Tax Code of the Russian Federation had no accurate conceptual structure. It is enough to say that in the course of the preparation of part 1 its developers started with the concept of the absence of link between taxes and the level of financing of necessary expenses[6]. Subsequently this concept did not stand the test of practice.

As a consequence of faults and development of conceptual approaches to structuring the Tax Code of the Russian Federation it was constantly being modified and amended. It is enough to say that since the adoption of the Tax Code of the Russian Federation this act has been modified and amended 92 times.

It is natural that such frequent amendments to the Tax Code of the Russian Federation are its drawback repeatedly paid attention to by scientists. However, the problem of modifications of the Tax Code of the Russian Federation is not unequivocal. In other words, one cannot believe that tax legislation, like constitutional law, should not be changeable. Tax legislation will always be characterized by a high

6 See: The Tax Code of the Russian Federation. The article-by-article comment, part 1, edited by V. I. Sloma, Moscow 1998, p. 6-7.

degree of modifications because it has to react flexibly to changes in the economic and political situation in the country. In this sense, the Tax Code of the Russian Federation should actively reflect such changes in its second part, i.e. in the part where particular taxes are described. As for the first part of the Tax Code, it should be characterized by the relative stability. In other words, the postulates of tax legal regulations should not change. It concerns, in particular, the concept of tax and fee, principles of the tax legislation, etc.

In the Russian Federation tax legislation is subject to constitutional control of the Constitutional Court of the Russian Federation. Moreover, decisions of the Constitutional Court of the Russian Federation on taxation are a subject of active discussion of scientific community on the platform of the annual conference called «The Tax law in decisions of the Constitutional Court of the Russian Federation».

4. Development of tax codification in Russia

Now in Russia the changes brought in the Tax Code of the Russian Federation were actively discussed. Moreover, there are numerous offers on enhancement of the Tax Code of the Russian Federation. For example, today in the scientific literature there is a disagreement on the change of the concept of "fee" which was made in 2014. Likewise, the question on the possibility and necessity of codification of the legal doctrine of tax benefit which has entered into practice thanks to the Resolution of Plenum of the Supreme Arbitration Court of the Russian Federation of October 12, 2006 № 53 is widely discussed. However, the problem of basic reforming of the Tax Code of the Russian Federation is not urgent.

Abstract

This paper deals with tax codification in Russia. Its preconditions and general characteristics were also presented. The article depicts the structure of the Tax Code of the Russian Federation and other legislation on taxes and fees in the Russian Federation. Attention is also paid to the evaluation of this Tax Code and development of tax codification in Russia.

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CZECH TAX PROCEDURE CODE

Marie Karfíková[1]

1. Introduction[2]

The legal system in the Czech Republic after 1989 in general and especially in financial legislation has undergone major qualitative and quantitative changes. These shifts have been made in the tax system as well as in the tax procedure. Tax law is considered by the prominent scholars and theoreticians of financial and tax law in the Czech Republic as a subsystem of financial law,[3] although it is not possible to deny that in the context of changing social relationships, the meaning and concept of tax law has been also fundamentally changed. On the one hand, the importance of taxes as a revenue for public budgets has increased, on the other hand, taxes as such have become an inseparable part of life for all legal entities (natural or legal persons) that have become the real taxpayers[4].

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3 See more (in Czech language) in: M. Bakeš, M. Karfíková, P. Kotáb, H. Marková a kol., Finanční právo, 6. upravené vydání, Praha 2012, p. 12-14; M. Karfíková, Postavení daňového práva v systému práva, in: Teoretické otázky finančního práva. AUC IURIDICA 3-4/2003, Univerzita Karlova v Praze, ed. Karolinum, 2004, p. 97-116.

4 Decision of the Extended Chamber of the Czech Supreme Administrative Court dated 16 October 2008, ref. 7 Afs 54 / 2006-155, No. 1778/2009 Sb. NSS, www.nssoud.cz. The Supreme Administrative Court in this context maintains its conclusion on the unilateral nature of the tax law. The Court is fully aware that a tax is no punishment against the tax entity in the sense that it would be retaliation for its behaviour deemed undesirable by law. The unilateral nature of the tax law should be understood in the way that the tax entity is required to pay a tax without receiving an appropriate compensation tied directly or indirectly to the amount of tax paid. Those who pay taxes are simply not always identical with those who receive benefits from taxes paid; often it is just the opposite. Charging taxes requires – precisely because of their unilaterally perceived nature (just like any public law sanction) ensuring a sufficient degree of legal certainty to the charged entity, i.e. to a private person.

Financial law belongs to stable branches of public law and has a certain basis in the constitutional order of the Czech Republic[5] since some of the most important institutes of financial law (such as state budget, state's general budget final account, taxes, the status of the Czech National Bank, etc.) are regulated by the constitutional law. It is a traditional branch of law which is developing dynamically both in a real life as well as a scientific and pedagogical discipline which, in the context of the European Union and transnational monopolies, must also work with the elements of international and European Union law.

Financial law as a stabilized legal branch has common points with other branches of law, however, the science of financial law must deal with inner tendencies within the financial law itself. One of these phenomena is, for example, a new subsystem of capital market law which is very closely linked to private law, e.g. civil law, as well as insurance and banking law and, last but not least, the games of chance law. Tax law has been also gradually separating from other areas and becoming an independent branch of law. So is the case of Slovakia as prof. Babčák considers tax law to be a separate branch of law next to financial law. He argues for his approach as follows: *"The similar content of the subject of legal regulation is mainly related to the fact that financial law regulates the socio-economic relations concerning the generation, distribution and use of public money funds, whereby tax law regulates the most important forms of money through which the decisive part of these funds is being formed. That means that legal norms (of tax law) regulate taxes and charges as a crucial source of income for these money funds*[6]. According to this view, also in the Czech Republic a basic requirement for considering the tax law as an independent legal branch next to financial law would be fulfilled.

The substantive tax law establishes various taxes and is applied through the tax procedure law. As tax laws should be considered not only acts determining various taxes but also laws regulating fees, duties

5 Act No. 1/1993 Coll., Constitution of the Czech Republic and Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., on Promulgation of the Charter of Fundamental Rights and Basic Freedoms (in Czech: Listina základních práv a svobod) as part of the constitutional order of the Czech Republic.

6 See more (in Czech language) in: V. Babčák a kolektiv: Finančné právo na Slovensku a v Evropské unii, Bratislava 2012, p. 63 ff.

and other financial considerations of which administration requires the application of the Tax Procedure Code.

Tax procedure law provides for the general rights and obligations of tax administrators, taxpayers and other persons involved in tax administration in order to fulfil the basic objective of tax administration which is to ascertain and determine a tax and to ensure its payment. A basic source of tax procedure law is, since January 1, 2011, the new Tax Procedure Code[7]. Furthermore, budget rules and other regulations on budgetary allocation specifying into which public budget and in what amount the taxes shall be flowing to are also important.

Tax procedure law builds upon tax substantive law, whereby the two form a single entity – tax law, which has the characteristics of a separate subsystem. Although the Czech tax law itself, as noted above, cannot be considered today as a separate legal branch, the tax legislation constitutes rather a very specific fragment of the Czech legislation. It is one of the areas of regulation of a broadly conceived financial law, consisting further of legislation related to public budgets and state funds, credit, currency, money circulation, foreign exchange management and financial market. In this broad meaning, financial law is considered to be a separate branch within the Czech legal system.

Although tax substantive and procedural law constitute a single entity, it is always necessary to distinguish, on the one hand, between the substantive law part contained in the legal regulations determining various types of taxes (e.g. income tax, value added tax and consumer tax) and possibly also other financial considerations of a tax character (e.g. local charges, administrative fees, duties, etc.) and the procedural part contained in a single act that provides general terms common to all kinds of taxes. This a traditional structure typical for many other countries in which the whole tax procedure law (unlike substantive law) is encoded into a single comprehensive codification. This does not exclude the situation where certain areas in which it is justified by their specific features have their special procedural regulation. It is, therefore common, that matters of tax procedure law are in many cases contained

7 Act No. 280/2009 Coll., Tax Procedure Code.

in various substantive tax law regulations defining the subject of taxes, tax liabilities related thereto as well as necessary procedural derogations that result from the specifics of the subject of taxation, circle of taxpayers, or international aspects.

The tax law legislature reflects, among other things, the fact that tax law is a branch of law that is an inherent subject of economic development and political influences. As a result, these influences bring numerous changes in tax legislation. However, this should not be the case of tax procedure law, or more specifically of the act on tax law procedure which sets the rules of tax administration.

Administration of taxes and charges, i.e. the issues related to tax procedure (tax procedure legislation), has been subject to substantial changes in the sense that since 1993 the tax procedure has been governed by a single act[8] that replaced the former fragmented legislation (often not having the form of an act/statute but of a secondary legislation decree).

2. The nature of the tax procedure regulation

Tax procedure law[9] used to be regulated since 1993 by the act No. 337/1992 Coll., on Administration of Taxes and Charges. Prof. Knapp[10] did not consider this act to be a codified tax procedure law, i.e., in his opinion, it could not be viewed as a code despite a broad scope of the act.

Codification means a systematic and uniform statutory regulation of a certain, relatively independent part of legal relationships. Codification must be viewed as a regulation of a broad legal area in one single act ("code")[11]. The term "codification" comes from the Latin "codex", which is the later written form of the Latin word "caudex".

8 Act No. 337/1992 Coll., on Administration of Taxes and Charges.
9 See more (in Czech language) in: M. Karfíková, Z. Karfík, Kodifikace ve finančním právu v České republice, in. J. Suchoža, J. Husár, R. Hučková (eds.), Právo, Obchod, Ekonomika V, Košice, Univerzita P.J. Šafárika v Košiciach 2015, p. 188-199.
10 V. Knapp, Teorie práva, 1.vydání, Praha 1995, p. 112.
11 Ibidem.

In the current system, codification means a systematic regulation of a certain legal sector, i.e. a particular area of social relations regulated by a single statutory instrument[12]. Codification thus means a unified regulation. It is, therefore, a creation of the written form of law by issuing a code or codified rules for a predetermined range of social relations. In other words, it the legislative activity in which a continuous and systematic process results in regulation of a particular branch of law by a single act. Codification enables an easier orientation in the legal order, simplified interpretation and introduction of law into practice.

Otto's encyclopaedia[13] notes that codification requires the statute to be worded accurately, concisely and clearly to everyone by using general expressions so that under the general rule multiple cases could be included.

In the light of the above mentioned and even despite the opinion of Prof. Knapp, the designation "code" can be applied even to the act on tax procedure because there is no doubt that it represents a uniform and systematic regulation of a certain large part of social relations in a unified act and not just a partial regulation. This corresponds to the designation "Tax Procedure Code" which was used in the Czech jurisprudence even for the former legislation, i.e. Act no. 337/1992 Coll., on Administration of Taxes and Charges. From the theoretical point of view, certain doubts have been expressed concerning the character of this act because in comparison with other "codes" valid and effective under the Czech legislation, the Tax Procedure Code contained (contains) even many substantive legal provisions. With regard to the unifying role of the Tax Procedure Code in the tax subsystem, it may be considered logical that even the provisions having the substantive law character that are common to all tax laws and do not require a differentiated approach would be included into one single act (although it has rather a procedural nature). Thus a unifying role of the Tax Procedure Code shall be reinforced. The process of codification of tax procedure law has been, at least in my view, completed through the release of the new Tax Procedure Code[14].

12 V. Knapp, Teorie práva, 1. vydání, Praha 1995, p. 113.
13 Ottův slovník naučný: čtrnáctý díl, Paseka/Argo 1998, p. 498.
14 Act No. 280/2009 Coll., Tax Procedure Code.

3. Tax Procedure Code

3.1. A short explanation of the history of the introduction of the Tax Procedure Code to the tax system

Entitlement to collect taxes and tax liabilities is realized through a tax technique which is in neighbouring countries and since 1992 also in the Czech Republic (apart from the relatively extensive procedural rules contained in Act No. 76/1927 Coll., on Direct Taxes) subject to statutory regulation. In the period from 1953 to 1992, matters of procedural tax law in our country were contained in a decree.

With effect from June 8, 1953 Decree No. 162/1953 Official Journal, on Administration of Taxes and Joint Regulations for the Implementation of Tax Taws was issued. The construction of this procedural regulation was based on the principle that the provisions of the substantive tax law regulation contained the mandate for the Ministry of Finance to issue procedural rules. Specifically, the relevant provisions containing the "enabling clause" were: section 19 (1) (a) and (2) of Act No. 73/1952 Coll., on Sales Tax, section 9 (1) (a) and (2) of Act No. 74/1952 Coll., on Taxation of Individual Performance, section 11 (2) (c) and (d) of Act No. 75/1952 Coll., on the Income Tax of Cooperatives and Other Organizations, section 22 (3) No. 10 and 11 of Act No. 76/1952 Coll., on Wage Tax, section 24 (2) No. 2 and 3 of Act No. 77/1952 Coll., on Agricultural Tax, section 23 (3) No. 2 and 3 of Act No. 78/1952 Coll., on Population's Income Tax, section 7 (2) (c) and (d) of Act No. 79/1952 Coll., on Business Tax, section 20 (2) and section 21 (2) of Act No. 80/1952 Coll., on House Tax and section 17 (2) and (3) of Act No. 81/1952 Coll., on Artistic Performance Tax.

This Decree was replaced in 1962 by the Decree No. 16/1962 Coll., on Proceedings in Matters of Taxes and Charges, which became effective on February 28, 1962. The former regulation contained 99 sections, the decree of 1962 had only 48 provisions. Our attention should be drawn to section 2 of the mentioned decree, which stated that *Unless provided otherwise by this Decree or a specific regulation, the national committees and other government bodies shall proceed in matters of taxes and charges (hereinafter referred to as "taxes") pursuant to the governmental Decree no. 91/1960 Coll., on Administrative*

Procedure. This provision implicates the relation between the financial proceedings regulation and the administrative code which had a form of a governmental decree. The position of the Decree No. 16/1962 Coll., on Proceedings in Matters of Taxes and Charges even "worsened" after the administrative procedure was encoded on a statutory level by Act No. 71/1967 Coll., on Administrative Procedure (Administrative Procedure Code)[15].

The Act on Administration of Taxes and Charges

After the change of social relations in 1989 and due to subsequent changes in the economic sector, a new tax reform was prepared in the form of a statute, including the procedural aspects. The new act[16] regulated the overall issues of tax administration and contained 107 sections. At the same time, this concept symbolized a return to the traditional regulation of tax procedure law on a statutory level. It is not only a Czech tradition but, as mentioned, a common approach in other developed countries of continental Europe, e.g. Germany, Austria and France, where tax administration is built upon similar principles of procedural law. This is a traditional concept implying that the regulation of tax procedure law (unlike substantive law) is encoded in comprehensive codification which does not preclude certain areas to be regulated by separate acts if it is justified by their specific characteristics. It is therefore possible that certain matters of tax procedure law are contained in numerous substantive tax laws which regulate various taxes in the tax system.

The existence of the Act on Administration of Taxes and Charges implied the application of the principle that the Act shall be applied if an international treaty or another act (substantive tax law) did not provide for anything else (according to sections 96 and 97). Section 99 of this Act expressly stated that the Administrative Procedure Code (Act No. 71/1967) shall not be applied in tax procedure. Thus, the tax procedure legislation was in relation to the Administrative Procedure Code defined

15 See more (in Czech language) in: M. Karfíková, Řízení ve věcech daní, odvodů a poplatků (kapitola XIV.), in: M. Bakeš, a kol.: Československé finanční právo, Praha 1979, p. 198-205.

16 Act No. 337/1992 Coll., on Administration of Taxes and Charges.

as an entirely independent regulation from the very beginning. At the time when this act became effective (January 1, 1993), the then effective Act No. 71/1967 Coll., on Administrative Procedure, contained only 85 sections. Despite this situation, Prof. Knapp, as mentioned above, denied to acknowledge the independence and codification traits to the new legislation.

However, the Act on Administration of Taxes and Charges was a truly coherent regulation of tax administration through a special legislation, which began to be applied in the administration of the new system of taxes. As of January 1, 1993 a new tax system was introduced: value added tax and consumer tax, personal income tax and corporate income tax, road tax, real estate tax, gift and inheritance tax. The new tax system and the new tax administration rules became effective on the day of the establishment of the Czech Republic, i.e. from January 1, 1993. The Act on Administration of Taxes and Charges was based on the principle of an independent status in relation to the then effective Administrative Procedure Code (Act No. 71/1967) which it preserved even until the adoption of the new Administrative Procedure Code (Act No. 500/2004)[17]. The Act on Administration of Taxes and Charges was in fact effective in the period from January 1, 1993 until December 31, 2010, i.e. for 18 years, and was amended a total of 64 times during the period in which it was in effect.

Under the former Act on Administration of Taxes and Charges, case law became increasingly important in the domain of tax administration. In the 90s of the 20th century and the first years of the 21st century, tax administration was affected in particular by rulings of the Constitutional Court on constitutional complaints and by judgments issued by various regional courts in administrative justice. Since 2003, when the Supreme Administrative Court (hereinafter "SAC") started to operate and began to decide on appeals in cassation pursuant to the Administrative Procedure Code, tax administrators had to focus on the case law of this institution in tax matters. In the second half of the first decade of the 21st century, also the decisions of the SAC's Extended Chamber on the interpretation

17 See more (in Czech language) in: Daňové řízení (kapitola XIV.), in: M. Bakeš a kolektiv: Finanční právo, 1. vydání, Praha 1995, p. 214-231.

of various provisions of the Act on Administration of Taxes and Charges became of growing significance.

On the basis of the case law in the area of tax administration and tax procedure, administrative practice has begun to apply new principles and also changed approach to the interpretation of many provisions of the Act on Administration of Taxes and Charges. The case law affected tax administration in such a manner that the concerned provisions were reinterpreted and their application changed although the wording of these provisions was the same. It is also interesting to point out that under the influence of the court rulings, tax administrators had changed their established procedures. In some cases, as a result of interpretative shifts, even amendments to the Act on Administration of Taxes and Charges were adopted[18].

Tax Procedure Code

Developments in codification of financial law, i.e. tax procedure law[19], culminated through the adoption of a new act[20] in 2009. The new legislation contained 266 sections and came into effect on January 1, 2011, thus the requirement of *vacatio legis* was fulfilled. Regarding the relationship to the Administrative Procedure Code, the former legislation's principle based on the separation of the two codes has been followed. Section 262, therefore, states that *The Administrative Procedure Code shall not apply in tax administration*. As regards the application of the provisions of the Tax Procedure Code, provision 4 states that "*the*

18 In December 2008, the Constitutional Court in its judgment No. I. US 1611/07 expressed its legal opinion on the terms for tax assessment. According to this judgement, tax duty shall expire after three years from the end of the tax period in which the tax became chargeable (i.e. 3+0) and not from the end of the tax period in which there was an obligation to submit a tax return (i.e. 3+1). The Constitutional Court insisted that the former interpretation of the wording of section 47 (1) of the Act on Administration of Taxes and Charges was making out of the three-year period a four-year period and was therefore unconstitutional. Given that the cited provision allowed two possible interpretations, the Constitutional Court gave priority to the one that is more favourable to the addressees of human rights and freedoms. On the basis of the Constitutional Court judgment a new amendment was passed in the Parliament (Act No. 304/2009 Coll. with effect from 1.1.2010) that reflected this interpretation of section 47 (1) of the Act on Administration of Taxes and Charges.

19 M. Bakeš, M. Karfíková, P. Kotáb, H. Marková a kol, Finanční právo, 6. Upravené vydání, Praha 2012, p. 255.

20 Act No. 280/2009 Coll., Tax Procedure Code.

provisions of the Tax Procedure Code shall apply unless another law on tax administration provides otherwise". This implies that even after the effective date of this Act procedural provisions contained in substantive tax laws before the procedural provisions of the Tax Procedure Code shall prevail.

The Czech Ministry of Finance was responsible for preparing the draft of the Tax Procedure Code, which was further discussed by the Government. Subsequently it was approved by the Parliament of the Czech Republic (consisting of two chambers: the House of Deputies and the Senate) and finally signed by President of the Czech Republic.

In connection with the preparation of the recodification of procedural tax law there emerged discussions among specialists and academics concerning the question of the relationship between the Tax Procedure Code and the Administrative Procedure Code. The subject of these theoretical debates was whether it would be preferable to structure the Tax Procedure Code (consequently, all tax laws) as subordinate to the Administrative Procedure Code. Summary of assumptions and opinions which underpin the adopted concept can be divided in several viewpoints:

- **The specific nature of tax administration and related procedures**

A fundamental aspect that must be kept in mind is the fact that instruments used within tax administration show such significant specifics that it is highly difficult to find a general foundation in the provisions of the effective Administrative Procedure Code. We can take as an example the concept of tax procedure itself, which by its nature requires an entirely different approach. Typical is continuation of each tax procedure depending on different tax periods and various types of taxes which must be considered, e.g. in record-keeping mechanism. The fact that the procedural rights and obligations of the parties arise out of the patrimonial and superior model even outside the regime of initiated proceedings (especially within search activities) leads to a different conception of parties to the proceedings which is typically based on a bilateral character of tax obligations. That means that we can observe above the procedural aspects even a substantive-law-based relationship between the taxpayer and the state power (represented by

a tax administrator), i.e. it acts not only as a public authority but also as the creditor of the tax liability. Other persons/entities (third parties) which participate in tax administration then have by the definition a different status than the taxpayers and cannot be considered as parties to the proceedings. The existence of the burden of proof and the burden of persuasion in order to succeed in a lawsuit that is carried by a taxpayer is also crucial. It is also necessary to underline that tax procedure is composed of several proceedings and ends with expiry (the deadline for issuing a decision/time-limit laid down by law) even before delivering a decision (i.e. gaining full legal force). The definition of administrative proceedings pursuant to the Administrative Procedure Code actually corresponds only to a certain phase of tax procedure which often continues by a (from the point of view of the taxpayer) voluntary (more frequently) or involuntary next stage of tax proceedings, which ends by a final decision.

- **The history and tradition of the tax procedure legislation**

The aforementioned principles and specifics of tax procedure, i.e. administration of taxes in general, were not created artificially just in order to defend the autonomy of this legal branch, but they result from the experience of the Czech tax authorities gained in the last century and from similar principles applied in the EU and OECD countries.

The regulation of tax procedure based on a subsidiary application of the Administrative Procedure Code has been applied since 1962 as the differences from the then effective Administrative Procedure Code (Act No. 71/1967 Coll.) were contained in the Decree No. 16/1962 Coll., on Proceedings in Matters of Taxes and Charges. Here it is necessary to point out that this legislation corresponded to the period in which it was applied. There were several strictly monitored organizations in the district and property relationships were very transparent as most income taxes were administered by taxable persons. Also international influences on the collection of taxes were minimal and no developments in the domain of tax law theory could be observed.

After 1989 it was clear that such regulation had no place in the new economic order based on individual property and ownership protection. Therefore, the Act on Administration of Taxes and Charges, which sought

to establish basic rules so that it was possible to collect taxes in the new economic and political conditions, was passed. The fundamental structure of this act was based on the independent status from the then effective Administrative Procedure Code. The tax procedure was able to keep this independent status even after the adoption of the new Administrative Procedure Code (Act No. 500/2004 Coll.) while it contained only one reference concerning the out-of-court complaints procedure pursuant to section 175 of the Administrative Procedure Code.

- **Status of tax law**

Opinions calling for a subsidiary application of the Administrative Procedure Code on tax laws mostly refer to the general view of the traditional legal theory, according to which the principle of unity and internal consistency of the legal order shall be observed and laws shall be prepared from the perspective of the whole system. The construction according to which a similar matter is duplicately fragmented into several acts regardless of the fact that some issues are already addressed in the general law is not appropriate. As far as my opinion is concerned, I can completely agree with this stance. It is absolutely in order when a general law (*lex generalis*) provides for a common regulation and specific needs in the domain of tax administration are addressed by a law designed only for this part of the legal system (*lex specialis*). This is also the case of the current tax law as the Tax Procedure Code is a *lex generalis* to procedural derogations contained in other tax laws. However, it is necessary to stress that this principle might be generally applied only within a given legal branch, not the whole field of public law.

Voices calling for a subsidiary application of the Administrative Procedure Code might be viewed as an attempt at exclusive subordination of tax law under administrative law. It must be noted that apart from these efforts administrative law undoubtedly provides a seemingly general scope for public administration, and from the legal point of view, is a set of legal norms applied to the actions and organizational structure of public administration, whereby the general part of administrative law includes the fundamental basis as, for instance, the principles, definitions and institutions which, in principle, can be applied to public administration as a whole. However, the Administrative Procedure Code

constitutes a procedural legislation basis for an entirely different set of substantive rules when compared with the financial, i.e. tax, law. Unlike administrative law, tax law regulates the relationships between tax administrators and subjects of taxation. The general administrative law constitutes a fundament for the existence of a legal relationship between the administrative authorities and addressees of public administration. The uniqueness of tax procedure law with regard to the above mentioned seems rather obvious and it is not quite clear whether incorporation of this area into administrative law (and therefore, at least latently into administrative law science) would not bring in the future unwanted changes to interpretations of some institutes and would not be in conflict with the tensions towards a greater autonomy of this discipline, i.e. subsequently, interpretation and application of law.

- **International comparisons**

The aforementioned principles were observed when elaborating the new codification of tax procedure law which preserved the traditional structure of the Act on Administration of Taxes and Charges built upon the principle of autonomy of tax law. This approach is also supported by comparisons with foreign legislations. It can be stated that in foreign countries with a legal system comparable to the Czech Republic, the autonomy of tax law (including the procedural matters) is significantly preserved. In some cases, it is a set of specific regulations, possibly being formally codified in the Code of Tax Proceedings (e.g. the French Code des procédures fiscales). Some states have followed the path of material codification by focusing systemized rules of tax administration in a single special regulation (e.g. the German Abgabenordnung). It is also possible to find countries which apply a set of specific provisions in tax administration without any formal codification.

- **User perspective**

While addressing the question of a subsidiary application of the Administrative Procedure Code on tax laws, the user perspective must be also taken into account. For the ordinary taxpayer, tax adviser or accountant as well as employees of the tax administrator, subordination of tax procedure law to the current structure of the effective Administrative Procedure Code (with all the disadvantages and errors

that this act undoubtedly has) would mean greater difficulties when applying the legal provisions. An individual would be forced to form an idea and decide to which extent the Administrative Procedure Code is a general rule, what is excluded by special modifications of the Tax Procedure Code and what is further modified by special provisions in specific substantive tax laws. It would, therefore,be necessary to operate simultaneously with three laws. It is probably not necessary to mention that complications would arise for both the tax authorities and, above all, on the part of taxable persons that are subjects liable to taxes ranging from birth to ensuring duties for the deceased in very complex and politicized conditions of different substantive tax laws.

- **Relations to other legislation**

Reluctance to subordinate tax laws under the Administrative Procedure Code and reaffirmation of the principle of autonomy of tax law, which must be viewed rather from the perspective of legal theory, does not mean that the Tax Procedure Code aims at defining itself as totally separate from other legal fields as it is the case of some other codifications, especially those having their origins in times of totalitarian legislation.

On the contrary, the legislation in force counts on the existence of other legal branches, especially civil law, i.e. private law and its institutes. The area of tax execution is partially based on the subsidiary application of the Civil Procedure Code[21] to ensure equal standards and equal procedural background for the individuals. It is the same in relation to the Administrative Procedure Code as some of its institutes are automatically applicable to tax administration. Another reason for rejecting the subsidiary application of the Administrative Procedure Code is the fact that the current concept of the Administrative Procedure Code was created regardless of any interconnections with tax procedure. Should the final goal be consistent harmonization of the two texts, it would mean the necessity to amend the Administrative Procedure Code itself while maintaining the functionality of tax administration in

21 Act No. 99/1963 Coll., Civil Procedure Code, as amended.

addition to a new concept of tax procedure in the Tax Procedure Code and various tax laws.

It can be summarized that due to a significant increase in the number of taxable persons and their diversity as well as considerable deepening of international cooperation, it does not seem an appropriate solution that the scope of regulation and its importance should be (compared to the currently effective Tax Procedure Code) reduced and the regulation would become even more complicated by cancelling its independent status. We must admit that the function of the state is directly dependent on the collection of taxes while legal uncertainty and volatility already now complicate the complex exercise of state power and interpretation of laws in this field. Every uncertain step or an error of the tax administrator leads to the reduction of public revenues and to compensation for damages which is not so frequent in the general administrative procedure. Tax system of which the Tax Procedure Code is an integral part must rely on a concept allowing transparent, predictable and adequate exercise of public power.

The Tax Procedure Code is a relatively complex act, which thoroughly governs the matters of its regulation. In practice it is probably applied in most cases without the help and support of the Administrative Procedure Code. However, it is not (as for its completeness) a perfect set of provisions. Therefore, should a situation arise that is not covered (and no solution is to be found in a special tax law either) and cannot be bridged by using its other provisions by analogy legis (especially if it would cause deterioration of the situation of the taxable entity), the Administrative Procedure Code would have to be applied. Otherwise, the constitutional principle concerning the requirements of a legal procedure before public authorities would not be respected.

4. The structure of the Tax Procedure Code

The Tax Procedure Code embodies a new comprehensive regulation of the tax procedure and compared to former legislation contains a higher amount of provisions (266 in total) with short paragraphs and sentences and is essentially organized in a systematically new way. The

explanatory memorandum to this draft law stated that the aim of the new legislation was to establish a transparent and clear regulation of tax administration with emphasis on reducing the administrative burden and encouraging the use of electronic means for tax administration and communication with taxpayers. Many institutes are adopted from the Act on Administration of Taxes and Charges and the legal text also comprises some ideas from the current case law. The Tax Procedure Code has also introduced a unified terminology for other tax laws.

The Tax Procedure Code provides for procedural rules in tax administration involving regulation of the actions of tax administrators and the rights and obligations of taxpayers and third parties arising in connection with the administration of taxes. It also contains provisions concerning the rights and obligations common for substantive tax laws where a minimum number of reasonable derogations from the common provisions due to differences in various types of taxes is assumed. The consequences of the breach of payment are addressed in particular. Tax administration is a term that is used in the broadest sense for administration of financial considerations. The Tax Procedure Code specifies tax administration in all of its provisions, it is therefore a procedure (activity) regulated by tax laws which involves the interaction between the tax authorities and other persons and entities involved in tax administration. This process should be directed to meet the basic objective of tax administration, i.e. correct identification and assessment of a tax liability (in the original proceedings) and also ensuring its payment (payment stage of the proceedings). In this regard, the objective of tax administration continues to develop the very meaning of taxes which is to ensure financing of public needs, although this is not explicitly stated in the Act.

It is therefore essential to ensure the participation of individuals (tax subjects) in the costs necessary for the effective functioning of the state apparatus and the provision of public services. Therefore, the main purpose is to carry out the determined payment into the public budget in a manner specified by law. However, achieving this goal shall always be realized in accordance with law and must be based on the proper application of the principles of tax administration and procedure law. Only when respecting these conditions, the public interest can be

achieved. The purpose of tax administration is conceived more general and more balanced, as the initial criterion is not the elimination of possible tax evasion, but as the correct identification and assessment of a tax liability and ensuring its payment. The main activity of tax administrators lies in initiation and conduct of proceedings (especially tax procedure) through which a tax liability is transformed into income of a public budget and further in the application of procedural steps provided by the Tax Procedure Code (as for example local inquiry, tax control, etc.). However, other persons and entities are also participating in tax administration, especially tax subjects that significantly affect the final result and success of the realization of state's entitlement to collect taxes. It is necessary to emphasize that a part of tax administration is also formed by international cooperation among tax administrators on the basis of international coordination agreements and special laws[22].

Tax administration is based on the principle that the tax subjects are carrying the burden of persuasion regarding their tax liabilities. The taxpayers shall cooperate in determining their tax liability, in particular by stating properly the amount of tax that must be paid. The tax authority then revises this statement resulting in the acceptance of the alleged amount of tax determination and issuing a declaratory tax assessment or in a decision consisting in a change of the amount stated so that it corresponds to the tax liability specified by law.

Tax returns, reports and accounts statements are collectively referred to as "regular tax statements", and for additional tax returns, additional reports and additional accounts statements the legal abbreviation "additional tax statement" is used. The purpose of these legislative shortcuts is to increase the clarity of the legislative text and its shortening.

22 E.g. reporting in accordance with the currently applicable legislation on automatic exchange of information with the United States under the Act No. 330/2014 Coll., on Exchange of Information on Financial Accounts with the United States for Purposes of Tax Administration. This Act implements the Agreement between the Czech Republic and the United States on improving tax compliance at international scale and with regard to the laws of the United States on information and their reporting is commonly referred to as Foreign Account Tax Compliance Act ("FATCA Agreement"), signed on August 4, 2014 in Prague. The Exchange of Information is at the first stage based on provision 13 of Act No. 164/2013 Coll., on International Cooperation in Tax Administration (hereinafter "Act on International Cooperation in Tax Administration"), which implements Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC ("DAC Directive").

The Tax Procedure Code is divided into titles, chapters and divisions, and comprises six parts:

Part One – Introductory Provisions (sections 1 to 9);

Part Two – General Part on Tax Administration (sections 10 to 124a);

Part Three – Special Part on Tax Administration (sections 125 to 245);

Part Four – Consequences of Breach in Tax Administration (sections 246 to 254a);

Part Five – Common, Enabling, Transitional and Final Provisions (sections 255 to 265);

Part Six – Effect (section 266).

The Tax Procedure Code is structured in a way that each phase of the tax procedure (from registration through assessment of the tax to its payment, collection and its enforcement) is contained in Part Three. It is necessary to add explanatory definitions and general provisions in the Part Two and Three of the Tax Procedure Code to these multiple stages of tax procedure. In case of a breach of obligations arising from tax administration it is then necessary to focus on Part Four.

Part One titled Introductory Provisions is divided in two titles and contains a purpose of the Act and a list of elementary principles applied in tax administration.

Part Two titled General Part on Tax Administration contains general provisions applicable to various proceedings within tax administration, in particular tax procedure. General Part on Tax Administration is divided into seven titles:

Title I – Tax Administrator and Persons Involved in the Administration of Taxes (sections 10 to 31), (Chapter 1 Tax Administrator, Chapter 2 Persons Involved in the Administration of Taxes and Representation);

Title II – Time Limits (sections 32 to 38);

Title III – Delivery of Correspondence (sections 39 to 51), (Chapter 1 General Provisions on Delivery of Correspondence, Chapter 2

Electronic Delivery of Correspondence, Chapter 3 Delivery by Letter, Chapter 4 Special Delivery Methods and Chapter 5 Proof of Delivery);

Title IV – Protecting and Providing Information (sections 52 to 59);

Title V – Documentation (sections 60 to 69b);

Title VI – Proceedings and Other Actions (sections 70 to 107), (Chapter 1 General Provisions on Proceedings and Other Actions, Chapter 2 Actions in Tax Administration and Chapter 3 Conduct of Proceedings);

Title VII – Remedial and Supervisory Measures (sections 108 to 124a), (Chapter 1 General Provisions on Remedial and Supervisory Measures, Chapter 2 Appellate Procedure, Chapter 3 Reopening of the Case, Chapter 4 Review Proceeding and Chapter 5 Relation to Administrative Justice).

Part Three titled Special Part on Tax Administration contains mainly special provisions on various types of proceedings, payment of taxes, tax administration and legal succession and relation to insolvency proceedings. This part is divided into seven titles:

Title I – Registration Procedure (sections 125 to 131);

Title II – Procedure on Binding Assessment (sections 132 to 133);

Title III – Tax Procedure (section 134);

Title IV – Tax Discovery Procedure (sections 135 to 148), (Chapter 1 Assessment Procedure, Chapter 2 Additional Assessment Procedure and Chapter 3 Common Provisions on Tax Discovery Procedure);

Title V – Payment of Taxes (sections 149 to 232), (Chapter 1 General Provisions on Payment of Taxes, Chapter 2 Divided Administration, Chapter 3 Collection of Taxes, Chapter 4 Securing Payment of Taxes, Chapter 5 Tax Enforcement);

Title VI – Administration of Withholding Tax (sections 233 to 237);

Title VII – Legal Succession and Relation to Insolvency (sections 238 to 245), (Chapter 1 Legal Succession and Chapter 2 Relation to Insolvency).

In Title VII, titled Legal Succession and Relation to Insolvency, significant changes have occurred with effect from January 1, 2014. Based on the amendment to the Tax Procedure Code, it has been split into two Chapters: Chapter 1 Legal Succession and Chapter 2 Relation to Insolvency. For the sake of clarity, new sections with headings have been inserted behind sections 239 and 240. The new legislation on legal succession of natural and legal persons shall apply to cases of death and the dissolution of a legal person from January 1, 2014.

Part Four (sections 246 to 254a) titled Consequences of Breach in Tax Administration contains a comprehensive set of sanctions, both for a breach of duties of a financial character and for a breach of duties of a non-financial character. With effect from January 1, 2015 there was a change in the structure of this part. Apart from the provisions on disciplinary fine a new provision on a breach of duties of a non-financial character has been inserted, and apart from the provisions on interest from an unauthorized legal act, a new provision on interest on tax deductions has been inserted.

Part Five (sections 255 to 265) titled Common, Enabling, Transitional and Final Provisions contains common provisions (protection of confidentiality imposed on advisors, measures for international taxation, transfer of tax revenues, procedure on waiver of tax or of ancillary tax rights, waiver of money penalty, waiver of default interest and of interest on deferred tax, complaint, and relation to the Administrative Procedure Code), enabling provisions (the Ministry of Finance was empowered to issue a decree on costs of proceedings, duty stamps and auction), transitional provisions for the period after January 1, 2011 and final provisions. Part Five was affected by significant amendments changing its structure with effect from January 1, 2014. New provisions on individual waiver of money penalty, waiver of default interest and of interest on deferred tax have been inserted.

Part Six (section 266) titled Effect contains a provision on the entry into force of the Tax Procedure Code which shall be January 1, 2011.

The Tax Procedure Code was promulgated in the Collection of Laws pursuant to Act No. 280/2009 Coll. and the sheet was distributed on September 3, 2009. On the same day the Tax Procedure Code became valid (part of the Czech legal order) pursuant to provision 3 (1) of Act No. 309/1999 Coll., on the Collection of Laws and Collection of International Treaties[23].

The Administrative Procedure Code provides for possible derogations resulting in non-application hereof. It also puts special emphasis on compliance with the elementary principles of actions of administrative authorities as it states in section 177 (1) that *elementary principles of administration specified in sections 2 – 8 shall apply even in cases where a special law provides that the Administrative Procedure Code shall not apply, but such law contains no provision corresponding to these principles*. The Tax Procedure Code in its attempt to avoid the application of the Administrative Procedure Code fulfilled the negative condition by specifying its own principles applied in tax administration (see provisions 5 to 9)[24].

5. The assessment of the Tax Procedure Code

The process of the creation of tax laws reflects, among other things, also the fact that tax law is a branch of law which by its nature is subject to economic development and considerable political influences. The

23 See more (in Czech language) in: J. Baxa, O. Dráb, L. Kaniová, P. Lavický, A. Schillerová, K. Šimek, M. Žišková, Daňový řád. Komentář. I. díl. (§ 1 až § 124), II. díl. (§ 125 až § 266), Přílohy, Praha 2011, 3 sv. – 800 p., 808 p., 272.

24 Compare with: M. Kindl, O použití správního řádu při správě daní. Daně a finance, 2010, č. 1-2, s. 20-22; M. Kindl, O vztahu správního a daňového řádu. Daně a finance, 2009, č. 6, p. 6-9; P. Svoboda, Ústavní základy správního řízení v České republice. Praha 2007; M. Kindl, Správní řád v daňovém řízení? Právní fórum, 2006, č. 3, p. 101-105; J. Kobík, Základní zásady činnosti správních orgánů a správa daní aneb máme opravdu jasno? Daňový expert, 2006, č. 2, p. 33-36; A. Kohoutková, K. Šimek, Co znamená pro správu daní text § 177 odst. 1 nového správního řádu, ale sám úpravu odpovídající těmto zásadám neobsahuje."? Daňový expert, 2006, č. 2, p. 30-33; P. Mates, Působnost správního řádu. Právní rádce, 2006, č. 11, pp. 34-37; P. Taranda, Ještě jednou k možnostem aplikace správního řádu v daňovém řízení. Poradce, 2006, č. 12, p. 225-229; T. Čebišová, Nový správní řád. Praha: ASPI, 2005. [Kap.] K východiskům a principům nového správního řádu, p. 43-67; R. Pomahač, Nový správní řád. Praha 2005. [Kap.] Nový správní řád mezi řádky, p. 73-82. J. Vedral, Nový správní řád. Praha 2005. [Kap.] K rozsahu působnosti nového správního řádu, pp. 18-42; Z. Vejvalková, L. Hlouch, Princip jednoty a bezrozpornosti aplikace právního řádu v rozhodování správních úřadů. Právní rozhledy, 2005, č. 23, p. 873-875; V. Vopálka, Nový správní řád – rozsah působnosti a vztah k jiným předpisům. Právní rozhledy, 2004, p. 21, p. 787.

consequence of these influences are very numerous changes in tax laws. However, this should not be the case of the tax procedure law, more specifically of the procedural legislation that sets rules for administration of taxes.

The Tax Procedure Code as a codified tax procedure legislation provides for transparent procedural rules in the framework of tax administration with emphasis on reducing the administrative burden and enhancing the use of electronic means in tax administration and communication with taxpayers. The adoption of the Tax Procedure Code has ensured higher legal certainty for taxpayers and tax administrators as it responds to the experience gained from the interpretation problems related to the former Act on Administration of Taxes and Charges.

This legislation constitutes a comprehensible text based on unified terminology and systemic links, which can be considered as a primary requirement for any legislative text in general. The desired characteristics of a new legislation can be summarized as long-term stability and resistance to changes in the related legislation, its universality, i.e. it is applicable to all cases of the same nature with no formal barriers to overcome unwanted fragmented legislation. This requires the wording to be general enough (instead of being casuistic), to be ready to resolve specific situations and to accommodate application of specific terms within its structure. Only legislation that is based on a combination of general principles (whether expressed or not) and specific rules has the potential to deal with situations that were not anticipated in advance. These general requirements are met by the Tax Procedure Code in the framework of the tax procedure because it provides a stable legal environment even in a situation where there are significant changes in substantive tax laws and in the organizational structure. This Code has proven its qualities even in an ever-closer involvement of the economy and public administration into international structures which occurs in the area of taxation. Its stability is further demonstrated by the fact that the Act has been amended only six times since its entry into force.

6. Amendment proposals to the Tax Procedure Code

The tax legal theory and practice shall submit comments on the improvement of tax administration especially with regard to the further use of information systems and technology, e-government, and the role of tax professionals. The desirable trend is, therefore, to reduce administrative costs associated with the collection of taxes and to increase the comfort for those participating in it.

Substantive tax laws are quite often amended. Especially Act No. 586/1992 Coll., on Income Taxes, is changed every year since its entry into force in 1993 and in some years it was amended even 5 times (e.g. in 2001). By contrast, the Tax Procedure Code, as mentioned above, has been amended only 6 times. I suppose that this Act continues to keep its stability and most importantly I hope that no bill proposed by the Ministry of Finance would be adjusted in the process of discussion in the Parliament of the Czech Republic in a manner affecting the quality of the effective Tax Procedure Code. In 2016 the Czech Republic will gradually launch a new system of electronic recording of sales. It is a modern system for fast communication between entrepreneurs and the Financial Administration of the Czech Republic, which increases the effectiveness of tax administration and allows the tax administrators to target controls exactly where they are needed. The system of the electronic records of cash sales of goods and services shall help in restoring the competitive environment among entrepreneurs and ensuring higher tax revenues for the state without the need to raise taxes for those who are properly paying them. It can be assumed that the system of electronic records of sales will require an amendment to the Tax Procedure Code.

7. Conclusion

From the above mentioned, it follows that regarding the codification of financial, i.e. tax procedure, law, the former decree of 1962 was successfully replaced by a separate and complex law in 1992. Should not be the Act on Taxes and Charges considered by Prof. Knapp to be a codified law, then the Tax Procedure Code of 2009 certainly meets the requirements and it is possible to state that in the Czech Republic the

tax procedure has been successfully codified. The adoption of Act No. 280/2009 Coll., Tax Procedure Code, is a great achievement and a result of many years of work undertaken to preserve the autonomy of the tax procedure[25].

Given the fact that tax procedure has been successfully codified, the question is whether the tax legal theory should initiate efforts directed towards possible codification of substantive tax laws, especially from the user perspective.

Abstract

This paper deals with tax law while providing a special focus on tax procedure, i.e. on the codification of financial law in the Czech Republic in this area. Attention is also paid to the structure of the Tax Procedure Code, its assessment and proposals *de lege ferenda*.

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FEATURES OF LEGAL REGULATION OF TAX RELATIONS IN UKRAINE

Andrii Mostovyi[1]

1. The history of the formation of tax legislation in Ukraine

The development of tax legislation of Ukraine can be calculated from the time of the declaration of independence. Section VI "The economic independence" of the Declaration of State Sovereignty of Ukraine (hereinafter – the Declaration) envisioned the creation of the independent tax system. However, the Declaration contained the basics of collecting mandatory payments. According to the Declaration: enterprises, institutions, organizations and production units that are located in the Ukrainian SSR pay a fee for the use of land and other natural and human resources, allocations of foreign exchange earnings and pay taxes to local budgets[2]. The Declaration of Independence of Ukraine of 24 August 1991 (hereinafter – the Act) is a basis for the adoption of its own national legislation, including taxation.

For the purpose of the Declaration and the Act, in 1991 the Act of Ukrainian Taxation System[3]was passed. This Act is the first tax law of independent Ukraine. It should be emphasized that this Act was in force until the adoption of the Tax Code in 2010.

The Act of the Taxation System was a progressive tax law at that time. This normative Act contained the basis of the tax system of Ukraine. Twenty articles presented the basics of collecting mandatory payments

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2 See: Declaration of State Sovereignty of Ukraine, Journal of Laws of 1990. No. 31, item 429137.

3 The Official Bulletin of the Verkhovna Rada of Ukraine of 1991, No. 39, item 510.

in Ukraine and the characteristic of elements of the tax, and set out the rights and obligations of taxpayers and their responsibility.

An important element of this Act was the consolidation of principles of design and purpose of the tax system of Ukraine. In the third article of the Act, there was a structure of the system of taxation which was based on twelve principles, namely, promotion of scientific and technological progress; stimulation of entrepreneurial productive activity and investment; equivalence and proportionality; equality, preventing any form of tax discrimination; social justice; stability; economic reasonableness; uniformity of payment; competence; a common approach; and accessibility. This normally set standards not only constructed but also defined the requirements of a formal and substantive nature of the tax system of Ukraine.

Apart from the Act of the Taxation System, there were also acts of Verhovna Rada of Ukraine and decrees of the Cabinet of Ministers of Ukraine in respect to certain types of taxes. Among these, we should mention the Act on corporate income tax[4], the Act on income tax of physical persons[5], the Act on value added tax[6], the Decree on excise tax[7] and many others. The Act on Taxation System contained provisions regarding the basics of levying mandatory fees in Ukraine, the provisions regarding the collection of certain tax contained in separate normative acts with the force of law.

Implementation of tax control is based on the Act of the liabilities of taxpayers to budgets and state trust funds[8]. This Act contains provisions not only on tax control but also the application of the responsibility of taxpayers for tax violations.

Among the sources of tax law, we should also identify the Act on basic principles of state supervision (control) in the sphere of economic activity[9]. As the name implies, this Act is a normative act containing regulations for the conduct of examinations in respect of business

4 The Official Bulletin of the Verkhovna Rada of Ukraine of 1995, No. 4, item. 51, Art. 28.
5 The Official Bulletin of the Verkhovna Rada of Ukraine of 2003, No. 37, item 308.
6 The Official Bulletin of the Verkhovna Rada of Ukraine of 1997, No. 21, item 156.
7 The Official Bulletin of the Verkhovna Rada of Ukraine of 1993, No. 10, item 82.
8 The Official Bulletin of the Verkhovna Rada of Ukraine of 2001, No. 10, item 44.
9 The Official Bulletin of the Verkhovna Rada of Ukraine of 2007, No. 44, item. 12, Art. 1771.

entities. The provisions of this Act will also apply to inspections carried out by tax administration. It should be noted that this Act remains in force to this day.

Tax legislation of that time is observed with a large number of acts[10]. For the purpose of systematizing regulatory material, the set objective was to adopt a code that would unite all provisions for mandatory payments in Ukraine. Work on the development of the Tax Code was launched in early 2000[11].

Realization of this goal was accompanied by a lot of debates. It offered a lot of different projects of the code. The current Tax Code is based on the project of the Government of Azarov. An interesting story is the adoption of that regulation. In June 2010, the Verkhovna Rada of Ukraine adopted the draft Tax Code of Ukraine. Due to the large number of comments and criticism from both deputies and the public, Parliament adopted a resolution on the national discussion of the Tax Code of Ukraine (hereinafter – the TCU). After public discussion, a revised draft of the Code was adopted on 7 October 2010[12]. Following the adoption of the Tax Code, the text of the document was handed to the President. The President, in turn, returned it for revision to the parliament. After adjusting the text of the document in accordance with the President's comments, the Code was adopted on 10 December 2010 and published in the newspaper "Voice of Ukraine"[13].

Despite the protests and a difficult process of adoption of the TCU, it is worth noting that this regulation is the crown of many years of work on the codification of Ukrainian tax law since the adoption of the TCU could be considered the beginning of a new stage of development of the tax regulation in Ukraine.

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10 See: pp. 2,3 Chapter XIX Final provisions of the Tax Code of Ukraine. In connection with the adoption of the Tax Code of Ukraine, more than thirty laws on taxation were canceled.

11 See: E. Kovzarova, Draft Tax Code of Ukraine: problems and prospects. Law journal, 2003, No. 4, p. 25-31.

12 See: On adopting a draft Tax Code of Ukraine, Decision of Verkhovna Rada of Ukraine 07.10.2010 № 2593-VI.

13 See: O. V. Maystrenko, Tax Code of Ukraine: forecasts and reality, Bulletin of the Ministry of Justice of Ukraine – 2011 – № 5 – p. 46-51.

2. The structure and content of the Tax Code of Ukraine

The TCU is the first codified act which contains almost all the rules of tax legislation of Ukraine. Gathering them in a single act allowed not only to organize tax rules but also unify them. How effective the process of unification was can be judged by the number of amendments to the Code from the date of its adoption.

The current version of the TCU contains three hundred and fifty-seven articles, which are united into twenty sections, some of them, namely the second and the fourth, are divided into chapters. The TCU has been used for the first time in the history of the Ukrainian normative approach, which is also subject to numbering the paragraphs and separate articles of the Code. The greatest number of paragraphs contains fourteenth articles, in which there are two hundred and seventy items. The numbering of paragraphs helps to alleviate the use of this normative act and accelerates the search of a relevant rule. In presenting the material, not only the authors but also judges in their decisions refer to a specific paragraph of the TCU, and not its article. One of the positive aspects of this approach is to establish an appropriate level of transparency and specify the provisions of the tax law of Ukraine.

The structural construction of the Code is quite logical and reasonable. The first section of the TCU has the title General Provisions. This section contains forty articles. In the first article of the Code its scope is defined: The Tax Code of Ukraine regulates relations in the sphere of taxation and duties, in particular, it defines an exhaustive list of taxes and duties levied in Ukraine and the order of administration thereof, payers of taxes and duties, rights and responsibilities, competence of regulatory authorities, powers and duties of their officials in the exercise of fiscal control as well as responsibility for the violation of tax laws.

Each next article defines the concept of tax, fee, taxpayer, rights and duties, and the powers of tax authorities. Article 7 of the TCU is noteworthy. This article introduces the requirement to establish taxes in Ukraine. This article identifies main and elective elements of the tax. The main elements are: taxpayers, object, tax base, tax rate, tax calculation procedure, tax period, date and manner of tax payment, the

term and procedure of declaration of the calculation and payment of tax. Without defining such elements in the TCU, the use of tax is impossible in contrast to the optional element. The optional element includes tax breaks and the procedure for their application. In addition, this article contains an imperative norm regarding the implementation and changes of individual types of taxes in Ukraine exclusively by the Act with the changes to the TCU.

The first section of the Tax Code also contains a dictionary of concepts. Article fourteenth contains a list of terms that are used in the TCU. This article is one of the largest, it has more than 270 paragraphs, some paragraphs are numbered with tags approx. It should be noted that this article contains a large number of concepts not only of tax law but of civil and commercial law. This approach brings confusion and complexity of the situation because tax legislators provided more opportunities to interpret certain concepts in their sole discretion, which may contradict the meaning of the relevant field of law.

Another extensive article of the first section is Article 39. This article focuses on the issue of transfer pricing. The question is why the legislator has placed this provision in the first section of the TCU and not, for example, in the section of administration, or tax control.

The next section contains rules regarding the administration of taxes, fees and duties. The structure of this section includes chapters containing the rules: tax accounts, tax advice, determination of the amount of tax and/or cash liabilities of a taxpayer, procedure for payment and appeal of decisions of regulatory authorities, the order of payment and appeal of decisions of supervisory authorities, tax control, taxpayers, information-analytical maintenance of activity of regulatory bodies, audits, repayment of tax debt of taxpayers, the application of international agreements and tax debt repayment at the request of the competent authorities of foreign States, responsibility and fine.

Among the chapters of this section Chapter Eleven should be highlighted. The Eleventh Chapter "Responsibility" contains a provision applying to violators of tax legislation measures of financial responsibility. The TCU set out for the first time the standards of

financial responsibility, which has a compensatory nature[14]. Under this kind of liability, it provides for the application of the interest fine for late payment of tax liabilities. Another measure of exposure for violations of the tax legislation is a fine. Types of tax offenses and penalties are provided for in Articles 117-128-1 TCU.

Starting from the third Section, the TCU sets out provisions on the use of certain types of taxes. TCU Sections are presented in the same order as the list of national and local taxes and fees in Article 9 and Article 11.

The list of national taxes and duties is provided in Article 9 of the TCU. National taxes include: commercial income tax; personal income tax; value added tax; excise tax; environmental tax; rental fee; customs duty. It is worth mentioning that the said list of state taxes was established by the Act number 71-VIII of 12.28.2014. This Act reduced the list of state taxes from eighteen to seven. In this case, the reduction of a number of taxes is conditional as edited by the Law No 71 where a rental fee includes: rent for the use of subsoil for mining; rent for the use of subsoil for purposes not related to mining; rent for the use of radio frequency resource of Ukraine; rent for the special use of water; rent for the special use of forest resources; rent for the transportation of oil and oil trunk pipelines and oil pipelines; transit pipeline transportation of ammonia through Ukraine.

A similar situation is also with local taxes and fees. The new version of TCU has two local taxes such as property tax and single tax. Property tax is the tax on real property other than land, vehicle tax and land tax. The land tax also has its constituent parts, namely rents fee and land tax.

It is difficult to explain the approach of the legislator to the formation of tax rules in this way. The explanation of the unification of rules can not be taken into account because every single type of tax has its mandatory payment object and subject of taxation and it is, therefore, a separate method of calculating the amount of tax liability.

Local fees include: a fee for parking vehicles and tourist tax.

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14 See: Y. O. Rovinsky, Financial and legal coercion in Ukraine: problems and prospects: Author. Dis. ... Dr. Legal. Sciences: 12.00.07 / Y.O. Rovinsky – Zaporozhye 2011 – p. 40.

Chapter fourteen of TCU contains rules on special tax treatments After many versions of this Section, the last edition thereof contains only one chapter called "A simplified tax system". The simplified tax system provides for charging a single tax on business entities.

Due to the connection of rent with many kinds of merger, it was removed from the TCU Sections XV, XVI and XVII.

Section XVIII contains rules concerning features of the taxation of taxpayers under the agreement on production sharing. This type of taxable transactions provides for the replacement of the requirement of the investor with regard to national and local taxes and fees provided in the TCU by means of distribution of produced goods between the state and the investor on the terms of the agreement on production section.

Section XIX contains final provisions and Section XX – transitional provisions. The nineteenth Section contains a list of revoked normative acts in connection with the adoption of the TCU as well as indicates the date of entry into force. Transitional provisions indicate some dates of application of certain provisions of the TCU. This Section consists of 12 units, which contain provisions regarding the details of levying a separate tax type in a certain term. Most of these units are no longer applied in connection with the completion of the deadline of their norms.

3. General assessment of the provisions of the Tax Code of Ukraine

Assessment standards of the TCU can begin with the provisions of Section I. Article 4 of this Section sets out basic principles of tax legislation. In comparison with the Act on taxation system, the TCU provides eleven principles of tax legislation. The list of principles was shortened and changed: the incentive as well as the principle of availability were eliminated. The last one would be the most appropriate in terms of the TCU as the presentation of the material in the Code is quite convoluted and complex. Among the principles of the TCU there appeared principles of neutrality, inevitability of occurrence of a certain law, responsibility in case of violation of tax legislation as well as the presumption of legitimacy of decisions of a taxpayer.

The norm of item 16 of Section XX is of a particular interest. This item provides rules for levying military duty as a mandatory payment that is entered temporarily before the entry into force of the decision of the Verkhovna Rada of Ukraine on nearly finished reform of the Armed Forces of Ukraine.

Discrepancies between that rule and the regulations and principles of TCU must be emphasized. That provision is contrary to the provisions of paragraph 6.2., which provides that the fee is individually compensatory. According to the norms of the Tax Code, payment of military collection comes from earned income of individuals and foresees no reciprocal action by the state[15].

Special features of regulatory rules of the TCU should also include provisions of paragraphs 9.4. and 10.4. According to these regulations, establishing o state taxes and fees not covered by this Code is prohibited. Paragraphs 9.1. and 10.1. provide a list of national and local taxes including no military duty. The specific wording of paragraphs 9.4. and 10.4. allows the legislator to impose any tax or fee by the enactment of amendments to the Tax Code.

A similar situation also occurs with payments as binding state duty and united duty charged at checkpoints across the state border of Ukraine and the single social fee. In the Article 9 and 11 these types of mandatory payments are not provided but in Ukraine there is the Act on the united duty charged at checkpoints across the state border of Ukraine from 04.11.1999, No. 1212[16] and the Decree of the Cabinet of Ministers of Ukraine on State Duty from 21.01.1993 No. 7-93[17] as well as the Act on the collection and accounting of a single social fee for obligatory state social insurance of 08.07.2010, No. 2464-VI[18].

The TCU also contains other inconsistencies and gaps. It is necessary to mention the issue of the statute of limitations in tax matters. The statute of limitations in the implementation of control measures against

15 See: subp.1.2. of p.16-1 of Division 10 of the TCU.
16 The Official Bulletin of the Verkhovna Rada of Ukraine of 1999, No. 51, item 454.
17 The Official Bulletin of the Verkhovna Rada of Ukraine of 1993, No. 13, item 113.
18 The Official Bulletin of the Verkhovna Rada of Ukraine of 2011, No. 2, No. 2-3 /, page 34, item 11.

taxpayers amounts to 1095 days. The limitation period of appeal against actions of tax authorities by taxpayers is 10 days in administrative procedure and in a court – 1 month. The Supreme Administrative Court of Ukraine in its Information Letter dated 01.11.2011 No. 1935/11/13-11 on the basis of the principle of the tax legislation of the presumption of legality of taxpayers' decisions indicated that the deadline for appealing to the court of the taxpayer with the requirement to recognize illegal decisions of tax authorities on the calculation of monetary liabilities is 1095 days from the date of a receipt of such a decision regardless of whether the person used their right to pre-trial settlement of the dispute[19].

Decisions of the Constitutional Court of Ukraine were also relative to the norms of the TCU. Such decisions were made twice, in 2011 and 2012. In 2011, the Decision of the Constitutional Court established that the monthly lifetime allowance of the judges is the income of an individual that is contained in subparagraph "e" of subparagraph 165.1.1 of paragraph 165.1 of Article 165 of the TCU, that is not included in the object of taxation of the personal incomes tax[20]. The court's Decision of 2012 dealt with the constitutional recognition of individual forms of tax control, in particular the admission of officials of tax authorities in the premises and territory of the taxpayer as well as the imposition of administrative arrest on the property of the taxpayer in cases specified in the TCU[21].

Today there are 99 amended laws in the Tax Code. It is worth mentioning that the changes were made in the period of five and a half years. A frantic pace of amendments to the TCU was due to the hasty process of adoption. Another factor that influenced the number of changes to the TCU is no failure of governments to deliver effective economic reforms. Because of the changes to the TCU, they mainly

19 Business Accounting Law, Taxes, Consultations, 28.11.2011, No. 48, page 37.

20 The Decision of the Constitutional Court of Ukraine in the constitutional petition of the Supreme Court of Ukraine for an official interpretation of the concept of "monthly lifelong allowance" contained in subparagraph "e" of subparagraph 165.1.1 of paragraph 165.1 of Article 165 of the Tax Code of Ukraine on December 14, 2011, No. 18- rp / 2011.

21 The Decision of the Constitutional Court of Ukraine in the constitutional petition of 53 National Deputies of Ukraine concerning compliance of the Constitution of Ukraine (constitutionality) with certain provisions of the Tax Code of Ukraine on June 12, 2012 № 13-rp / 2012.

introduced new taxes or canceled or changed the rates of existing taxes. The main objective of each of the amended law is raising revenue.

4. Recent amendments to the Tax Code of Ukraine

Another Act with amendments was adopted in 24.12.2015 "on amendments to the Tax Code of Ukraine and laws of Ukraine to ensure the balance of revenue in 2016"[22]. This Act can be considered as the beginning of the reform of tax law of Ukraine aiming to simplify tax administration and reduce tax burden. Among the positive aspects of the regulation, we should mention the reduction of taxes, the introduction of a unified approach to the tax and financial reporting, and the abolition of charging a single social contribution on the wages of employees.

The Act provides for changes in the collection of corporate income tax. A quarterly reporting period was established for payers of income tax from 01.01.2016. Special rules provided for new businesses, farmers and businesses with annual revenues in the range of UAH 20.000,000, which provide for the establishment of the annual reporting period.

A novelty of this Act was the introduction of filing tax returns on the basis of financial reporting and the abolition of the obligation to keep tax accounting. By 01.01.2016, the payers of income tax should maintain both financial and tax reporting.

The Act №909 amended levying personal income tax. Basic personal income tax rate changed from 15% to 18%. In cases specially defined in the TCU, the tax rate may be 0%, 5% and 15% of the excess pension limit in the amount of three minimum wages (p. 164.2.19 TCU).

The procedure for collecting value added tax was also changed. The changes determined the taxable amount of VAT, namely that the base should not be lower than usual prices (this wording was "not below cost"). The rules of the usual price are stipulated in Art. 39 of the TCU. The reform was subjected to the perennial problem of VAT refund.

22 The Official Bulletin of the Verkhovna Rada of Ukraine of 2016, No. 5, page 5, item 47.

Changes have also been made to the simplified taxation system. Act 909 reduced the number of groups of payers of simplified taxation to four while the fourth group includes farms that change to pay a fixed agricultural tax. In order to reduce fraud and increase revenues to the State Budget, Law 909 provides for the rate of reduction for taxpayers of the III group the maximum amount of annual income of 20 million UAH to 5 million UAH with simultaneous increase rates of 2% to 3% of revenue – the VAT payers, and from 4% to 5% of income – for non-payers of VAT. In addition, a single tax rate for taxpayers of group IV (agricultural) increased 1.8 times.

The amendments also provided for the increase of the excise tax. The excise tax on alcohol, alcoholic beverages (except natural wine) increased by 50% for beer and 100% for sparkling wine, specific excise duty and the minimum excise tax liability for tobacco products increased by 40% without increasing the ad valorem rate, the excise tax on fuel increased by 13%.

Changes also affected tax on immovable property. Act 909 provides for an increase in the marginal tax rate to 3% of the minimum wage for 1 square meter of a total area of residential and non-residential real estate. Additional tax rate of 25 thousand UAH for apartments over 300 square meters and houses area of over 500 square meters was also established.

Although the amendments to the TCU adopted in December 2015 brought positive aspects but just like all the other ones, they were passed with a gross violation of tax and budget legislation, including the tax laws principle of stability. The principle provides imperative request of stability of amendments to any element of taxes not later than six months before the end of the fiscal period in which new rules and rates will be effected. Moreover, this principle provides that taxes and fees, their rates and tax incentives cannot be changed during the fiscal year[23]. The Budget Code of Ukraine also provides the stability of tax legislation[24]. Article 27 provides for limiting the adoption of laws that affect the performance of the budget (budget revenues decrease and/or increase of the budget costs) by 15 July of the year preceding the planned changes put into

23 See: p.4.1.19 of the Tax Code of Ukraine.
24 The Official Bulletin of the Verkhovna Rada of Ukraine of 2010, No. 50-51, item 572.

effect until the start of the planned budget period. Laws adopted after 15 July of the year preceding the planned changes put into effect until the beginning of the budget period following the planned changes.

Violation of that principle is typical of any government of Ukraine. In previous years, except for scientific doctrine, this problem did not arise. In 2015, a judge of Kirovohrad Regional Administrative Court decided on the basis of these principles about invalidation and cancellation of tax notification solutions of Kirovograd United State Tax Inspectorate Main Department of Fiscal Service in fiscal Kirovohrad region, which determined the amount of liability of vehicle tax at 25,000 UAH[25]. This judgment can be considered as a precedent to comply with the principles of stability of tax legislation.

5. Conclusion

To sum up, we must emphasize the difficult situation regarding the regulation of tax relations in Ukraine. From the adoption of the TCU to present day, in Ukraine, tax laws reforms are constantly conducted. One reason for this is the government's refusal to cooperate with representatives of science in the development of tax bills[26].

The presence of a single Act which includes almost all tax rules in Ukraine is positive. At the same time, the TCU does not contain rules for collecting certain types of mandatory payments although they operate in Ukraine today.

Reforming the TCU, the thesis of the new Prime Minister of Ukraine Vladimir Groisman on the need for urgent reform of the tax sphere is worth mentioning. It seems that Ukraine is expecting a new tax reform to reduce and simplify formalities connected with the fulfillment of tax obligations.

25 Decision of Kirovohrad Regional Administrative Court of 14 December 2015, case number R / 811/3341/15 (http://www.reyestr.court.gov.ua/Review/54881465).

26 See: M. Kucheriavenko, Reforming the Tax Code of Ukraine: the same rake again?... (http://zib.com.ua/ua/90444-mikola_kucheryavenko_reformuvannya_podatkovogo_kodeksu_ukrai.html).

Abstract

This paper deals with the general tax law in Ukraine. It covers the history of the formation of tax legislation Ukraine. Within the frames of this article the structure and content of the Tax Code of Ukraine was presented. The article also depicts the evaluation of the provisions of the Tax Code of Ukraine. Attention is also paid to recent amendments introduced to this Code.

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LAW ON TAX ADMINISTRATION – THE TAX ORDINANCE ACT OF THE REPUBLIC OF LITHUANIA

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1. Introduction

It is generally recognized that relevant monetary resources accumulated primarily in the state budget are necessary for the successful functioning of the state as a political organization. Charles F. Bastable in his work *Public Finance* (1892) affirmed: "Accumulation of the monetary resources funds for the state needs and usage of such funds has a vital importance for the whole political organization [...]"[3]. That means that the state seeking its purposes as a political organization shall accumulate necessary monetary resources for the implementation of these purposes, their rational allocation and use. Thus the state shall pursue relevant activities in the financial field. It is possible only to see whether for an appropriate legal mechanism of accumulation and usage of state monetary resources, which manifests itself as the whole of relevant legal norms and their application, will be created. Ipso facto, the creation of an independent financial system and its legal regulation mechanism could be described as one of the essential presumptions of the state independence. It is very relevant for the Republic of Lithuania, which after the Restoration of Independence had to take immediate steps in order to create its own independent financial system because before the Restoration of Independence, the Republic of Lithuania did not have financial autonomy or independent budget, independent tax system and independent monetary system[4]. This is why the provisions about

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2 Dr.; Vilnius University (Republic of Lithuania).
3 Ch. F. Bastable, Public finance, London, New York 1892, p. 2.
4 B. Sudavičius, V. Vasiliauskas, The influence of European Union membership on budget planning in the Republic of Lithuania. In: Lituanian legal system under the influence of European Union law, Vilnius 2014, p. 481.

Lithuania's independent state budgetary system were included in the Basic Temporary Law of the Republic of Lithuania, enacted on 11 January 1990[5]. Paragraph 1 of Article 47 of Basic Temporary Law stated that "The budgetary system of the Republic of Lithuania shall consist of the independent State Budget of the Republic of Lithuania and independent municipal budgets". National income accumulated in the state budget shall be allocated to implement education, science, health care and state social support programs, develop economy and infrastructure, maintain state government and state government agencies, and recover expenses for national defense (Paragraph 2 of Article 47), while funds accrued in municipal budgets shall be allocated to finance social, economic and other local programs and support municipal authorities (Article 52).

The most important source of the State Budget revenue are taxes. Paragraph 2 of Article 127 of the Constitution of the Republic of Lithuania[6] (hereinafter – the Constitution) states that "The revenue of the State Budget shall be raised from taxes, compulsory payments, levies, income from state-owned property, and other income". It is obvious that the Constitution describes taxes as the main (having exceptional value) legal form of the state budget revenue[7]. The Constitutional Court of the Republic of Lithuania (hereinafter – The Constitutional Court) in its ruling of 15 March 1996 explained that according to the Constitution, five legal forms of the state budget revenues may be distinguished: regular taxes, other compulsory payments, dues, receipts from the state property, and other income. They are specified in particular laws[8]. That is why the state seeks to create an independent and effectively functioning state tax system[9]. The Republic of Lithuania is also not an exception. After the Restoration of Independence, one of the most important tasks was to create an independent and modern tax system corresponding to market economy.

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5 Official gazette, 1990, № 9-224.

6 Official gazette,1992, № 33-1014.

7 B. Sudavičius, Mokesčiai kaip konstitucinė biudžeto pajamų forma. In: Konstitucionalizmo idėja, bendroji Europos teisė ir Lietuvos konstitucinė tradicija, Vilnius 2016, p. 153.

8 Lietuvos Respublikos Konstitucinio Teismo oficialiosios konstitucinės doktrinos nuostatos: 1993-2009, Vilnius 2010, p. 1048.

9 The importance of taxes and taxation for the state even led to coining such a term as "state of taxes" (J.-E. Lane, Konstitucija ir politikos teorija, Kaunas 2003, p. 187).

It should be noticed that nowadays in the Republic of Lithuania a broad legal framework on tax collection is created and tax law is finally formed as a specific legal regulation area.

2. The system of sources of Lithuanian tax law. Common overviev

The presence of independent legal sources is one of the necessary features of autonomous law branch. Tax law, despite its importance and plenty of legal sources, belongs to the system of public finance law. Consequently, tax law sources are finance law sources at the same time[10]. On the other hand, tax law as the institute of public finance law has its own sources. It shows the autonomy of this institute in the common system of public finance law.

According to the Lithuanian tax law doctrine, tax law source is a normative legal act of the competent state (municipal) institution which enacts (replaces or abolishes) legal norms regulating public tax relations on the basis of mandatory instructions[11]. As Paragraph 1 of Article 3 of the Law IX-2112 of the Republic of Lithuania on Tax Administration (hereinafter – Law IX-2112/2004)[12] regulates: "The system of tax legislation shall comprise tax laws and subordinate legal acts adopted on their basis". Such legal acts can be adopted only by the Seimas (Parliament of the Republic of Lithuania), the Government, the Ministry of Finance, the State Tax Inspectorate (hereinafter – STI), the Customs Department of the Republic of Lithuania, the Municipal Council, and some other authorities in the Republic of Lithuania.

Due to their forms, legal power and a huge number of regulations within their scope, tax law sources consist of a complex system in which separate tax law sources (links) could be identified. According to the legal power of tax law sources, they are divided into the Constitution, laws and bye-laws. According to the scope of regulation of public relations, tax law sources are divided into common sources of tax law

10 A. Medelienė, B. Sudavičius, Mokesčių teisė, Vilnius 2011, p. 59.
11 A. Marcijonas, B. Sudavičius, Mokesčių teisė, Vilnius 2003, p. 34.
12 Official gazette, 2004, № 63-2243.

and other branches of law, common sources of finance and tax law and special tax law sources[13]. Common sources of tax law and other branches of law shall be normative legal acts which regulate not only tax relations but also relations regulated by other law branches. These legal acts are common sources of tax, finance and other branches of law, for example, the Constitution, Criminal Code[14], Administrative Offenses Code[15], Law on State and Municipal Enterprises[16], Law on State Social Insurance[17], Law on Local Self-Government[18], etc. Common sources of finance and tax law mean legal norms which shall be applied in various social relations regulated by financial law (Law on Budget Structure[19], annually enacted Law on State Budget and Municipal Budgets Financial Indicators, Law on Lithuanian Bank[20], etc.). Special tax law sources are characterized in such a way that they basically regulate tax relations despite the fact that they are financial law system sources. Special tax law sources are the Law IX-2112/2004 itself, laws on concrete taxes and subordinate legal acts adopted on their basis. Paragraph 2 of Article 3 of the Law IX-2112/2004 states that "Any tax falling within the national competence of the Republic of Lithuania can be established only by law".

Because of the transition to market economy the state pays greater attention to the legal regulation of tax relations as such regulation is pursued by the use of special tax law sources. The analysis of the Law IX-2112/2004 reveals that special tax law sources are legal acts which "establish taxes, fees or other payments to the state (municipal) budget and funds"; they also define issues related to the application of taxes or tax reliefs. According to Paragraph 7 of Article 2 and Article 3 of the Law IX-2112/2004, special tax law sources are: 1) Law IX-2112/2004 itself; 2) tax laws establishing taxes stated in Article 13 of the Law IX-2112/2004[21]; 3) Law on Customs; 4) international treaties of the

13 It should be noticed that such legal sources division is relative because virtually entire legislation regulates a wide range of public relations as nowadays legal regulation is complex.
14 Official gazette, 2000, № 89-2741.
15 TAR, 2015-07-10, № 11216.
16 Official gazette, 1994, № 102-2049; 2004, № 4-24.
17 Official gazette, 1991, № 17-447; 2004, № 171-6295.
18 Official gazette, 1994, № 55-1049; 2008, № 113-4290.
19 Official gazette, 1990, № 24-596; 2004, № 4-47.
20 Official gazette, 1994, № 99-1957; 2001, № 28-890.
21 It should be noticed that this category also includes laws which were enacted with the purpose of not regulating tax collection but regulating other public relations (Civil Procedure Code, Law on Forests, Law on Health Insurance, and Law on State Social Insurance).

Republic of Lithuania establishing taxes and (or) defining issues related to the application of taxes or tax reliefs; 5) the Community customs legislation[22]; 6) subordinate legal acts adopted on tax laws basis and ensuring the implementation of tax laws.

3. Law on tax administration of 13 April 2004 – the Tax Ordinance Act of Lithuania

3.1. The assumptions of enacting Law on Tax Administration

The current state tax system of the Republic of Lithuania and its legal framework started to be created immediately after the Restoration of Independence as following tax collection by Soviet law did not meet new political and economic realities of life, independent democratic state status and aspirations[23]. As a result, such important tax laws as Law on Legal Entities Tax[24] and Temporary Law on Individuals Income Tax[25] were adopted in the first years of Independence.

At the same time, the state institutions system responsible for tax collection has been developed. Following the Government Resolution 92/1990 "For the State Tax Inspectorates"[26], STI was established in order to ensure tax collection and control of fiscal discipline compliance. Implementing this Government Resolution, the central STI in the central structure of the Ministry of Finance was established instead of the State Revenue Department, whereas local STI in cities and districts were established instead of finance departments of executive committees of local councils. For the purpose of ensuring centralized subordination and independence of these institutions from local governments, it was

22 In the view of Article of Law IX-2112/2004, the Community customs legislation consists of the Community Customs Code and legal acts establishing the Community Customs Code, international treaties of the Community which regulate procedures of the importation of goods into the customs territory from the third countries and export from the customs territory to the third countries and procedures of application of customs for such goods.

23 A. Marcijonas, B. Sudavičius, Lietuvos Respublikos mokesčių sistemos teisiniai pagrindai ir jų reforma, Teisė 2002, p. 129.

24 Official gazette, 1990, № 24-601.

25 Official gazette, 1990, № 31-742.

26 Official gazette, 1990, № 13!383ю.

decided that local STIs were financed from the state budget. Law on State Tax Inspectorate was enacted on 26th June 1990[27] formalizing a legal position of STI.

Law on Tax Administration[28] enacted on 28 June 1995 has become a major step in improving Lithuanian tax regulation framework. The significance of this Law as the main source of tax law was the fact that this Law regulated complex fiscal relations, bringing together general tax rules and procedures applicable to all taxes and charges equivalent to taxes paid to the budget. The Law was enacted following the principal constitutional norm that taxes, other payments to the budgets and levies shall be established by the laws of the Republic of Lithuania and following other constitutional norms laying down the exclusive right to set (validate) state taxes and other obligatory payments to the Seimas. The Law became the most important tax law source which established basic concepts and regulations which must be observed in implementing tax laws of the Republic of Lithuania, basic principles of legal regulation of taxation, and the list of taxes applied in the Republic of Lithuania described in Article 13 with the exception stated in Article 16. Separate taxes were regulated by separate tax laws and only specific concrete procedures of separate tax collection were implicated in tax bye-laws.

Law on Tax Administration of 1995 was valid till 1st May 2004 – the day when the Law IX-2112/2004 came into force. It was the same day in which the Republic of Lithuania became the member state of European Union (hereinafter – EU). New Law IX-2112/2004 enactment was caused by both internal and external assumptions. However, it should be noticed that changes of tax law in the Republic of Lithuania were mostly caused not due to external assumptions (joining the EU) but because of internal assumptions: the urgent need to reform the tax system and tax administration in the way assuring keeping pace with the rapidly developing of economic relations, ensuring vital national financial needs and not hampering the increasing competitiveness of the region.

27 Official gazette, 1990, № 19-493.
28 Official gazette, 1995, № 61-1525.

Government Resolution 1013/1998 "On the legal tax base clean-up program"[29] became the legal basis of the tax law revision and enactment of the Law IX-2112/2004. It pointed out that it was necessary "to prepare a Tax Code of the Republic of Lithuania and ensure its stability and, if necessary, change it with prior notification only from the beginning of the year".

As mentioned before, the first Law on tax administration was enacted in 1995. As a consequence, within ten years of existence it managed to become outdated and it no longer reflects economic realities of the relationship between taxpayers and tax administrators, which is based on the modern state and modern economic system. It should be noticed that the Law during its ten years of existence has been modified as many as 45 times, usually changing not one or two articles of but a dozen articles at the same time. It is important to mention that the new Law was enacted with the purpose to convey the best international practices in tax administration.

3.2. The structure and general overview of the Law on Tax Administration

The Law IX-2112/2004 came into force since 1 May 2004. The current version of the Law IX-2112/2004 consists of 170 articles divided into ten chapters. It should be noticed that despite the fact that the quantity of changes of its articles was not very large, however, the Law IX-2112/2004 was modified and completed even 28 times. These modifications were a result of the changes in economic relations as well as state tax policy changes and external factors related to the enactment of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing the Directive 77/799/ EEC.

Chapter I of the Law IX-2112/2004 describes regulated relations and general terms of tax law ("tax"," tax administrator", "budget", "tax payer", etc.). Article 1of the Law IX-2112/2004 states that "This Law shall establish basic concepts and regulations which must be observed in implementing the tax laws of the Republic of Lithuania, basic principles

29 Official gazette, 1998, № 72-2102.

of legal regulation of taxation, the list of taxes applied in the Republic of Lithuania, the functions, rights and obligations of the tax administrator, the rights and obligations of the taxpayer, the calculation and payment of taxes, the procedure of enforced recovery of taxes and related amounts as well as the procedure for the settlement of tax disputes.[...] This Law shall also ensure the implementation of the EU legal acts listed in the Annex hereto".

In Chapter II of the Law IX-2112/2004the tax legal regulation framework is presented. A key point to be considered is that the Law IX-2112/2004 established not only the legal form of acts establishing the taxes – the law, but also an important requirement of how the tax laws shall come into force. Paragraph 3 of Article 3 states that "The Seimas of the Republic of Lithuania shall ensure that the tax laws of the Republic of Lithuania establishing a new tax, a new tax rate, a tax relief and/or sanctions for violations of tax laws or substantially amending the procedure of specific taxation or the principles of the legal regulation of taxation and their application should come into effect not earlier than within six months after the day of their publication". This requirement shall not apply to the amendments of tax laws of the Republic of Lithuania related to the Law on the Approval of Financial Indicators of the State Budget and Municipal Budgets and to legal acts approximated with the provisions of EU legislation. It is important to mention that any legal tax act can not contradict general tax principles stated in this chapter and all these principles shall be implicated in tax administration process: equality of taxpayers, fairness and universal obligation, clarity of taxation, precedence of content over form principles.

Chapter III of the Law IX-2112/2004 determines a complete list of taxes and equated them with payments establishing the state tax system of the Republic of Lithuania: 1) value added tax; 2) excise duties; 3) personal income tax; 4) immovable property tax; 5) land tax; 6) state natural resources tax; 7) petroleum and gas resources tax; 8) tax on environmental pollution; 9) consular fees; 10) stamp duty; 11) inheritance tax; 12) compulsory health insurance contributions; 13) contributions to the Guarantee Fund; 14) state-imposed fees and charges; 15) lottery and gaming tax; 16) fees for the registration of industrial property objects; 17) corporate income tax; 18) state social

insurance contributions; 19) tax on a surplus amount in the sugar sector; 20) production charge in the sugar sector; 21) customs duties; 22) deductions from income under the Law of the Republic of Lithuania on Forestry; 23) tax on the use of state property by the right of trust; 24) one-off tax on additional quota for white sugar production and on supplementary quota for glucose production. What is more, the Law IX-2112/2004 also regulates administration of fines for administrative offenses since 1 January 2015. Paragraph 1of Article 14 states that "[...] The tax administration procedures provided for in this Law shall be applied in respect of all taxes specified in Article 13 of this Law and the taxpayers thereof unless this Law or the relevant tax law provide otherwise".

Chapter IV of the Law IX-2112/2004 determines the rights and obligations of the participants of legal relations in tax administration. Paragraph 1 of Article 15 regulates that the state institution responsible for the administration of taxes in the Republic of Lithuania specified in Article 13, with the exception of customs duties, shall be STI. The Customs of the Republic of Lithuania shall be responsible for the administration of customs duties in the Republic of Lithuania. The Customs shall administer the taxes referred to in subparagraphs 1 and 2 of Article 13 (value added tax and excise duties) to the extent assigned by the Law on Value Added Tax[30] and the Law on Excise Duty [31]. No other state institutions or agencies may perform the functions of the tax administrator, except for the cases explicitly stated in the Law IX-2112/2004 or the relevant tax law[32]. Moreover, there are newly arranged main tasks of STI, i.e. described as one of the most important tasks, namely assisting taxpayers in exercising their rights and performing their obligations. This chapter further depicts the functions of STI and the duties and rights of the tax administrator. There is also a very important legal norm consolidating the tax administrator's responsibility in this chapter – "Where the tax administrator has caused damage to the taxpayer by illegal actions or failure to act, he must compensate for the damage so caused in accordance with the procedure

30 Official gazette, 2002, № 35-1271.
31 Official gazette, 2001, № 98-3482.
32 The relevant tax administration powers according to special laws are provided to the Ministry of Environment, the Ministry of Agriculture, State social insurance institutions.

prescribed by law. A tax officer whose direct actions or failure to act have caused damage shall be held liable in accordance with the procedure laid down in the Law on Civil Service and other legal acts. Where a tax officer has performed illegal actions, he shall be held liable in accordance with the procedure prescribed by law". What is more, this chapter describes taxpayers' rights and obligations that collectively compose a general legal status of taxpayers, third persons (bailiffs and notaries) and their obligations in tax relations.

Chapter V of the Law IX-2112/2004 regulates procedures of calculation, declaration, payment and recovery of taxes. Although the Law IX-2112/2004 generally attributes the obligation of tax calculation to the taxpayer, it provides the possibility of a tax administrator to compute taxes by himself including the usage of anti-avoidance techniques universally recognized in the world – calculation of tax based on the assessment by the tax administrator and calculation of tax based on the precedence of content over form. According to Paragraph 1 of Article 69, "in cases where a taxpayer's transaction, economic operation or any combination thereof is concluded with a view of gaining a tax benefit, i.e. to defer, directly or indirectly, the deadline for the payment of tax, reduce the payable amount of tax or fully avoid the payment of taxes, or increase the tax overpayment (tax difference) to be refunded (credited), or shorten the time limit for refunding the tax overpayment (tax difference), the tax administrator shall apply the content-over-form principle for the purpose of calculating the tax. In this case, the tax administrator shall not take into account the formal expression of the taxpayer's activity and shall recreate the distorted or hidden circumstances associated with taxation as provided for in tax laws and calculate the tax pursuant to the relevant provisions of the said tax laws". According to 1 Paragraph of Article 70, "in cases where the taxpayer fails to discharge or properly discharge his obligation to calculate taxes, co-operate with the tax administrator, keep accounts, safe-keep the accounting and other documents, which precludes the tax administrator from determining the amount of the taxpayer's tax liability pursuant to the standard procedure, i.e. a procedure laid down in the relevant tax law, the tax administrator shall assess the amount of tax to be paid by the taxpayer taking into account all the circumstances relevant for

the assessment, the information available and, if necessary, selecting the methods of assessment laid down by him that comply with the criteria of prudence and, in so far as objectively feasible, fairness in determining the amount of tax liability".

Following the tax administrator practice of Germany, the Law IX-2112/2004 states the possibility of agreement on a tax amount. The tax administrator and the taxpayer may conclude an agreement regarding taxes and related amounts provided that neither of the parties has sufficient evidence to substantiate their calculations for the purpose of calculating taxes. After having signed such an agreement, the taxpayer shall lose the right to dispute the correctness of tax calculation and the tax administrator shall lose the right to calculate an amount larger than specified in the agreement.

It should be noticed that the Law IX-2112/2004gives priority to voluntary tax compliance but also states the ways of enforcing tax obligations and the possibility for the tax administrator to enforce tax obligations.

Chapter VI and VII of the Law IX-2112/2004 regulate forms of control over taxpayers. These chapters state not only fundamental organizational forms of control – tax inspection and tax investigation, but also fundamental provisions on the procedures of tax inspection and tax investigation. In order to protect taxpayers, for example, it is stated therein that the tax administrator shall have no right to re-inspect a taxpayer (there are some exceptions stated in the Law IX-2112/2004) regarding the same tax for the same tax period. The tax and/or related amounts are calculated anew and the taxpayer is instructed to pay them which is adopted by the tax administrator or the inspection results approved by a certificate of inspection. Tax investigation is a new institute of the Law IX-2112/2004 since 2004 whose purpose is to help taxpayers perform their tax duties and avoid possible violations of tax laws.

Chapter VIII of the Law IX-2112/2004 regulates violation of tax laws and liability for them. According to Paragraph 1 of Article 139, "if the tax administrator determines that the taxpayer has failed to calculate taxes not subject to declaration (including the tax to be calculated in the customs declaration) or has failed to declare taxes subject to declaration

or has illegally applied a lower tax rate, which has resulted in an illegal reduction of payable tax, the amount of tax underpayment shall be calculated in respect of the taxpayer and a penalty equal to 10%-50% of the said amount shall be imposed, unless the relevant tax law provides otherwise". The amount of the actual penalty imposed shall be conditional on the type of violation, whether the taxpayer has cooperated with the tax administrator, acknowledged the committed violation of tax laws and other circumstances which the tax administrator deems to be relevant when imposing a smaller or larger fine.

Norms of Chapter IX of the Law IX-2112/2004 regulate a tax disputes process. According to Article 144 thereof, "the taxpayer shall have the right to appeal against any action or failure to act by the tax administrator (officer)". Tax disputes have mandatory pre-trial proceedings – firstly, tax disputes shall be considered by the central tax administrator, the Commission on Tax Disputes and only later by the court. It should be noticed that the norms of the Law IX-2112/2004 implicate considering not all disputes between the taxpayer and the tax administrator but only disputes arising between the taxpayer and the tax administrator over a decision on the approval of an inspection report or any other similar decision on the basis of which the tax is calculated anew and the taxpayer is instructed to pay it, also over a decision made by the tax administrator to refuse the refund (crediting) of tax overpayment (tax difference). For all other disputes between the taxpayer and the tax administrator, legal norms contained in the Law on Administrative Proceedings[33] shall apply.

Finally, Chapters X and XI of the Law IX-2112/2004 state the rules of calculation of time limits, submission of documents and legal requirements related to the legislation.

3.3. The evaluation of Law on Tax Administration in the view of its constitutionality

As it was mentioned before, the Law IX-2112/2004 was enacted following the principal constitutional norm that taxes, other payments

33 Official gazette, 1999, № 13-308; 2000, № 85-2566.

to the budgets and levies shall be established by the laws of the Republic of Lithuania following other constitutional norms laying down the exclusive right set (validate) state taxes and other obligatory payments to the Seimas. Consequently, it is a relevant question on the constitutionality of the Law IX-2112/2004.

The question on the constitutionality of the Law IX-2112/2004 was judged only one time and only indirectly in the Constitutional Court – the Constitutional Court in a written procedure judged the constitutional justice case 15/2011 under the applicant on 22 January 2013 – Kaunas Regional Administrative Court's application to investigate whether Paragraph 1 of Article 38 of the Law on State Social Insurance (1 July 1997 wording) and Paragraph 1 of Article 16 of the Law on State Social Insurance (20 December 2007 wording), do not contradict constitutional justice, the rule of law principles stated in subparagraph 15 of Article 67 and in Paragraph 3 of Article 127 of the Constitution, to the extent that they confirmed the right of the Minister of Finance to determine the amount of interest and calculation procedures.

According to the applicant, the provision of Paragraph 1 of Article 38 of the Law on State Social Insurance (1 July 1997 wording) which regulated that interest on late payment of state social insurance contributions was calculated according to the interest rate applied for late payment of taxes determined by the Minister of Finance and the provision of Paragraph 1 of Article 16 of the Law on State Social Insurance (20 December 2007 wording) which stated that the amount of interest and calculation procedures were determined by the Minister of Finance, allowed the Minister of Finance in its sole discretion, without any restrictions, indicators and criteria to determine the interest rate.

The Constitutional Court explained that it entails from the case and the arguments set down in the application, *inter alia* the quoted provisions from the Constitutional Court 26 September ruling (which decided on the legal regulation that approved the power of the Minister of Finance to determine the amount of interest for unpaid taxes) that the problem of constitutionality the raised by the applicant is connected not with the provisions of the Law on State Social Insurance but with the provisions of the Law IX-2112/2004 which established the power of the Minister

of Finance to determine the amount of interest for unpaid taxes, *inter alia* for state social insurance contributions.

It is important to mention that Article 99 of the Law IX-2112/2004 regulates that the amount of late payment interest and the procedure of its calculation shall be established by the Minister of Finance, taking into account the weighted average of the annual interest rate for the Treasury Bills of the Republic of Lithuania, issued in Euros by auction in the previous quarter. The amount of late payment interest shall be established by increasing the said interest rate by 10 percentage points.

It should be emphasized that legal regulation of Article 99 of the Law IX-2112/2004 by which the amount of late payment interest and the procedure of its calculation shall be established by the Minister of Finance and by which this procedure has to follow the above mentioned criteria does not give power to the Minister of Finance in his sole discretion, without any restrictions to determine the interest rate. Consequently, there are no arguments to claim that such legal regulation contradicts constitutional justice and the rule of law principles stated in subparagraph 15 of Article 67 and Paragraph 3 of Article 127 of the Constitution.

According to this, the Constitutional Court explained that Article 99 of the Law IX-2112/2004does not contradict constitutional justice and the rule of law principles stated in subparagraph 15 of Article 67 and 3 Paragraph of Article 127 of the Constitution[34] to the extent that establishes the power of the Minister of Finance to determine the amount of interest for unpaid taxes by increasing the said interest rate by 10 percentage points.

4. Concluding remarks

According to the Lithuanian tax law doctrine, a tax law source is a normative legal act created by the competent state (municipal) institution which enacts (replaces or abolishes) legal norms regulating public tax relations on the basis of mandatory instructions. As Paragraph

34 TAR, 2014-02-04, No. 963.

1 of Article 3 of the Law IX-2112/2004 regulates: "the system of tax legislation shall comprise tax laws and subordinate legal acts adopted on their basis". Such legal acts can be adopted only by the Seimas, the Government, the Ministry of Finance, STI, the Customs Department of the Republic of Lithuania, the Municipal Council, and some other authorities of the Republic of Lithuania.

The Law IX-2112/2004, which was enacted on 13 April 2004 and came into force the same day on which Lithuania became a EU member state, occupies a very important place among special tax law sources. The enactment of the Law IX-2112/2004 was caused by both internal and external assumptions. This enactment was mostly caused not by external assumptions (joining the EU) but because of internal assumptions: the urgent need to reform the tax system and tax administration to keep pace with the rapidly developing economic relations, ensure vital national financial needs and not to hamper the increasing competitiveness of the region.

The significance of the Law IX-2112/2004 as the main source of the tax law is the fact that this Law regulates complex fiscal relations bringing together general tax rules and procedures applicable to all taxes and charges equivalent to taxes paid to the budget. As Paragraph 1 of Article 1 of the Law IX-2112/2004 states: "This Law shall establish basic concepts and regulations which must be observed in implementing the tax laws of the Republic of Lithuania, the basic principles of legal regulation of taxation [...]".

As a consequence, the Law IX-2112/2004 as the most important special tax law source: 1) legitimizes the state tax system of the Republic of Lithuania (Article 13); 2) determines general tax law terms and tax law principles (Articles 2, 3, 5, 6-10); 3) sets tax administrators system and their (and their officials) tasks, functions and powers (Articles 15-35); 4) determines common tax payers' status (Articles 36-47); 5) regulates third party's involvement in legal tax relations (Articles 48-65); 6) regulates general tax compliance with obligations and sets ways of enforcing tax obligations (Articles 66-104); 7) sets the basics of tax arrears recovery, procedures of tax inspection and tax investigation and liability for tax laws violation (Articles 105-143); 8) regulates a

tax disputes process (Articles 144-160). As the Law IX-2112/2004 sets general tax law provisions, this Law is a base for the enactment of other tax law acts.

It is important to mention that regulation of tax relations is constantly evolving depending on various factors, including the Law IX-2112/2004 which is constantly changing. One of the newest changes of the Law IX-2112/2004 – transition to electronic tax declaration – stipulates that a tax return must be submitted electronically to the central tax authority following established procedures since 1 October 2016 except the situations determined in the Law. The taxpayer has the right to submit a tax return in writing: 1) when annual personal income tax return is submitted; 2) when submitting a tax return electronically is not possible for objective reasons, or electronic submission of a tax return would obviously disproportionate administrative burden.

Abstract

This paper deals with the law on tax administration from the perspective of the Tax Ordinance Act of Lithuania. It covers the assumptions of enacting Law on Tax Administration. Within the frames of this article the structure and general overview of the Law on Tax Administration was depicted. The article also presents the evaluation of Law on Tax Administration in the view of its constitutionality.

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Part II.

SUBSTANTIVE AND PROCEDURAL TAX LAW ASPECTS FROM THE TAX CODIFICATION PERSPECTIVE

CONCEPTUAL APPROACHES TO THE TAX CODE OF THE RUSSIAN FEDERATION WITH REGARD TO FORCED RECOVERY OF TAX ARREARS PENALTIES AND FINES ON TAXES AND DUTIES IMPOSED ON TAXPAYERS BEING INDIVIDUALS

Tsindeliani Imeda Anatolevich[1]

1. Introduction

Within the territory of Russia, Tax Code of the Russian Federation[2] has been in force for the second decade. However, despite many regular changes, there are still many gaps and contradictions that have an ambiguous effect on the law enforcement practice. These gaps and contradictions concern directly a significant amount of taxpayers and are connected with the realization of their constitutional obligation to pay the legally established taxes and fees. We believe it is necessary to examine a seemingly simple and uncomplicated institute connected with the enforcement of arrears of taxes, fees, fines and penalties[3] imposed on taxpayers being individuals, and illustrate the imperfection of the legislation due to the existing discrepancies in the evolving judicial practice.

Until September 15, 2015 the order of the forced collection of arrears on individuals consisted of two related but not identical procedures, namely, in the order of action proceedings recovery of arrears from individuals and administrative (mandatory) procedure for collecting them[4].

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2 Hereinafter – the Tax Code.
3 Next – arrears.
4 3 Federal law of 29.11.2010 N 324-FZ "On Amendments to Part One of the RF Tax Code".

Article 48 of the Tax Code determining the mechanism of the enforcement of arrears, till January 3, 2011, was based solely on the action proceedings (claim) of collecting arrears from individuals. It is noteworthy that until 2007 the Russian Tax Code did not contain directly the provisions about the order of recovery of arrears on taxes and fees with regard to legal entities because the Tax Code included provisions in respect of them only in the non-judicial procedure of recovery of compulsory payments and sanctions by a writ.

By itself, an indication of the statute of order of collection of arrears on individuals, nevertheless, did not lead to the resolution of arising contradictions in the law enforcement practice:

– despite the fact that the Tax Code pointed to the only claim procedure for recovering arrears, the Civil Procedure Code defined a simplified procedure for the recovery of arrears, i.e. administrative order. Hence, a conflict of interests arose in the law enforcement practice in the courts of general jurisdiction in the question of a priority – the norms of the Tax Code or the Code of Civil Procedure of the Russian Federation – and what procedure should be carried out by the tax authority.

Along with the above, the problem of determination of jurisdiction claims by the tax authorities on the recovery of arrears in the law enforcement practice has not been decided for a long time. In a number of subjects of the Russian Federation, tax authorities assumed to determine jurisdiction of the claims on the basis of the amount of the claim, i.e. – if the tax authority requirements did not exceed 50,000 rubles, claims were attributed to the jurisdiction of justices of the peace, and in the case of a declaration of claims in excess of 50,000 rubles, claims of the tax authorities were attributed to the jurisdiction of district courts of general jurisdiction. In other regions, due to the nature of tax relations, the consideration of claims of the tax authorities for the recovery of the arrears attributed to the jurisdiction of district and municipal courts of general jurisdiction. Introduction of a new edition of the Tax Code, Article 48, as of January 3, 2011 did not lead to the resolution of gaps in the legal regulation of the collection of arrears of taxes, fees, fines and penalties imposed on taxpayers being individuals.

2. The reform of the administrative procedural legislation and its influence on the implementation of enforcement forms of recovery of arrears from taxpayers being individuals

With the entry of the Code of Administrative Procedure of the Russian Federation[5] into force, the legislator has approached solving problems related to the mandatory forms of discharge of a duty on the payment of obligatory payments and penalties thereon have been significantly changed. The need to improve the institutions providing compulsory payments and penalties has been repeatedly discussed in legal literature[6]. Due to the increasing the number of such disputes, the legislators followed the path of maximum simplification of enforcement procedures for compulsory payments and penalties imposed on individuals, which was very clearly demonstrated on the example of the recovery of arrears of taxes, fees, fines and penalties imposed on individuals. Hopes of the legislators on lessening the burden on the judicial system by introducing simplified procedures have not been, unfortunately, materialized.

It is necessary to consider the problem of the correlation of the rules of the Criminal Procedure Code of the Russian Federation with the legislation on taxes and fees governing compulsory procedure for collecting mandatory payments. Given that the administrative statement of a claim for the recovery of compulsory payments and penalties is accompanied by the documents confirming the administrative lawsuit circumstances, including a copy of the directions of the administrative claim of the plaintiff for the payment of a levy on a voluntary basis (Art. 126 of the RF CAS) confirming these administrative lawsuit circumstances, including a copy sent by the administrative body to the plaintiff's claim **and the collected payment on** a voluntary basis

5 "Code of Administrative Procedure of the Russian Federation" dated 08.03.2015 N 21-FZ// SZ the Russian Federation. 2015. N 10.St. 1391.

6 I.A. Tsindeliani, Legal regulation of the collection of arrears of taxes, fees, fines, penalties imposed to taxpayers being individuals: current law and practice, Financial Law 2012, No. 11, p. 14-21.

(Art. 126 of the RF CAS) as well as the **requirements for the payment** collected on a voluntary basis (Art. 126 of the RF CAS).

It is a doubtless fact that the existing branch of legislation establishes **a direct relationship of the realization by control bodies of the right to appeal in an administrative lawsuit to collect the mandatory payments and sanctions on individuals only after compliance with a compulsory pre-trial procedure,** namely, the direction of the requirements for the payment of tax collection, fines and penalties. In turn, **regarding individuals, the realization of this right is tied to the performance of the control (tax) duties of the authorities, namely, the calculation of the mandatory payments to a number of taxes:** land tax, vehicle tax and the tax on personal property of the individuals. Thus, the implementation of compulsory forms of the recovery of compulsory payments and penalties imposed on individuals requires taking into account the requirements of the branch of legislation both in the field of calculation of mandatory payments and fulfillment of the obligations concerning requirements of mandatory payments and penalties on a voluntary basis.

In general, it should be recognized that with the adoption of the Federal Code of Administrative Procedure the most important legal institution of the enforcement of mandatory payments and sanctions on individuals has been formed, and the implementation of standards must be carried out in the system uniform with the rules of the branch legislation providing for specific types and order of payment of obligatory payments and establishing sanctions for the violation of terms of payment and defined by other requirements of a specific branch of legislation.

3. A simplified procedure of the recovery of arrears with regard to taxpayers being individuals

A significant growth of tax disputes relating to the enforcement of arrears, penalties and fines on taxes and duties imposed on taxpayers being individuals has led to a new reform.

In August 2016 the legislator introduced a new simplified procedure for the recovery of arrears. According to this reform, the writ proceeding was put in effect into the Code of Administrative Procedure of the Russian Federation. In accordance with it, the arrears from taxpayers being individuals should be collected on the basis of court orders. The court order – a judicial act passed by a single judge on the basis of the application at the request of the claimant for the recovery of compulsory payments and penalties. The court order is also an executive document and is enforced in accordance with the procedure established for the execution of court decisions. The application for a court order and documents attached to this application are submitted to a justice of the peace. This writ on the merits of the claimed requirement shall be made within five days of a receipt of the application for a court order to the court. It is imposed without a trial and inviting parties on the base of examination of evidence. A copy of the court order (a writ) is sent to the debtor within three days of the delivery of the court order. The debtor may submit objections to the execution of a court order within twenty days from the date of its communication. If within the specified period the debtor does not present an objection, the claimant is given a second copy of the court order, certified by the official seal of the court, for the presentation of it to execution. At the request of the claimant the court order may be directed by the court for execution to the bailiff, including in the form of an electronic document signed by a judge of reinforced by a qualified electronic signature in accordance with the legislation of the Russian Federation.

4. Conclusion

As it can be seen from the above analysis on the conceptual approach embodied in the Tax Code of the Russian Federation with regard to the compulsory collection of arrears, penalties and fines on taxes and duties imposed on taxpayers being individuals, it has been subjected to repeated changes. This is due not only to the need of the improvement of the legislation on taxes and fees but, above all, the desire to facilitate the mechanism of judicial procedures. As a consequence, there is a lack of coordination of the rules laid down in the Tax Code of the Russian Federation and the Code of Administrative Procedure of the Russian Federation.

Abstract

The author examines theoretical approaches contained in the Tax Code of the Russian Federation to the enforcement of the obligations to pay taxes, fees, fines and penalties imposed on taxpayers being individuals. The author analyzes the problems of correlation of the legislation on taxes and fees and administrative procedure law as well as the established law enforcement practice in the sphere of the enforcement of the obligation to pay taxes, fees, fines and penalties imposed on taxpayers being individuals.

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THE DIFFICULTIES OF TAX LAW CODIFICATION IN THE CZECH REPUBLIC

Radim Boháč[1]

1. Introduction

This article[2] deals with the possible codification of tax law in the Czech Republic. The aim of this article is to outline, describe and assess individual options (variants) that could potentially be carried out in order to codify tax law in the Czech Republic.

In legal theory, codification is defined as "a concentration of legal regulation of a large specific segment of social relations in an extensive act, the so-called code (codex)"[3]. This article is based on that concept, too.

In order to be able to actually think about the codification of tax law, it is necessary to define the concept of tax law in the first place. Therefore, the first chapter hereof deals with the theoretical concept of tax law in the Czech Republic, and the second one deals with actual positive tax law. A mere idea of what a notion of tax law actually denotes and what legal regulations are currently used in the Czech Republic for a regulation thereof is sufficient to think about the ways of its possible codification.

The third chapter hereof deals with possible approaches to the codification of tax law in the Czech Republic. Individual ways to approach the codification are briefly described, and their advantages/

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2 This paper has been elaborated within the framework of the project "PRVOUK – P06 Public Law in the context of Europeanization and globalization" which is realized at the Faculty of Law of the Charles University in Prague in the year 2016.

3 V. Knapp, Teorie práva, Praha 1995, p. 111-112.

disadvantages are assessed. In the end of the article, there is a summary of the previously made assessment.

2. Tax law in the Czech Republic from a theoretical point of view[4]

In order to be able to deal with the codification of tax law in the Czech Republic, it is necessary to define the term of tax law. Tax law cannot be, however, specified without defining the term tax. A definition of a tax is provided by a number of domestic and foreign authors, from both a legal and economic perspective.[5] I personally consider **taxes** as irreversible, involuntary, non-equivalent and non-punitive financial considerations imposed by the act and administered by the state or other persons engaged in public administration which are public revenues of public budgets and which are generally purpose-built, regular, periodical and planned. In the Czech Republic direct taxes (income taxes and property taxes) and indirect taxes (value added tax, excise taxes and energy taxes) are imposed.

In addition to taxes Czech law, however, provides a number of other financial considerations (payments) that are similar to taxes, i.e. which have a tax nature. It is necessary to mention especially charges, customs duties and public insurance premiums. **Charges** are irreversible, involuntary, equivalent and non-punitive financial considerations imposed by the act and administered by the state or other persons engaged in public administration which are public revenues of public budgets and which are generally purpose-built, regular, periodical and planned. Charges differ from taxes in equivalence and usually in purposefulness. In the Czech legal order, administrative charges, judicial charges, local charges and other charges can be found.

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4 A part of this chapter was already published in R. Boháč, Problems arising during creating of positive tax law in the Czech Republic, in: Problems of application of tax law in Central and Eastern European countries. Omsk, Vydavatelství Státní univerzity v Omsku 2013, p. 297-303.

5 Comp. M. Bakeš, M. Karfíková, P. Kotáb, H. Marková a kol., Finanční právo. 6. upravené vydání, Praha 2012, p. 154, K. Kubátová, Daňová teorie a politika. 5. aktualizované vydání, Praha 2010, p. 15-16 or L. Etel and B. Brzeziński, System prawa finansowego. Tom III. Prawo daninowe, Warszawa 2010, p. 867.

I consider **customs duty** as irreversible, involuntary, non-equivalent and non-punitive financial consideration imposed by the act in connection with the transfer of goods across the customs border which is administered by the state or other persons engaged in public administration, which is public revenue of public budgets that lacks a purpose, and is regular, periodical and planned. Finally, **public insurance premiums** can be defined as irreversible, involuntary, conditionally equivalent and non-punitive financial considerations imposed by the act and administered by the state or other persons engaged in public administration which are public revenues of public budgets and which are generally purpose-built, regular, periodical and planned. Public insurance premiums are characterized by conditional equivalence. At present, public insurance includes social security insurance premiums and health insurance premiums.

Apart from taxes, charges, customs duties and public insurance premiums, the legislation also governs other similar financial considerations as contributions, benefits, allowances and grants. Such financial considerations usually meet the characteristics of taxes or charges. Together with customs duties and public insurance premiums these considerations can be described as **financial considerations similar to taxes and charges**.

Sometimes, however, charges and other similar financial considerations are referred to as taxes or tax revenues of public budgets respectively. In this case, we can distinguish taxes in the strict sense and taxes in the broad sense. **Taxes in the strict sense** are such financial considerations that meet the above-mentioned theoretical definition of taxes; **taxes in the broad sense** are such financial considerations that meet the definition of taxes, charges or other similar financial consideration.

Tax law is a system of legal rules governing taxes.[6] If there is a tax in the strict sense and a tax in the broad sense, then there is no doubt that tax law in the strict sense and tax law in the broad sense do exist.

6 For more details see M. Bakeš, R. Boháč, Daňové právo České republiky v kontextu s právem Evropské unie, in: P. Šturma, M. Tomášek et al., Nové jevy v právu na počátku 21. století, III. Proměny veřejného práva, kapitola 5 Daňové právo České republiky v kontextu s právem Evropské unie., Praha 2009, p. 250-303.

Tax law in the strict sense is a set of legal rules governing taxes and **tax law in the broad sense** is a set of legal rules governing taxes, charges and other similar financial considerations.

3. Positive tax law in the Czech Republic (in a broad sense)

Taxes in the Czech Republic are almost exclusively regulated by **acts**, but also by some ordinances of government and generally binding public notices of the Ministry of Finance, but this is a minimum case. Acts governing taxes can be divided into several groups from different perspectives.

First of all, we can distinguish between **general and special tax acts.** The difference between these two is that the general act applies to all types of taxes in the broad sense, while the special one regulates one type of tax only, even though there are exceptions possible so it can regulate also more than one type. The general tax act in the Czech Republic is the Tax Procedure Code[7], the other ones are special. Thus, the Tax Procedure Code is an act that is general and this is the reason why this act widely differs from the other ones. The Tax Procedure Code was adopted in 2009 and is effective from 1 January 2011.

Furthermore, we can sort tax acts into acts regulating taxes, acts regulating charges and acts regulating other similar financial considerations. **Acts regulating taxes (in the strict sense)** can be divided into four groups:

1. The tax acts that were passed as a part of the tax reform in 1992, effective from 1 January 1993. Namely it is the Income Tax Act[8], the Real Estate Tax Act[9] and the Road Tax Act[10].
2. The tax acts passed at the turn of the years 2003/2004 that became effective on 1 May 2004, in connection with the fact that

7 Tax Procedure Code No. 280/2009 Coll., as amended.
8 Income Tax Act No. 586/1992 Coll., as amended.
9 Real Estate Tax Act No. 338/1992 Coll., as amended.
10 Road Tax Act No. 16/1993 Coll., as amended.

the Czech Republic had joined the European Union, i.e. the Value Added Tax Act[11] and the Excise Tax Act[12].

3. The Act on Stabilization of Public Budgets[13] (regulating energy taxes), passed in 2007 and effective from 1 January 2008, in connection with the end of the transitive period during which energy taxes in the Czech Republic did not have to be effective.
4. The Real Estate Acquisition Tax, passed in 2013 and effective from 1 January 2014 in connection with recodification of private law in the Czech Republic.

Therefore, there is a rule applicable to taxes in the strict sense which says that these are regulated by individual acts that do not include any other legal norms. An exception to this rule are energy taxes that are regulated by the Act on Stabilization of Public Budgets, but even with regard to these a future legal regulation that would be contained in an individual act is expected to be adopted. This fact contributes to the clarity of the legal regulation of taxes in a strict sense.

Legal regulations dealing with charges can be categorized as follows (according to the type of a charge that is regulated thereby):

1 Act on Administrative Charges[14], the Annex of which regulates a wide range of administrative charges that are paid either for proceedings or transactions by the administrative bodies;

2. Act on Court Charges[15], the Annex of which regulates a wide range of court charges that are paid either for proceedings or transactions by courts;
3. Act on Local Charges[16], which empowers municipalities to introduce one (or more) of the eight local charges through the adoption of a municipal public binding notice;

11 Value Added Tax Act No. 235/2004 Coll., as amended.
12 Excise Taxes Act No. 353/2003 Coll., as amended.
13 Act on Stabilization of Public Budgets No. 261/2007 Coll., as amended.
14 Act No. 634/2004 Coll. on Administrative Fees, as amended.
15 Act No. 549/1991 Coll. on Court Fees, as amended.
16 Act No. 565/1990 Sb., on Local Fees, as amended.

4. Acts regulating other charges (e.g. the Act on Waste that regulates the charge for depositing waste in landfills, or the Act on the Protection of Air that regulates the charge for polluting the air).

Regarding the first three groups, the mentioned acts regulate charges exclusively. For the last category it is, however, typical that the charge is regulated in a legal regulation together with other legal norms that govern the respective area, and there are at least twenty such charges in the Czech legal system. This fact contributes to the lack of clarity of the system of charges and it makes it very hard for the addressees of legal norms to orientate themselves therein.

Finally, regarding other legal regulations that govern other similar financial considerations, I have to mention customs duty and public insurance premiums separately. Customs duties are rather specific as they are regulated by the legislation of the European Union. However, the Tax Procedure Code is subsidiarily applicable. Even though public insurance premiums, i.e. social security insurance premiums and health insurance premiums are governed by separate laws,[17] the Tax Procedure Code is not applicable when administering these. This was about to be changed by the implementation of the project of the single collection point which was, however, later set aside. Regarding other similar financial considerations, the rules that were mentioned in connection with charges are applicable. As well as other similar financial considerations even these considerations are regulated by the respective act together with other legal norms that are concerned with the respective area. As an example, it is possible to mention a charge for the face working district and a charge for extracted reverse minerals that are governed by the Mining Act[18]. Moreover, some of the financial considerations are not fully administered within the regime of the Tax Procedure Code but rather in the course of the so-called divided administration (they are imposed under the Administrative Procedure Code and collected and enforced under the Tax Procedure Code).

17 Act No. 589/1992 Coll., on Social Security Insurance, as amended, and Act No. 592/1992 Coll., on General Health Insurance, as amended.

18 Act No. 44/1988 Coll., on the protection and utilization of mineral resources (Mining Act), as amended.

It implies that the positive tax law in a broad sense is regulated by three different types of legal regulations in the Czech Republic:

1) a general act that regulates tax administration (the Tax Procedure Code);
2) acts on taxes which only contain legal regulation of one or more taxes (in a strict sense) or charges, and which contain special rules for administration of such taxes and charges at the same time;
3) acts which govern a specific area and which, among other legal norms, contain specific legal regulation and specific rules for administration of a charge or other financial consideration similar to taxes and charges.

In view of the aforementioned facts, a possible designation of the current state of tax law in the Czech Republic as at least „partially codified" is debatable. I believe that such designation is not applicable as tax procedure law (tax administration) is not comprehensively regulated by one act either. Rather, it is regulated by a general act, the Tax Procedure Code, and additionally by individual tax acts that can be characterized as special legal regulations.

In order to think about the possibilities of codification of tax law in the Czech Republic, the state described above has to be viewed as a default one.

4. Possible approaches to the codification of tax law in the Czech Republic

With regard to the aforementioned opinions, it is to be noted that any attempts of tax law codification will collide with the fragmentation of current positive tax law and with the fact that numerous financial considerations of a tax nature are regulated outside of the scope of tax laws together with other legal rules regulating correspondent areas. It needs to be further stressed that successful codification is not possible without settling and clarifying basic rules, policies and principles of tax

law and its premise is a relative rigidity and constancy of a tax system and structural elements of individual taxes.

Nevertheless, there is a possibility of considering these approaches to the codification of tax law in the Czech Republic:

- **The method of a comprehensive tax law codification**

The method of a comprehensive tax law codification assumes concentration of entire regulation of tax law in a broad sense into one act (tax code). Such code would include not only legal regulation of individual taxes, charges and other similar financial considerations (their essential and other elements), but also legal regulation of administration of these financial considerations.

The result of such tax law codification would be a relatively large legal act. In order to provide a basic idea, it can be mentioned that the Civil Code has approximately 180 thousand words. On the other hand, the most extensive tax laws, such as the Excise Taxes Act (approx. 72 thousand words), Value Added Tax Act (approx. 58 thousand words), Income Tax Act (approx. 57 thousand words), Tax Procedure Code (approx. 41 thousand words) Act on Administrative Charges (approx. 34 thousand words), together have approximately 262 thousand words. If all other regulation acts are counted in a broad sense, it can be assumed that the number of words in the tax code would be much higher, apparently more than twice the number of words in the Civil Code. The fact that some of the rules could be, as a result of one act regulation, simplified or omitted, does not change this matter at all.

The advantage of such a tax code would be its comprehensiveness. Both subjects to the tax and administrators would be certain that all legal rules relating to taxation are contained in a single piece of legislation. In contrast, a basic disadvantage of such a tax code would be its complexity, the necessity for an amendment thereof and difficulty to maintain and keep all the rules of tax law in such a code.

With regard to the current state of objective tax law, the adoption of such a tax code is very difficult to imagine since its actual preparation and approval would require several years of intensive work with an

unpredictable result. For its passage, a broad consensus would be needed in the professional and political field.

- **The method of a comprehensive codification of tax procedure law**

The part of the tax law that regulates tax administration, i.e. assessment and payment of taxes, can be identified as tax procedure law. As I have previously stated, general legal regulation of tax administration is currently contained in the Tax Procedural Code. However, a number of other, specific legal rules concerning tax administration are included in individual tax acts, with the Tax Procedural Code being used subsidiarily.

Comprehensive codification of tax procedure law (tax administration respectively) would cause concentration of every legal rule regulating tax administration (both general and particular) in one legal act.

A fundamental disadvantage of this method would be the need to determine which specific legal rules are a part of tax administration and which are not. This can be demonstrated on the due date of a tax. Many authors include the due date of a tax among essential elements of a tax[19], some of them (including me[20]) consider it as an institute of tax administration. According to the first approach to the due date, its regulation should be placed within the code, according to the second approach, however, not.

An indisputable advantage of this codification of tax administration would be consistency and comprehensiveness of tax administration rules contained in one legal act. However, a substantial disadvantage would be the separation of special rules of tax administration from legal regulation of individual taxes. Special rules without their own legal regulation of individual taxes would appear as isolated an unsystematic. Therefore, I would rather not recommend the adoption of this method.

19 M. Bakeš, M. Karfíková, P. Kotáb and H. Marková, Finanční právo, 6. upravené vydání, Praha 2012, p. 162 or P. Jánošíková, P. Mrkývka, I. Tomažič et al., Finanční a daňové právo, Plzeň 2009, p. 304.

20 See also R. Boháč, Daňové příjmy veřejných rozpočtů, Praha 2013, p. 76.

- **The method of a partial tax law codification (regulation and administration of certain taxes)**

Another conceivable method is the regulation of some taxes (in a broad sense) in the tax code and regulation of other taxes through different individual acts. This method does not have the ambition to codify the tax law as a whole, but only a certain part thereof. On the other hand, it still expects regulation of taxes (structural elements of taxes) in particular, together with their administration in one act. This method has an infinite number of submethods, naturally in order to fulfill the reason for the codification of at least a certain coherent part of tax law. The following three methods are particularly relevant herein:

1) codification of legal regulation and administration of taxes in a strict sense;
2) codification of legal regulation and administration of charges;
3) codification of legal regulation and administration of taxes and charges in a strict sense.

According to all these submethods, a part of the code should not only be the legal regulation governing structural elements and the administration of taxes and charges (following the selection of a specific submethod), but also a general legal act governing tax administration (the Tax Procedure Act), which would be used in a subsidiary way for tax administration not governed in the code.

An advantage of this method would be comprehensive and unified legal regulation of the most important financial considerations of a tax character in one legal act. However, unclarity regarding the criteria that would be decisive in order to consider a particular financial consideration to fall within the scope of the code can be considered to be a disadvantage. The thing is that it is questionable what criteria, i.e. whether the designation of a financial consideration or its material nature, should be made decisive. I would personally choose the material nature under the condition that such consideration is designated as a tax or a charge in the code. This could entail, however, that such a code will be less likely to be politically accepted.

- **The method of a codification of general rules of law and tax administration**

The least ambitious method of tax law codification in the Czech Republic is a method of codification of general rules of law and tax administration. Considering the fact that the code would contain only these general rules of law and administration of individual taxes, suitability of potential designation of this process as a tax law codification is the question.

This method is currently applied only in the area of tax administration as the Tax Procedure Code governs general rules of tax administration. Similar legal legislation for general regulation (structural elements) of individual taxes is missing. Essentially, it would only mean that basic rules on structural elements of taxes would be added to the current Tax Procedure Code. Tax calculation or a budgetary determination of taxes may be used as an example of such general rules.

A fundamental disadvantage of this method is the fact that it is in its essence no longer a tax law codification but merely an expansion of a general legal regulation governing tax administration. On the other hand, the introduction of this method would be the easiest one of all aforementioned methods.

5. Conclusion

The goal of this article is to briefly describe and evaluate different methods through which the codification of tax law in the Czech Republic could be carried out. In the article, four basic principles of codification in the Czech Republic are mentioned.

The first method of a comprehensive tax law codification is the most proper one from the theoretical point of view, however, admittedly, very difficult to implement. Tax code in this form could contain the entire legal regulation of individual taxes and their administration in a broad sense.

The second conceivable method of the Czech tax law codification is the method of comprehensive codification of tax procedural law.

This method would mean the concentration of all legal rules governing tax administration (both general and particular) in one legal act. In my opinion, this model is not suitable with regard to the separation of special rules of tax administration from the regulation of individual taxes.

The third method of a partial tax law codification assumes both essential legal regulation of some taxes (structural elements of taxes) and also their administration. This method contains a number of submethods. However, the only methods that are realistic are these of the codification of legal regulation and administration of taxes in a strict sense, codification of legal regulation and administration of charges, and codification of legal regulation and administration of taxes and charges in a strict sense. The tax procedure code would be a part of this code in every aforementioned case. The tax code that would be formed in accordance with this method could be a contribution to the Czech law because of the concentration of a regulation of the most essential taxes or charges and concurrently general legal regulation of tax administration.

The fourth method of a codification of general legal regulation and tax administration is not in fact codification in its essence, but rather an expansion of the existing general legal regulation governing tax administration. For this reason, I would not recommend such method, even though its implementation could be the easiest.

Hence, it follows that the third method – the method of a partial tax law codification – could be considered as the most appropriate. The remaining question is whether tax law should be codified at all, and whether the benefits of codification would outweigh its drawbacks. It would have to be the subject of thorough studies and analyses.

Abstract

The goal of this article is to briefly describe and evaluate different methods through which codification of tax law in the Czech Republic could be carried out. In the article, four basic principles of codification in the Czech Republic are mentioned.

The method of a partial tax law codification could be considered as the most appropriate. The remaining question is whether tax law should be codified at all, and whether the benefits of codification would outweigh its drawbacks.

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VAGUE TERMS AND GENERAL CLAUSES IN THE TAX CODE – INTRODUCTION TO THE FIELD

Paweł Borszowski[1]

1. General observations – the issue of flexibility in tax law

Consideration of the possibility of introducing the tax code is a multifaceted issue. Undoubtedly, in the first place it would require an examination of not only the concept, but its assumptions. Developing and implementing the regulations which could be described as the tax code is, of course, an extremely difficult task. However, this should by no means constitute an obstacle to take such an action, which consequently leads to the creation of the Code. Clearly no haste is advisable in this regard, whereas the creation of the right atmosphere around the concept of developing such a code would be more than fitting here. Hence, conferences have proven to be especially valuable, whose subject revolves around the very concept of the tax code[2].

One of the first issues already considered in the context of the assumptions of the aforementioned concept of the tax code should be taking a position regarding the scope of the code regulation[3]. It seems that the functioning rules of the Tax Ordinance could constitute a point of reference[4]. Therefore, another issue to consider in the context of this concept would concern the relationship between the tax code and the normative matter, which would remain under the specific provisions of tax law.

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1 Professor, University of Wroclaw (Poland).

2 An example would be a scientific conference titled "The Tax Code – is there a need?", organized by the Department of Financial Law and Financial Law Scientific Association on 27-28 March 2014 at the Faculty of Law, Administration and Economics of the University of Wroclaw.

3 The doctrine points to an even wider recognition, and thus to the creation of a code of levies. C. Kosikowski, Ogólny kodeks daninowy zamiast ordynacji podatkowej, „Przegląd Podatkowy" 2014, no. 9, p. 11 ff.

4 The Tax Act of 29 August, 1997 (Journal of Laws, 2015, item 613).

However, regardless of the weight of the scope of normative matter regulated by the rules of the tax code, one of the most important issues already at the stage of the assumptions of the concept itself would be the selection of appropriate legislative technique. It seems that the key to success in the creation of new regulations lies first in the proper mapping out the area of regulation and, secondly, in the selection of appropriate legislative techniques.

The subject of discussion in this paper is the second element defined by convention, hence the selection of the appropriate measures of legislative technique. One common means of legislative technique which should be used in the regulation of the tax code are vague terms and general clauses, which can be defined as measures of the legislative technique that create flexibility in the tax law. The issue of flexibility in the tax law is simplification which, however, is a consequence of the wording of the legislator used according to provision § 155 on the regulation of ''The Principles of Legislative Technique''[5]. Since the norm giver uses the formulation that points to the need to ensure flexibility in the text of the normative act, it can be assumed that it is a matter of the need to ensure flexibility in the provision of tax law as part of the text of the normative act. As a result, it is not a question of the flexibility of the text of the normative act itself, but rather about the flexibility of situations related to the text of the normative act.

The use of the legislative technique that creates the flexibility of tax law within the framework of the tax code is inevitable. Constituting not only a consequence of the use, including in the provisions of the Tax Ordinance, of the aforementioned legislative technique, this should be seen more broadly. It is not, however, about the wider use of appropriate means of legislative technique, but rather about their correct application. In this paper, vague terms and general clauses were adopted for analysis as sources that create flexibility in the tax law. These techniques of legislative measures are mentioned by the norm giver, at the very beginning, in provision § 155 on the regulation of ''The

5 Ordinance of the Chairman of the Council of Ministers, 20 June 2002 (Journal of Laws 2016, item 283).

Principles of Legislative Technique''. In addition, they are used by the legislature in different areas of the Tax Ordinance.

It seems, however, that the tax legislator does not appreciate the importance and significance of vague terms and general clauses. It is, in fact, one of those measures of legislative technique by which one can try to limit the pursuit of excessive regulation of tax law changes[6]. There is no doubt that the use of vague terms and general clauses in the area of tax law and thus the public law of the administrative law regulations is not an easy task. Therefore, of particular importance is the understanding and application of the criterion of the use of these measures of legislative technique, and thus the criterion of the need to ensure flexibility in the text of the normative act in the area of the tax code. Subsequently, the placement of vague terms and general clauses within the institutions, which the tax legislator should use to construct the basic scope of regulation of the tax code, should be considered. One of the major problems with which it would be desirable to confront, in the context of the use of vague terms and general clauses, is their application to situations where a norm giver uses legal definitions. It is, therefore, worth considering the criterion of the need for these measures of legislative technique in the field of legal definitions and pointing out the postulates by which a norm giver should be guided in this case.

The research objectives are intended to confirm the thesis that a norm giver should, within the framework of the regulations of the tax code, use the instruments in the form of vague terms and general clauses but not in a way that makes it hitherto in the regulation of the Tax Ordinance. The point is to respect the introduction of determinants of vague terms and general clauses and their proper placement within the norms of the tax code.

6 For a broader discussion, see P. Borszowski, Elastyczność a zmiany prawa podatkowego, XXV lat przeobrażeń w prawie finansowym i prawie podatkowym: ocena dokonań i wnioski na przyszłość, Z. Ofiarski (ed.), Szczecin 2014, p. 379-387.

2. Determinants of the introduction of vague terms and general clauses in the tax code

The main issue in the context of considering the issue of the use of vague terms and general clauses in the regulation of the tax code is the need to discern the determinants of their introduction. For it seems that this is one of the main shortcomings of the current state of the use of vague terms and general clauses, which unfortunately is reflected in their use. The introduction of determinants of vague terms and general clauses under the provisions of the tax code should be sought in the initial regulation as it seems for each case of the use of these measures of the legislative technique, i.e. § 155 on the regulation of ''The Principles of Legislative Technique'', in which the criterion of the need to provide flexibility in the text of the normative act has been formulated. The criterion of the need to ensure flexibility in the text of the normative act is a solution in a universal sense, and thus with the intention to adapt to any regulation set in the legal system. Hence a norm giver uses at this stage – somewhat the initial stage – wording that provides for flexibility, and accordingly the term "need". Undoubtedly, this wording should be related both to the branch of law as well as to the method of adjusting the language which the branch of law uses. Hence, the criterion of the need to ensure the flexibility of the text of a normative act at the initial stage, thus at the stage where the system itself is justified, and where it is appropriate to justify it within the framework of applicable law. It would be difficult to formulate an initial criterion for the flexibility of the text of a normative act without a solution that permits flexibility.

Taking into consideration, therefore, the criterion of the need to ensure flexibility of the text of the normative act at the first or initial stage, it must be assumed that the first of the determinants of the introduction of vague terms and general clauses in the studied problematic area should be justifiable in the system of the applicable law. That system justification involves considerations made at a more general level, i.e. at the level of the systematic justification for the introduction of the tax code itself. It is not, however, a question of searching for the introduction of determinants of vague terms and general clauses in the tax code at the stage of the justification of the system for the introduction

of this normative act. It is, in fact, a different level of discussion, i.e. considerations regarding the advisability of introducing the tax code. In this sense, it is not so much a search for the introduction of determinants of vague terms and general clauses at the stage of justification for the introduction of the tax code, but rather the consequences of that systematic justification. In other words, the first of the determinants of the introduction of vague terms and general clauses into the tax code is a consequence of the justification of the introduction of the tax code.

The second of the determinants of introducing vague terms and general clauses into the tax code has already been defined in a direct way, and is related to the criterion of the need to ensure flexibility of the text of the normative act to the area of tax law. Considering the determinants in this area it must first be considered whether it is the determinant which is understood as the one that leads to flexibility of the tax law in the sense of its creation by determining vague or general clauses, or whether it is the determinant which is understood as the one that only confirms the aforementioned flexibility. These doubts are a consequence of the use by a norm giver of the wording "to ensure" upon the criterion of need. It should be assumed that the legislator, in provision § 155 on the regulation of ''The Principles of Legislative Technique'', has used this expression not to create a sense of the existence of flexibility of the text of the normative act, where the introduced measures of legislative technique are only there to confirm this flexibility. It should be noted that the use of this phrase is probably a consequence of the use of a rather blurry wording of *need*, an expression that can be understood in an excessively individualized way. Hence, it should be assumed that it is about such an understanding of the determinant which creates a degree of flexibility in the text of the normative act in the area of tax law and does not confirm the existing flexibility.

The indicated understanding of the determinant constitutes somewhat a foreground to its wording. At the same time, one cannot underestimate this foreground since a misunderstood determinant, only meant to confirm the already-created flexibility, can lead to an unwarranted raising of the degree of flexibility which, above all, does not have a basis in the tax law before vague terms or general clauses are,"added" to it.

The basic introduction of the determinant of vague terms and general clauses stems from the ‚ratio'' of the criterion of the need to ensure flexibility in the area of tax law and, therefore, the public law of administrative and legal method of regulation. For it seems that the criterion of need – as already indicated – has a universal dimension, i.e. introducing to the area of the regulation, while the legal nature of the regulation and the adopted method determine the application of the measures of legislative technique, and thus indicate, simultaneously, the determinant. It, therefore, seems that this determinant will be the need to ensure flexibility of the text of the normative act in the area of tax law, and thus the need to ensure flexibility of the tax code. It does not seem that such specified introduction of determinants of vague terms and general clauses in the area of the tax code constitute a restriction of a rather broad wording of the criterion of the need to provide this flexibility.

The two indicated determinants might be applied to the entire tax law. Hence, another, third, determinant should be proper for the regulation of the tax code. Involved in this case is the motivating factor for the introduction of vague terms and general clauses that is considered at the level of the tax code. First of all, the determinant stems from the consequence of the relationship between the matter of general tax law designed to be placed within the framework of the tax code, and the matter set out in the provisions of detailed legislation of tax law. Secondly, it is the consequence of the choice of a legal institution based on which the provisions of the tax code will be constructed. The first level of forming this determinant determines the proper selection of these legislative technique measures depending on whether they are general or specific provisions of tax law. In turn, the second level is a consequence of the specificity of the adopted institution. It seems that such an institution, based on which one can formulate the rules of the tax code, could become the institution of tax liability, already used in the Tax Ordinance as well as previously in the Act on tax liabilities [7].

7 The Law of 19 December 1980 on tax obligations (Journal of Laws, 1993, No. 108, item 486 with amendments).

The designation of the determinants on the level of the tax code itself is the last phase of formulating these determinants. The determinant resulting from the specificity of institution of tax liability becomes a key factor. At the same time, these determinants should be considered together with the one that results from the relationship between the matter of general and specific provisions of tax law. The correct choice of legislative technique depends on whether or not the matter concerning the tax liability as part of the tax code has been adequately defined.

3. The location of vague terms and general clauses in the regulation of tax liability

Individual introduction of determinants of vague terms and general clauses to the tax code can be represented as some, conventionally called, phases of deciding to take advantage of these measures of legislative technique. The last of these phases will thus concern the institution of the tax liability under which these vague terms and general clauses should operate. Due to the fact that the presented study focuses only on the introduction to this difficult issue of tax law, considerations shall focus – as it seems – on the key institutions for the tax code, i.e. on the institution of the tax liability. There is no doubt, however, that the provisions of the tax code should also apply to tax regulations procedures, in which should also be considered the placing of the appropriate means of legislative technique. However, this is a matter beyond the scope of this study.

Thus, in the introduction of vague terms and general clauses to regulate the tax liability, one of the first procedures is their positioning. When examining the location, it should be considered whether it is about the inclusion of a static analysis of tax liability and, therefore, through its elements, or the inclusion of dynamic analysis, i.e. through certain stages of the implementation of this tax liability. It should be assumed that the placement of vague terms and general clauses is considered in order to provide for a dynamic analysis of tax liability. It is a matter of allowing an appropriate degree of flexibility by placing the

terms of vague and general clauses in the framework of the formation of tax liabilities, securing their execution and expiry.

Thus, considering the already identified introduction of determinants of vague terms and general clauses to the tax code, it should be assumed that the positioning of vague terms and general clauses is necessary: firstly for the proper "opening" of tax liability; secondly, to determine the proper scope of the legislation aimed at guaranteeing that this obligation will be carried out, and thirdly to organize properly the ways leading to its expiry. For each of these three phases of dynamic analysis of the tax liability, the proper positioning of vague terms, or general clauses, must be carefully considered. In other words, identified as corresponding to the specifics of the tax law, the criterion of the need to ensure flexibility of the text of the normative act manifests itself de facto in the introduction of determinants of vague terms and general clauses examined for each of the three phases. A lack of reference of these determinants for a given implementation phase of the tax liability can lead to negative effects as a consequence of improper positioning of these measures of legislative technique. The effects of improper positioning of vague terms and general clauses may become apparent if a degree of flexibility is created that exceeds that which is appropriate for a given implementation phase of this liability. In this case, the effects can exceed more broadly, beyond the tax law regarding the key relationship between business transactions and tax law.

Therefore, the importance of the location of vague terms and general clauses in a given implementation phase of tax liability cannot be underestimated. Maneuvering these legislative technique measures is important not only to tax law, but also to a branch of private law closely related to this law[8]. Hence, not so much maneuvering should be postulated, which – as shown by the current state of regulation – causes too high degree of flexibility, but the appropriate positioning of these legislative technique measures, and thus fitting into the implementation phase of tax liability.

8 For more on the subject of the relationship between tax and civil law, see R. Mastalski, Prawo podatkowe, Warszawa 2016, p. 28-30.

4. The question of the use of vague terms and general clauses in legal definitions in the tax code

In considering the initial issues related to the introduction of vague terms and general clauses in the provisions of the tax code, it seems that there also arises the problem of these measures of legislative technique in the context of legal definitions. It can be assumed that one of the ''Code expectations'' is the choice and construction of the corresponding legal definitions[9]. Undoubtedly, therefore, in addition to the structure of the tax liability, the legislator's actions should also include the creation of a dictionary of legal definitions, with particular meanings for the entire tax law, in view of the role of the tax code. The initial issue is whether, when creating legal definitions in the tax code, such measures of legislative technique that create flexibility in the provisions of tax law should be avoided. It should be assumed that such a formulated postulate should not be promoted. Creating legal definitions without the use of the content of the legislative technique which create flexibility, i.e. especially when vague terms are involved, cannot be presumed somewhat in advance[10]. It should be noted that norm givers themselves refer to vague terms as a reason for the creation of legal definitions[11]. It is, therefore, a matter of defining concepts based on vague terms. And in this case it comes to creating legal definitions on the assumption to limit that vagueness. It seems that in the area of tax law and, therefore, considering here the issue of the tax code by reducing the vagueness through legal definitions could become quite a good mechanism, on the one hand, increasing the flexibility of tax law, on the other hand, however, ''controlling'' the process of making it more flexible because of the administrative and legal method of regulation or the implementation phase of tax liability. In this case, therefore, it is a matter of connecting the two actions of the

9 See also B. Brzeziński, O zasięgu definicji zawartych w ordynacji podatkowej, in: Ordynacja podatkowa w teorii i praktyce, L. Etel, ed., Białystok 2008.

10 On the other hand, it would be much more difficult to use them in the form of legal definitions of general clauses. I think of classic general clauses, and thus to those to which the norm giver refers in provision § 155 of the regulation on the "Principles of Legislative Technique". M. Zieliński, in: S. Wronkowska, M. Zieliński, Komentarz do Zasad Techniki Prawodawczej, Warszawa 2012, p. 297.

11 In accordance with the provision §146, paragraph 1, point 2, of the regulation concerning the issue of "Principles of Legislative Technique", where a definition is formulated for a given term which is vague in the law or other normative act, it is necessary to make it more precise.

legislature, i.e. increasing the flexibility and reducing its degree by legal definitions.

Another issue with which the norm giver creating definitions in the tax code should come across are the ways in which the measures of legislative technique are made more flexible, in the context of an already-introduced definition that is not necessarily used to limit the scope of vagueness of the defined determinant. Similarly, in this case a call for action to strive for the elimination of the legislative technique measures ensuring flexibility in the provisions should not be postulated. In this case, the tax legislator must confront two levels of analysis, i.e. firstly the desire for conceptual precision in the framework of a created legal definition and, secondly, the desire for a more flexible provision of tax law which is de facto a "component" of a legal definition. At the indicated two levels, which should be taken into account by the legislator, the introduction of determinants of vague terms and general clauses are imposed and, thereby, the requirements arising from the implementation phase of tax liability and administrative and legal methods of regulation.

5. Summary

The development and implementation of the tax code to the applicable law system is a difficult but feasible task. This would be also a good time for a gradual transition from the law on tax liabilities through the Tax Ordinance to the tax code. The initial goal should be for the legislator to choose the matter covered by the tax code and the legislative technique that should be used. One of such measures of legislative technique, considered to be typical ones, are vague terms and general clauses. The introduction of these measures in the area of the tax code can become a good mechanism which is one antidote to too-frequent changes in tax law. The value of these measures of legislative technique should increase due to their use in the framework of a legislative act of a code rank. Therefore, in introducing vague terms or general clauses, the created degree of flexibility related to the relationship between the general and the specific provisions of tax law should also be taken into

account. While the decision to implement these measures of legislative technique is beyond doubt, some concerns may appear when it comes to how they enter into the framework of the tax code. In this regard, it is advisable to adhere to the determinants indicated in the article and their proper positioning.

Abstract

The article describes the introduction of vague terms and general clauses to the provisions of the tax code. The author has dealt with the initial issues, putting the thesis of the need for a norm giver to use, in the provisions of the tax code, these measures of legislative technique, but not as it works now. Therefore, the author points to the need to respect the introduction of determinants of these measures of legislative technique and some rules for their proper positioning in the provisions of the tax code.

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MAXIMS AND PRINCIPLES OF TAX PROCEEDING[1]

Mária Bujňáková[2]

1. Introduction to tax system and taxation

In general, the system (derived from the Greek *systéma*) can be defined as a whole consisting of several components with mutual interconnections and networks organized in a logical sequence. Typical features of the system are its relative independence, stability and relative operation[3].

As the most significant revenue of the state and local budgets, taxes are used to fund social benefits, finance public needs and activities. In this respect, the issue of optimization of taxes or of the whole system of taxation has gradually become more topical. This matter has long been the major concern of many discussions and the centre of attention of many tax theories. Adam Smith in his masterpiece titled "*An Inquiry into the Nature and Causes of the Wealth of Nations*" postulated four basic canons of taxation, i.e. maxims the state should implement in its tax policy – equality, certainty, convenience of payment and economy of collection. His theory inspired other economists, for example J. Stiglitz, who proposed a theorem with requirements for optimal taxation – equality, administrative convenience, simplicity, economy of collection, tax certainty and transparency[4]. Taken from the perspective of eventual implementation, the said criteria may even seem unrealistic. Thus, a question may arise whether these criteria can be satisfied

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3 V. Babčák, Slovenské daňové právo, Bratislava 2012, p. 55.

4 A. Schulzová et al., Daňovníctvo: daňová teória a politika, 2 prep. vyd., Bratislava 2009, p. 14. Pozri aj: K. Červená, Daňová politika verzus ekonomická efektívnosť v období krízových javov, in: Dny práva 2012, Brno 2013, p. 1967-1976.

simultaneously. The fulfilment of one criterion usually results in the infringement of another. The content heterogeneity of the postulation of optimal taxation allows for various interpretations, definitions and implementation.

The economic theory approaches the individual theories more or less from the economic perspective, however, the legal aspect and legal nature cannot be disregarded either. In the theory of tax law, the concept of taxation denotes a wider concept than that of a tax system. These terms are similar in meaning, but they cannot be considered to be identical. Taxation in the conditions of the Slovak Republic comprises the following: the tax system, legally and organizationally arranged system of authorities in charge of tax administration and other related activities, the system of instruments, methods and procedural actions these authorities employ in relation to taxpayers or other persons/ entities.

It is generally known that the tax system must be strictly differentiated from the concept of taxation. The tax system in a state is viewed as a system of taxes imposed and collected in the state in a certain period of time. The tax system always depends on various factors, such as the system of government, size of the state, membership in international organizations as well as its political and cultural development. The Slovak Republic has also undergone the process of transformation of the tax system and undertaken a tax reform. The tax reform included complex changes in taxation and the tax system. The tax system is composed of various taxes which are stipulated in the substantive tax law[5]. A very significant feature of the tax law is its division into substantive and procedural parts. The definition of the tax itself comprises several properties typical of this institute and are reflected both in substantive and procedural rules[6].

At this point, our attention shall switch to the principles and maxims of tax administration exclusively, concretely to procedural actions in tax administration. For the purposes of tax administration, the formal

5 J. Medved et al., Daňová teória a daňový systém, Bratislava 2009, p. 14.
6 M. Karfíková, Daňové řízení. In Finanční právo, Praha 2009, p. 256-277.

delimitation of the concept of tax is enshrined in the provision of the section 2 of the Act no. 563/2009 Z.z. /Coll./ on tax administration and to amend the relevant Acts (Code of Tax Procedure). Under this Act, tax is deemed to be a tax as stipulated in special legal regulations. Our point of departure is the definition of the concept of tax as postulated in substantive rules, it means in various laws on taxes and in other related legal regulations[7].

2. Maxims and Principles

In our view, tax law is a separate branch of law defined as "a collection of legal rules regulating tax relations at the formation of the tax system, at the implementation of its component parts, at the organization of tax administration and at the execution of tax administration[8].

The Code of Tax Procedure embodies the fundamental procedural rules aimed at the implementation of the substantive law. The Code is of a *lex generalis* nature, i.e. where the legislation governing a specific subject-matter, *lex specialis*, contains no specific subject-matter regulation; it is inevitable to apply the provisions of the Code of Tax Procedure[9]. This serves to ensure the integrity and functioning of the procedural aspect of tax administration. The procedural tax law itself is based on certain principles and maxims regulating the process of the whole tax administration. Other branches of law are also governed by various principles and maxims, and owing to these principles and maxims, laws can be applied and procedures created.

The continental legal system is based on written law keeping legislation as the foremost source of law. The position of legal principles in this system has gradually gained importance, especially due to the fact that legal rules are frequently unsystematic, descriptive, their addressees find it difficult to read them, and they are often accompanied by deficiencies caused by legislators. Thus, the investigation of the legislative intent of the legal rule shall serve as the point of departure

7 For example, the Act no. 431/2002 Z. z. /Coll./ on accountancy as amended.
8 V. Babčák, Slovenské daňové právo, Bratislava 2012, p. 60.
9 For the details, see section 1 subs 2 of the Code of Tax Procedure.

– it means, it is essential to understand what the legislator meant by it. The intent itself, the purpose of the legal rule is interconnected with the legal principles, and the process of recognition of the intent requires the principles be considered since they support the recognition and help to understand mutual connections between the legal rules and the individual institutes.

Theoretical viewpoints concerning these principles differ especially with regards to the dispute between the positive law and natural law understanding of law. According to the positive law theory, the law is what is enshrined in valid legal regulations; i.e. what forms the content of the respective legal rule. On the other hand, natural law supporters hold the view that these principles can also be embodied in other sources than legal rules, and their use is not conditioned by their existence in legal rules[10]. As a result, there exists no single definition of the concept of a principle. Legal theory postulates that a legal principle cannot be defined merely on the basis of generalization of rules that were elevated at a higher degree of abstraction. A principle cannot be inferred from the generalization of a rule, rather, it should be approached from the concrete regulation back to the ideas it was built on[11].

Ronald Dworkin was also concerned with the issue of legal principles, and his essays depicted the difference between legal principles and legal rules. The difference is of a logical nature – rules are to be applied in the all-or-nothing fashion. If the facts a rule stipulates are given, then the rule is valid and in this case the answer it provides must be accepted. If the rule is not valid, then it contributes nothing to the decision. Principles operate in a different manner; they have a dimension that rules do not have, that is, the dimension of weight and importance. In case of conflict, one who is to resolve it, must take into account the weight of principles and decide on the importance and weight of each. Principles represent a certain standard which is to be observed because morality, fairness and justice so request.

10 J. Čollák, Právne princípy a zásady. 2012. Accessible on the internet at: http://www.lexforum.cz/382.

11 M. Vernarský, Procesné zásady daňového konania, 2. aktualizované a dopl., Košice 2013, p. 18.

Laying on the foundations of Dworkin' theory, according to Robert Alexy, the distinction between legal rules and legal principles can only be captured when a collision occurs. When a resolution can be reached by giving general weight in the collision of rules, we talk about principles, and we shall proceed to be able to apply both to the highest possible extent. When a resolution is given unequivocally and not by giving weight, it is considered to be a rule. The positive law theory proponents criticize this theory of principles. Their line of argumentation highlights the fact that its application excessively broadens the sources of law and disrupts legal certainty. Where is the borderline when the principle becomes the law? When is it incorporated into positive law and when not?[12] For Boguzsak, "legal principles are rules of higher level of abstraction that are explicitly or implicitly, or according to *communis opinio doctorum*, immanent in the law, branch of law or institute"[13].

Generally, principles constitute the basis for positive legal regulations, they express the essence and manifest tendencies in specific areas of social relations. The theory is not consistent in defining the concept of a principle. Similarly, opinions also vary when attempting to delimitate the distinguishing features of maxims and principles. According to the theory of law, legal principles represent the cornerstone of the legal system. The legal system consists of a collection of valid legal rules and their intersections. Their primary function is to establish a basic framework where this legal system shall operate. One fraction of theorists inclines to make a distinction between them, both in theory and practice. Their standpoint is grounded on the treatment of legal principles as legal rules constituting the core of a particular institute. General legal principles are common to the whole legal system. Legal principles themselves are legal rules at a lower level of abstraction and are typical of certain branches of law. Another group of theorists defends the view that these concepts are identical, thus, these terms are deemed to be synonyms.

12 J. Prusák, Právne princípy a pramene slovenského práva, in: Právny obzor. 2003, roč. 86, č. 3, p. 264-273.

13 J. Boguzsak, Pojetí druhy a význam právních princípu, in: Právny obzor. 2003, roč. 86, č. 3, p. 241-247.

Since no unified interpretation of legal maxims and legal principles exists, dissenting opinions and controversies have also occurred with regards to procedural principles and procedural rules, but putting it simply, these concepts are not to be regarded as synonyms.

At the mention of a maxim, it is believed to be a leading idea with absolute validity, without any limitation. In contrast, a principle is connected with concrete social phenomena and relations, and it is susceptible of exceptions from its application[14].

Tax administration is implemented in compliance with the ideas the legislator defined as the principles of tax administration. They can be taken to denote "rules forming and modelling the taxation system aimed to fulfil the goals of collection of taxes"[15]. Saying it simply, they are rules of procedure in the course of tax administration both for the tax authorities, for other persons involved in tax administration as well as for those who may significantly influence the correct assessment of taxes and ensure their payment.

The exact number of principles of taxation cannot be enumerated; they undergo changes instigated by the trends in economy, economic environment, theory and practical application. Section 3 of the Code of Tax Procedure enshrines the fundamental principles of tax administration from which other principles laid down in various provisions of the Code can be derived. Principles of tax administration are the prerequisites for the correct application of tax laws and their understanding. All principles embodied in the Code of Tax Procedure are characterized by their direct binding effect and must serve as the basis for the interpretation and application of individual provisions of the Code of Tax Procedure.

3. Maxims of tax administration

Contemporary legal regulation laid down in the provisions of the Code of Tax Procedure is grounded on three fundamental maxims of tax administration:

14 V. Babčák, Slovenské daňové právo, Bratislava 2012, p. 369.
15 Daňový poriadok po novelách s komentárom, Žilina: Poradca s.r.o., p. 19.

- maxim of legality
- maxim of uniformity of procedural decision-making
- maxim of legal certainty

The maxim of legality derives especially from the Constitution of the Slovak Republic, formulated simply, from its Article 1: The Slovak Republic is a sovereign, democratic state respecting the rule of law. The Constitution and the inclusion of the concept of rule of law in the Constitution manifest the recognition of a specific idea that the power of the state must be constrained by the law. The origins of this concept can be traced back as far as Ancient philosophy under which the law "is a ruler with unlimited powers above other rulers and the rulers are mere servants of the laws"[16]. In general, it is the state with the rule of law. On the one hand, there are the citizens and on the other hand, there are the state authorities bound to respect the law, as opposed to be held above the law[17].

The state respecting the rule of law is characterized by several maxims, pillars that must be respected and observed. The idea of legal principles stretches back to Ancient Roman jurists, other have gradually developed with the formation of constitutionalism. The maxim of legality stands in the foreground among other maxims and can be approached from the formal and material perspectives. From the formal perspective, it requires the observance of the Constitution, constitutional acts, and international agreements. From the material perspective, it is viewed as the "right to the Constitution guaranteeing the basic rights and freedoms and anchoring the structure of the democratic system of government and the right to maintain the democratic constitutional principles unchanged. Constitutionality forms the core of legality, especially with regards to its principle of generally binding effect of all valid legal rules on everyone and the principle that state authorities and institutions act in compliance with the law"[18]. Summarizing the above said, the concept

16 A. Brôstl, G. Dobrovičová, I. Kanárik, Základy štátovedy, Košice 2007.

17 For details see e.g. A. Kicová, Vybrané zásady daňového konania tak, ako ich nepoznali klasické rozprávky, in: Acta Iuridica Olomoucensia, Vol. 7, no. 1 (2012), s. 26 a nasl.

18 J. Prusák, Teória práva, Bratislava, Vydavateľské oddelenie PF UK, 1997, p. 164.

of legality is formed by the obligation of all subjects to comply with the laws and legal regulations.

This maxim has been transposed into the Constitution of the Slovak Republic in Article 2 provision 2 in the following wording: "State authorities may act solely in compliance with the Constitution, within its limits, and in the manner stipulated by the laws[19]. Its narrower definition corresponds with the section 3 subs 1 of the Code of Tax Procedure under which: "Tax administration is carried out in accordance with the legally binding legal regulations, protecting the interests of the state and municipalities and maintaining the rights and protected interests of taxpayers and other persons". A right is to be understood as the subjective right of the taxpayer resulting from this procedural rule or from substantive tax regulation. The protected interest is seen as the special protection of the interest of the taxpayer provided for by substantive tax regulations or the Code of Tax Procedure[20]. The maxim formulated this way may result in conflict of interests; on one side the fiscal interests of the state are taken into account, on the other side the rights and protected interests of taxpayers and other persons are respected. In the event such a case occurs, the tax authority or the court pursuing review proceedings shall take the circumstances of the concrete case into consideration and unambiguously determine which of these two maxims takes preponderance.

In its broader sense, the legality of tax administration is a constituent part of the constitutional principle of legality of imposition of taxes and fees as expressed in Article 59 of the Constitution of the Slovak Republic: "Taxes and fees may be levied by a law or on the basis of a law". Such formulation of legal rules shall ensure that interference with the property of the taxpayers, when fulfilling the intent of tax administration, is legal and legitimate. It is indispensable that the intent of tax administration be carried out respecting the rights of the taxpayers. This idea is affirmed by the Judgment of the Supreme Court of the Slovak Republic SR/17 (for details see the Judgment of the Supreme Court of the Slovak Republic, ref. no/sp. zn. 6Sžf79/2013/.

19 V. Babčák, Slovenské daňové právo, Bratislava 2012, p. 368.
20 K. Krchlíková, M. Mrvová, Daňový poriadok s vysvetlivkami, Bratislava 2012, p. 18.

The maxim of uniformity of procedural decision-making of the competent authority at tax administration is deemed to be a maxim not formulated *expressis verbis* in the Code of Tax Procedure and despite that its existence can be deduced from other provisions. Its basic tenet is that tax administration represents a unitary and compact system. The process of tax administration comprises many acts, activities which cannot be separated and are ordered in sequence. This can be exemplified by tax proceedings which must considered *en bloc*, although the legislator labelled its individual types separately. Tax enforcement proceedings, however, must be considered separately as a relatively independent type of proceedings. The maxim of uniformity expresses the idea that even if tax proceedings are pursued and other activities and procedures carried out, the integrity of the execution of tax administration is preserved because all activities aim at correct assessment of tax and to secure its payment. These statements are also affirmed by the Finding of the Constitutional court of the Slovak Republic /for details see the Finding of the Constitutional Court of the Slovak Republic, ref. no. /ÚS SR sp. Zn. 238/06-39/.

The maxim of legal certainty represents one of the pillars of the rule of law grounded on the idea of certainty for the citizen that the laws shall be observed in relation to him. The Constitution of the Slovak Republic in its Article 2 provision 2 captures several aspects of legal certainty, the determining criterion and stabilizing feature: "State authorities may act in compliance with the Constitution, within its limits and in the manner stipulated the law". The maxim of legal certainty simultaneously corresponds with the maxim of legality setting the limits over the powers of the tax administrator[21]. The maintenance of the maxim of legal certainty presupposes clear and precise formulation of laws that allow their addressees to understand them correctly[22]. In this respect, the legislators play a significant role because their primary concern should be to submit and adopt clear, simple and comprehensible legal regulations.

21 See also: A. Kicová, Interpretácia noriem daňového práva - problematika interných inštrukcií, in: Míľniky práva v stredoeurópskom priestore 2011, Bratislava 2011, p. 35 a nasl.

22 Frequently adverse cases may be encountered. For details see: A. Románová, K. Červená, Niekoľko poznámok k elektronizácii správy daní, in: Právo, obchod, ekonomika, Košice 2015, p. 329-335.

4. Principles of tax administration

The Code of Tax Procedure of the Slovak Republic, in its section 3, regulates the fundamental principles of tax administration. These principles can be regarded as the inevitable interpretation guidelines serving as the point of departure for the implementation and application of individual provisions of legal rules in the branch of tax law[23]. Every person involved in tax administration in any way is obliged to respect and observe them. The failure to observe these rules could amount to alteration or even quashing of the decision of the tax authority. As a result of non-observance of any of the principles of tax administration, the taxpayer may suffer unfavourable consequences or even financial penalty in the form of a sanction stipulated by the Code of Tax Procedure or by other substantive rules. The Code of Tax Procedure has eliminated eventual interpretation discrepancies arising in the course of application of principles by broadening the scope of basic principles to include the whole tax administration, not only the tax proceedings.

The Code of Tax Procedure primarily regulates the following fundamental principles:

- principle of legality;
- principle of cooperation of tax authorities, taxpayers and other persons;
- principle of discretion in weighing evidence;
- principle of trial being held in private;
- principle of officiality and disposition;
- principle of informality;
- procedural equality of taxpayers;
- uniformity in the procedural action of tax authorities adjudicating factually consistent cases.

It can be pinpointed here that we attempted to analyse only the fundamental principles of tax administration, however, more principles

23 Cf: M. Karfíková, Z. Karfík, Právní úprava procesního daňového práva v České republice, in: Finanse publiczne i prawo finansowe – realia i perspektywy zmian, Bialystok 2012, p. 440-449.

resulting from various other provisions can be implemented too, and although their definition is not provided *expressis verbis* in the law, there is no doubt about their existence and implementation.

The principle of legality has already been discussed in the previous parts but it still seems important to emphasize its importance especially in its relation to the fundamental principle of rule of law. Its manifestation is visible especially in the proceedings being pursued in compliance with the legally binding legal regulations applied to the concrete tax case. On the other hand, it also comprises the legal obligation of the tax authorities to protect the interests of the state and municipalities and safeguard the protection of rights and legally protected interests of the taxpayers and other persons. The interest of the state is superior in relation to the observance of the rights and legally protected interests of taxpayers; however, taxes, as a source of revenue to the budget, cannot be collected at the cost of failure to comply with the law. Tax laws can only apply such legal measures which are directly stipulated by the law or to which the tax authorities are authorized by the law /17 Judgment of the Supreme Court of the Slovak Republic, ref.no M-Sž do V 1/00 / sp. zn. M-Sž do V 1/00.

The principle of close cooperation of the tax authorities and the taxpayers and other persons provides for the tax authority to create such conditions that would allow the taxpayers and other persons to exercise their rights; on the other hand, the taxpayers and other persons have the statutory duty to cooperate with the tax authorities. This principle also enshrines the principle of conscientious and reliable approach of the tax authority to each case under consideration. The cooperation with other persons is regulated separately in section 26 of the Code of Tax Procedure, pursuant to which other persons are the courts, state administration authorities, self-governing units, notaries public, state control authorities, persons who have documents, and other institutions. These persons are obliged to submit the required documents and disclose information and facts to conduct expeditious and economic tax proceedings and fact-finding. Had this principle not been encompassed in regulatory legislation, the taxpayer would be open to obstruct the proceedings.

The principle of discretion in weighing evidence denotes that the tax authority decides about the evidence submitted by the taxpayer at its discretion, evidence is reviewed separately and then in mutual connection. However, this cannot be understood as arbitrariness on the part of the tax authority because the weighting of evidence shall safeguard precise, truthful and compete fact-finding and the tax authority shall take into account all that is discovered in the course of the tax proceedings. The Judgment of the Supreme Court of the Slovak Republic, ref. no. 4Sž 136/99/sp. zn.4Sž 136/99/ indicates that tax proceedings hold valid both the procedural principle of discretion of weighting of evidence and the accusatorial principle to try to be applied in the proceedings. Once the facts are settled, correct discretion concerns the weighting of evidence, and the tax authority has the right or duty to attach it to one or more allegations and to reject the other by applying the principles of logical thinking.

The principle of non-publicity /trial being held in private/ relates especially to the proceedings. In general, tax administration proceedings are held in private, with certain exceptions where the nature of the case contradicts it. The principle aims to prevent the abuse of information concerning the property owned by the taxpayer. On the surface, this principle is manifested mainly as an obligation to maintain tax secrets as regulated by the Code of Tax Procedure. The validity of the principle is, however, not absolute, meaning that tax lists and data are permitted to be disclosed as well as other information and source materials indispensable for entrepreneurial activities. The principle of non-publicity is crucial in the sphere of maintenance of confidential information concerning the taxpayers. In tax administration, though, the interest of the society takes preponderance over the interest of the individual, and for this reason, the breach is possible and permissible. In its essence, it seeks to prevent the taxpayer from defending his interests by means of violation of laws to the detriment of others.

The principles of officiality and disposition are directed to determine the conditions under which the competent authority or party to proceedings is entitled to be active in proceedings, i.e. whether he may influence and how he may influence the commencement, course

and outcome of the proceedings. In principle, officiality denotes the activity of the tax authority regulated by law in relation to the taxpayer, whereas it not only captures the activity of the tax authority with respect to the commencement of the proceedings, but also the behaviour of the tax authority in the process of tax administration. In practice, it means that the tax authority is obliged to carry out the acts directed at the imposition of taxes or their enforcement in the event the taxpayer is passive and fails to act, or if he acts contrary to the provisions of the Code of Tax or substantive laws.

The connecting side of the principle of officiality is the principle of disposition based on which the parties to proceedings may, at their discretion, carry out procedural acts within the scope stipulated by a law. To provide some examples, the taxpayer is allowed to file a petition to transfer local jurisdiction, the option to inspect the files, to file to a remedial measure, etc.

The principle of informality expresses the obligation of the acting authority to consider the filings of the parties and of third persons based on the content and irrespective of the formalities. The reasoning behind this principle is the idea to prevent the acting authority from rejecting the filing despite its incorrect designation since that would amount to the violation of the right to legal protection. This principle can be encountered in various provisions of the Code of Tax Procedure. Informality, as formulated in the fundamental principles, is not to be regarded as the informal review of procedural act, but rather the review of the substantive acts and other circumstances that are determining and decisive for the imposition and collection of taxes. According to some authors, this principle cannot be viewed as the principle with economic impact of the legal act on the imposition of a tax[24]. Statutory requirements laid down on the performance of tax authorities are much stricter in comparison with the performance of the taxpayer. The decision of the tax authority must comply with the law, be issued by the competent authority, grounded on reliable fact-finding and contain the prescribed

24 J. Králik, L. Grúň, L. Balko, Základy daňového, poplatkového a colného práva, Bratislava 2001, p. 148.

formalities. The failure to fulfil these criteria may result in the nullity of the decision[25].

The principle of equal procedural treatment of taxpayers; in essence, equality in law can be understood as a legal principle. Equality is a feature typical of law, it is one of its essential qualities, although not being regarded as a legal concept *a priori*[26]. This principle is applied in all branches of law, including tax law. In tax administration, this principle is listed among other fundamental principles, and section 3 subs 7 of the Code of Tax Procedure stipulates accordingly that the taxpayers have equal rights and obligations in tax administration. This principle builds on the universal equality of people enshrined in Article 12 of the Constitution of the Slovak Republic. According to the Constitution of the SR – People are free and equal in dignity and rights. The Constitutional Court of the Slovak Republic interpreted this provision in its decision as follows: this provision is of a general declaratory nature and not that of a basic human right and freedom. It may only be applied in connection with the protection of concrete basic rights and freedoms stipulated in the Constitution of the Slovak Republic[27]. In the context of tax relations, equality is to be understood as typologically identical equality of subjects in identical type of legal relations. The tax authority is, in principle, obliged to apply the law in relation to the taxpayers equally on condition that statutory requirements have been satisfied. Not even these cases can be labelled as cases with absolute equality because it is vital to take the various possibilities and abilities of subjects to exercise their rights and protect their interests into account. The Constitutional Court of the Slovak Republic similarly holds the view that the inequality between the parties identical in type is permissible if it is objective and reasonable, if it pursues a legitimate aim, and if the relation between this aim and the means to achieve it is based on proportionality – equilibrium[28]. Tax

25 Null decision has no legal effects and is to be regarded as if never issued, section 64 of the Code of Tax Procedure. Further details see: A. Románová, K zavedeniu nulitného rozhodnutia do Daňového poriadku, in: Právo, obchod, ekonomika III. Zbornik vedeckých prác, Košice 2013, p. 367-378.

26 M. Bobek, P. Boučková, Z. Kuhn, Rovnost a diskriminace, Praha 2007, p. 4.

27 Finding of the Constitutional court, ref. no. I ÚS SR 17/99 /Nález Ústavného súdu SR , sp.zn. I ÚS SR 17/99./

28 Finding of the Constitutional Court of the Slovak republic /Nález Ústavného súdu SR sp.zn. III. ÚS SR/ 63/06/.

administration must be executed to maintain the principle of equality at all events. Had it not been carried out this way, the procedure of the tax authority could be qualified as challenging the legality of its act.

The principle of uniformity in the procedural action of tax authorities adjudicating factually consistent cases postulates that the decision-making of the tax authorities should be saved from any unreasonable differences in factually consistent cases. In principle, it seeks to ensure certain stability in legal practice. It is one of the fundamental principles which, in our view, brings about many problems in the interpretation. The tax authorities must carefully examine which case is factually consistent and the principle may need some refinement in the meaning of the Code of Tax Procedure. It is very closely connected with the principle of legal certainty which, among others, protects the confidence in law, and the interpretation of this principle or its legislative delimitation could be grounded on different procedural rules.

5. Conclusion

The paper concentrated on the fundamental principles and maxims of tax administration although other principles could not be omitted either. Despite the fact that the latter are not defined *expressis verbis*, they can be inferred from the individual provisions of the Code of Tax Procedure. The principles as well as maxims represent the fundamental legal ideas primarily aimed to delimitate a certain framework for the operation of the whole tax administration. In symbiosis they create a harmonious unit, supplement one another and allow to fulfil the primary aim of collection and payment of taxes.

Abstract

This paper deals with maxims and principles of tax proceeding. The article depicts maxims of tax administration and principles of tax administration. It was outlined in the paper that the principles as well as maxims represent the fundamental legal ideas primarily aimed to delimitate a certain framework for the operation of the whole tax

administration, which supplement one another and allow to fulfil the primary aim of collection and payment of taxes.

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QUESTIONS CONCERNING THE HUNGARIAN CODE ON MUNICIPAL TAXES – WITH SPECIAL REGARD PAID TO COMMUNITY TAXES

Erdős Csaba[1]

1. Introduction

Although the Hungarian Code on Municipal Taxes (hereinafter: the Code) was adopted in the era of the change of regime – its official title: Act C. of 1990 –, it was amended by Act LXXIV of 2014 with rules of a new kind of municipal taxes called community tax. The amendment came into force on 1st January 2015. Several municipal governments discovered the opportunities given by this new type of tax and passed decrees on it and due to the activity of municipal governments some important judicial decisions have also been born and the scientific interest and debates about the topic are getting heated up as well.

Community tax means a change of paradigm in municipal taxation as, unlike other municipal taxes, its degree has not been concretely defined and the tax subject and object have not been clearly clarified, either: *The municipal government may, within its area of jurisdiction, introduce community tax and community taxes which are not prohibited by any other act by a decree. The municipal government may levy community tax on any basis of assessment provided that it is not covered by statutory public dues of any kind. Community tax may not be imposed as payable by the State, any municipal government or organization, or by entrepreneurs acting as such*[2].

Therefore, municipal governments received a sort of blank authorization in maximizing their tax income. This paper aims at the presentation and identification of the most significant constitutional/

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2 Code Section 1/A. subparagraph (1).

constitutional law questions raised by community tax as well as the exemplification of how municipal governments have taken advantage of this form of taxation. The examination of community taxes goes hand in hand with reviewing the system of municipal authority taxes; therefore, I am briefly going to introduce this first.

The constitutional judgement of community taxes has two main areas: on the one hand, it can be judged according to the legal-financial autonomy of municipal governments, on the other hand, according to basic principles and constitutional principles.

2. The system of taxes that may be introduced by municipal governments

The Code divides taxes that can be introduced by municipal governments into two major categories: municipal taxes and community taxes. The two groups are common in that municipal governments are free to decide whether or not to introduce them. On the other hand, the major differences are the following:

- On the one hand, types of municipal taxes are set in law, therefore, building tax, property tax, personal community tax[3], tourism tax, municipal business tax can be levied.
- On the other hand, the basis and degree of municipal tax is set by the Code, so it is the Parliament which sets the object and maximum degree of taxes, municipal governments can only regulate municipal taxes among these frames.
- On the third part, income coming from municipal taxes may be used by municipal governments according to their wish, while income coming *from community taxes may be allocated for funding developments and social welfare benefits falling within the competence of the council of representatives of the municipal government*[4].

3 The Code's official translation proves to be confused in a way that one municipal tax is referred to as personal community tax, however, it has nothing to do with community tax which shall be understood as the equivalent of municipal tax.

4 Code Section 1/A. subparagraph (5).

3. Transformation of the Municipal Governments' Legal and Financial Status

With the new constitution – called Fundamental Law[5] – and the new code of municipal governments – Act CLXCXXIX of 2011on Hungary's municipal governments, municipal governments' place has fundamentally changed in the system of the separation of powers.

During the transition – just like the German model[6] – municipal governments nationalized the so called basic law model in Hungary[7]. Its essence lies in that municipal governing is regulated by the constitution as a collective basic right, therefore, municipal governments have wide autonomy against the central power. The number of tasks to be carried out by municipal governments was extremely high and its vast majority was carried out by villages and towns settlements.

Financial independence was part of this autonomy. Its basic point is that – in line with Article 9 of the European Charter of Local Self-Government (hereinafter: Charter)[8] – municipal governments are

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5 Fundamental Law came into force on 1st January 2012.

6 K. Csalló, Önkormányzás, autonómia. A helyi önkormányzatok szabályozási típusai Európában, in: F. Csaba (ed.), Magyarország helyi önkormányzatai. Nemzeti Közszolgálati Egyetem, Budapest 2014, p. 27-28.

7 Act XX of 1949 on the Constitution of the Republic of Hungary, Article 42: "Eligible voters of the communities, cities, the capital and its districts, and the counties have the right to municipal government. Municipal government refers to independent, democratic management of municipal affairs and the exercise of municipal public authority in the interests of the municipal population".

8 Charter, Article 9: "1 Municipal authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers. 2 Municipal authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. 3 Part at least of the financial resources of municipal authorities shall derive from municipal taxes and charges of which, within the limits of statute, they have the power to determine the rate. 4 The financial systems on which resources available to municipal authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks. 5 The protection of financially weaker municipal authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion municipal authorities may exercise within their own sphere of responsibility. 6 Municipal authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them. 7 As far as possible, grants to municipal authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of municipal authorities to exercise policy discretion within their own jurisdiction. 8 For the purpose of borrowing for

entitled to have adequate financial sources, of which one part has to come from municipal taxes as well as budget support should possibly be used freely by municipal governments. Though Hungary joined the Charter in 1994 and it was only announced in 1997[9], the regulation formed at the time of the transition was penetrated by these principles. Accordingly, the bases of municipal governments' management was formed by various forms of budget support, which were so called norms, that is, municipal governments decided on their utilization freely. Municipal taxes mainly had an assistive role in the management of municipal governments[10].

The Fundamental Law left the German model of municipal governments behind; instead of the basic law of the right to self-government, it only contains a declaration of the existence of self-governments[11]; however, apart from that, it also lists their most significant competences and the right to municipal self-government is only mentioned on a legislative level. Though after having compared the Fundamental law and other acts, the Constitutional Court ascertained[12] that the competences of municipal governments set in the Fundamental Law shall be understood as fundamental rights[13], in reality the constitutional protection of municipal governments decreased compared to the central power's autonomy. Municipal governments became rather sub-units of the central power, not individual actors of the separation of powers[14].

In the new system of municipal governments their functions have also been reduced, perhaps the most important change is the takeover of the management of primary and secondary schools by the central power. From the point of view of municipal governments' management, this proves to be significant as low-population municipals' – and the majority

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capital investment, municipal authorities shall have access to the national capital market within the limits of the law".

9 Act XV of 1997 on the announcement of the European Charter of Municipal Self-Government

10 R. Bird, C. Wallich, Financing Municipal Government in Hungary, The World Bank 1992.

11 Fundamental Law Article 31 subparagraph (1): "In Hungary municipal governments are set up for the administration of public affairs municipally and for exercising municipal public authority".

12 Decision No. 18/2013. (VII. 3.) of the Constitutional Court.

13 L. Csörgits, A helyi önkormányzatok, in: P. Smuk (ed.): Alkotmányjog II. Államszervezet, Győr 2014, p. 196-197.

14 L. Csink, Mozaikok a hatalommegosztáshoz, Budapest 2014, p. 170-171.

of the 3200 communities has low population – highest expenditure was the maintenance of schools.

By 2010, the indebtedness of self-governments was a common phenomenon, which resulted in – besides the governmental takeover of self-governments' debts – the decrease of self-governments' management autonomy. Its main result was that central budget supports have continued to be paid in form of tasks financing instead of norms. Consequently, if municipal governments need freely expandable sources, they are forced to make some on their very own. The result is that the role of municipal and – especially because of the type- and degree of freedom – community taxes are appreciated even more[15].

4. The levy of municipal taxes in practice

4.1. Tax levy's limits

In spite of the fact that at first instance tax levy's limits seem to be extremely wide, the truth is that it is rather hard to find such tax payers and tax objects upon which community tax can be properly levied on. I would like to show the difficulty with some examples.

According to current data[16], from 1st January 2015 until today all together 55 municipal governments have decided to introduce community tax. The data clearly shows that most self-governments levy tax on lands. It is accompanied with some problems as according to the Code *the municipal government may levy community tax on any basis of assessment provided that it is not covered by statutory public dues of any kind*. However, some fees that are compulsorily have to be paid on lands: damage mitigation contribution and field inspector contribution. The Curia's council of Self-government – a body carrying out norm control over self-governmental decrees – stated the following in connection with these fees' nature of public burden[17]:

15 Though income coming from community tax can only be used for innovational and social purposes, it does not mean a serious limit as these are typical types of municipal government expenditures.

16 Source: Hungarian State Treasury's website, https://hakka.allamkincstar.gov.hu/

17 Decision no. Köf.5.035/2015/4. of Curia of Hungary's Council of Self-governments.

– Act CLXVIII of 2011 states that farmers are obliged to pay damage mitigation contribution. Though the payment obligation of farmers is based on law, the financial fund established by the state shall ensure farmers' possible damage's financial coverage, not "public needs". Therefore, in the case of obligatory contribution it is the insurance nature that dominates, hence, it is not a public burden, which results in that lands cannot be taxed because of it.
– According to Act CLIX of 1997, municipal governments can decide on the introduction of field inspector contribution. Field inspectors are so called policing services connected to the land, carrying out asset protection. The payment, which has to be paid for receiving a service ensured by national/local public powers, based on law, basically has to be paid for receiving the given public service, and is considered as public burden. Therefore, if a municipal government levies field inspector contribution, it cannot levy land tax.

Another serious limit of community taxes' levy is that endeavors cannot be tax subjects of such taxes. This problem also arises in the above mentioned case of land tax, in which the Curia of Hungary ruled that primary producers or sole entrepreneurs cannot be burdened by such taxes. It is significant as lands are mainly cultivated by tax payers of such legal status, so the circle of taxable persons is very tight.

The so called tax of high buildings is similar to this. This tax was introduced by the village of Zsombó and has been applied to buildings higher than 30 meters. Its degree depends upon height and varies between 1.25-2.75 million forints annually. The given village has three communications towers and a water tower in its area, the tax has to be paid by their owners. At the same time, I must note that these buildings are connected to a business activity (communications and water service), so the tax levy is very likely against the law, however, the Curia of Hungary has not ruled in this case yet.

4.2. Misuse of taxation

The municipal self-government of Óbuda-Békásmegyer levied kitsch tax, which can easily be an example to be followed by other self-

governments. Kitsch tax is supposed to be levied on such buildings which suit the main architectural regulation but do not take local, individual characteristics and landscape regulations into account, hence degrading streets' aesthetical look and feeling. The annual degree of the tax is expectedly going to be 500 000 forints. Its antecedent is that the government – in order to facilitate homemaking and simplify procedures – cancelled authorization procedure in the case of buildings smaller than 300 m^2, only an announcement is necessary.

In connection with kitsch tax, I must note that the self-government does not use it as it was planned – that is to create income – but it has become a tool for influencing legal subjects' behavior. Furthermore, its aspect of the separation of powers can also be seen: the self-government planned a simplified administration procedure termination of authorization was a part of which, then the self-government reintroduced the institution, 'disguised' in the form of community tax – not as authorization but consultation, however, the essence of the procedure has not changed. Therefore, the central power's will overruled that of self-governments.

Community tax has also proved to be a tool in "persecuting" people carrying out undesirable activity in the communities, a great example is the regulation issued in Zalaapáti, where dogs became tax objects. The so called dog tax has been levied in a banded way: two dogs are free from taxation, above two, in the case of three-four dogs, it is 1 000 forint per year, in the case of maximum 10 dogs – 10 000 forint tax per year, in the case of more dogs – 100 000 forint tax per year has to be paid. It is obvious that the tax aimed at the closure of the animal shelter operating at the area of the community, this aim was also clarified by the mayor: according to him, the animal shelter shall not be operating in the area and the self-government does not have any other choice for the limitation of inland animal housing.

5. Summary

At first instance, in the altered system of the legal status, task and competence sphere as well as financial autonomy of municipal

governments, the possibility of levying community tax seems to be a reasonable choice. However, if we look more closely, the especially wide possibility covers only a few tax objects and tax subjects upon which it can be levied.

Several municipal governments do not use tax according to its original aim – the increase of their own income – they rather only regulate people's behavior, they use it as a quasi-sanction[18].

In total, I can say that community tax created as the reform of municipal tax system is partly unable to fulfill its aim, and self-governments partly apply it abusively.

Abstract

This paper deals with issues concerning the Hungarian Code on Municipal Taxes with special regard paid to community taxes. It also covers the system of taxes that may be introduced by municipal governments. Within the frames of this article the transformation of the municipal governments' legal and financial status was presented. The article also depicts the levy of municipal taxes in practice.

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REAL ESTATE TRANSFERS TAXATION IN THE CZECH REPUBLIC

Šárka Faltová[1]

1. Introduction

There are many tax laws dealing with tax administration in the Czech Republic. The general tax law is Act. no 280/2009 Coll., Tax Code, as amended. This law contains substantive tax law regulation. Other individual tax laws are considered to be lex specialis. According to the theory of financial law (Radvan, 2014: 17), **tax administration** is considered as a process. Its aim is to assess tax correctly as well as collect and enforce its payment. The tax payers must follow the procedures because of the tax law obligations.

Similarly, the theory of financial law has another term, so called **tax process.** It has a broader meaning than firstly mentioned tax administration. Tax process goes beyond the Tax Code, because it includes procedures for all participants of tax relations. Tax process deals not only with the relationship between tax payers and tax administrator. On the contrary, the smallest "piece" of tax administration is **tax proceedings**. This term represents a specific procedure to assess, collect and enforce specific tax from a specific tax payer. During the tax proceedings, a tax payer acts to a specific tax administrator in a specific tax period.

Tax administration and tax proceedings are basically specified by Tax Code, this law regulation represents lex generalis. Individual tax laws usually state specific obligations for tax proceedings and also for some structural tax elements. This leads us to one example – to a real estate transfer tax, which is regulated by Senat legal Act no. 340/2013 Coll., Acquisition Tax of Immovable Properties, as amended. This law

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is considered as a reaction to recodification of Civil Code in 2014. According to the recodification, the terminology was supposed to change as well as the whole concept of immovable properties.

The paper deals with previous and current regulation of property transfer taxation and includes the reflection of its impact on tax administration.

2. Civil Code Recodification in 2014

The recodification of the Civil Code brought many changes to the Czech civil law. The "new" Civil Code caused significant transformation of legislation in force until 2014. It was necessary to establish legislative changes to 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 was strongly bound to the transformation of an income tax – currently the income tax contains the inheritance tax and gift tax. According 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 called Senat legal Act no. 340/2013 Coll., Acquisition Tax of Immovable Properties. To complete a former context, it can be noted that during the legislative process the Chamber of Deputies was dissolved because of a complicated political situation. According to these conditions, it was necessary to deal with the situation through the institute of Senat legal Act. This solution had no precedent until 2013 in the Czech Republic. Senate is authorized to issue Senat legal Acts by the Constitution of the Czech Republic (Article 33). But it can be used rarely – only if the Chamber of Deputies is dissolved.

The new tax law brought, instead of adopting changes due to the Civil Code recodification, also some changes in the subject of taxation – in a person of a tax payer, updated exemptions and reduced administration. However, since the new law came to force, Ministry of Finance was preparing a new bill of this Senat legal Act – and the result

is a current bill that finally established an acquirer (buyer) as the only tax payer. This step will eliminate the institute of tax administration defined in Tax Code – liability.

2.1. Acquisition Tax of Immovable Properties in the Czech Tax System

Acquisition tax of immovable properties (hereinafter referred to as "ATIP") is a property transfer tax; a taxpayer pays it directly due to the basis of his income from transfer of ownership of immovable property (Pelc, 2009: XII). However, the law also refers to the taxpayer as the acquirer of property rights in immovable assets in other cases.

The law is clear that ATIP is imposed primarily on 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 it is not defined by a single definition. The synthesis of modifications in various pieces of legislation can produce a general definition – property is considered as valuable cash values that bind 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 and property taxation if it is ATIP transfer or transition to the new owner (Radvan, 2007: 235). There is a noticeable difference from property taxes that attaches the ownership of property in a state of "rest" (Bakeš, 2012: 228).

The element distinguished between the acquisition tax on the one hand, and the inheritance and gift tax on the other hand, is a paid transfer. Furthermore, ATIP, unlike the other two, can only be applied to immovable properties. The tax burden is borne directly by the taxpayer, the obligation to pay tax cannot be converted to anybody else.

As mentioned above, the concept of an acquisition tax as a tax might seem a bit inconsistent. ATIP as well as additional transfer tax is paid only once, occasionally, has no-purpose and is a mandatory transfer to the state budget. These are elements of "taxes". But there is also an obligation to pay a fee for land registration. Thus, there could arise questions if the acquisition tax is a tax or rather a fee.

2.2. Acquisition Tax of Immovable Properties Specifications

Property transfer tax is a direct property tax and it is an integral part of the Czech tax system. Purchases, sales, exchanges, settlement of ownership, acquisition of property at auction, foreclosure, foreclosures, prescription of or in connection with the assignment of the claim – all of these terms belong to the subject of the tax. A taxpayer is obliged to pay tax which is deduced from a form of acquisition of the property. This person is mostly a transferor-seller whilst a buyer is a guarantor. However, the law in other cases (e.g. investment in real property business corporations, acquisition of immovable property by expropriation, acquisition of the business establishment, the cancellation and settlement of ownership, and acquisition of immovable property on the basis of securing transfer of rights) identifies an acquirer as a taxpayer. In that case, there is no liability institute. Similarly, in a situation of transition – the taxpayer becomes the acquirer, and there is no guarantor. The acquisition value is a term used for a tax base. This value can be reduced by deductible expenses, such as, e.g., costs of expert evidence. The acquisition value can be agreed price, observed price, special price or it may be a comparative tax value. The 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 of the immovable property) or observed prices. The observed price is the price according to an expert opinion and a 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.

The tax rate of ATIP is 4% and it is linear. The law also allows exemptions from ATIP in a relatively wide range of cases, of course, with compliance with all legal conditions. Two last structural elements of taxes – payment and tax administration – are subject to the general regulation in the Tax Code. Specific conditions, in particular the relevant facts from which the obligation to file a tax return follows, are already defined directly in ATIP law. The ATIP regulates differently local jurisdiction of tax administration. And finally – property transfer tax

is considered to be the most profitable of transfer taxes and it forms a stable part of public budget.

3. The New Concept of Transfer Taxation of Immovable Properties

And what are the differences between a new law ATIP and a previous law on a real estate transfer tax? In particular, main changes concerned the definition of structural elements. Moreover, the changes are reflected with regard to the tax rate, appropriation and payment of all other elements. The law ATIP inherently follows the previous modification of property transfer tax under the act of inheritance and gift tax on the transfer. Nevertheless, it is in many ways different too.

The most significant changes are due to the reintroduction of the principle of superficies solo cedit by the Civil Code. This specified the subject of tax – now acquiring ownership of real estate is included as well as the right to build and acquire assets in the trust fund. A structural element – tax base – has undergone another significant change. The tax base is now determined by the acquisition value, as we discussed in more details in subchapter 1.2. Moreover, tax exemptions were also updated at.

The legislature´s intent was to simplify the entire tax agenda, tax administration and also provide higher efficiency of tax collection because of reducing administrative and financial demands on taxpayers and tax administrators.

4. Conclusion

The paper deals with specific tax in tax administration – the acquisition tax of immovable properties. Czech civil law was recodified in 2014, and according to this extensive change, many civil laws as well as public laws had to be adapted. This also involves changes in property transfers tax.

The previous tax called a real estate transfer tax, which was in force by Act no. 357/1992 Coll, on Inheritance Tax, Gift Tax and Real Estate Transfer Tax, as amended, was not possible to be applied to the new Civil Code. The same problem also occurred with regard to the property tax, which is closely related. The need for approving new adjustments in tax laws was more than obvious. The Civil Code implemented a new concept of immovable properties by reintroducing the **superficies solo cedit** principle**,** brought many other concepts, whether new or with a modified meaning. If adopting new laws and amendments failed, it will be impossible to collect taxes. If there is no concept of property, there cannot be the property transfers tax or property tax. This would undermine the purpose of tax administration declared by the Tax Code. Tax would not achieve its fiscal, allocative, stimulative or other functions. The state would lose not only an important and stable revenue of the state budget, but it would also increase expenses associated with additional legislative process and administrative demands for the awareness and training of officials at the time of the general depression in the tax system.

In my opinion, Senat legal Act – Acquisition Tax of Immovable Properties – can be considered as a relatively successful and beneficial act of the legislation. This law is quite clear and understandable, it effectively reduces possibilities of tax evasion. However, neither treatment is perfect. Currently, there is already being prepared an amendment concerning the subject of taxation and tax base.

Abstract

The Tax Code of the Czech Republic regulates tax administration as lex generalis. More detailed regulation is specified by individual tax laws – lex specialis. The article deals with one of these individual taxes – the object of taxation is a transfer of immovable properties. Currently, the tax is regulated by Senat legal Act called Acquisition Tax of Immovable Properties. This law is a result of recodification of Civil Code in 2014 and political situation too. The paper deals with previous and current regulation of property transfer taxation and includes the reflection of its impact on tax administration.

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THE ROLE OF THE CODE OF TAX PROCEDURE IN THE FIGHT AGAINST TAX EVASION AND TAX FRAUD[1]

Ivana Forraiová[2], Karin Prievozníková[3]

1. Introduction

Tax law, as one of the most important branches of law in any state system, is going through a dynamic, continuous and never ending process of transformation. The law maker has to ensure its conformity with current trends typical for every concrete period and tax law has to be able to challenge any significant phenomenon. In the modern era of tax law, there are typical various tendencies manifested in legislative changes, reflected in the decision-making activity of courts as well seen in the approach of the tax authorities and taxpayers themselves in the implementation of the tax legislation. Among one of the biggest and the most serious challenges which national legislators and international organizations (especially in the European area, it is EU[4] and OECD) have to face, it is necessary to include the fight against tax evasion and tax fraud[5].

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At the beginning, we have to say that none of the tax law provisions expressly includes the obligation that the taxpayer has to pay the tax in the maximum possible amount within the purview of his creditworthiness. From the psychological and logical point of view, it is a natural phenomenon that wherever there are concerns about the protection of taxpayer´s property against the state interests of tax collection, it is a starting point for tax optimization. In the judgment of the Supreme Administrative Court in the Czech Republic, 2 Afs 173 /2005-69, it is even stated that rational economic behavior of entrepreneurs is an effort to minimize costs and maximize profits. *The natural expression of this behavior is the effort to optimize obligations to the state (e.g. tax, payments for health and social insurance). If this is done legally, in line not only with the Commercial Code and tax regulations as well as Employment Act, the entrepreneur cannot be punished…*[6]

The Constitutional Court of the Slovak Republic in its judgment I. ÚS 241/07 declares that *all tax provisions are inherently based on the fact that their priority is to protect the interest of the state, respectively other public bodies (municipalities, higher territorial units), to ensure a sufficient amount of income to finance their budgets. The basic purpose of tax proceedings, within the framework of which the rights and obligations of taxpayers will be decided, is the collection of tax in the way that the result of all proceedings processed by all tax authorities would not lead to the reduction in tax revenue of public budgets*[7]. We have to add that the Tax Code as a basic procedural legislation does not constitute a waiver and the ultimate aim of its provisions is to ensure the payments of taxes properly and on time.

The provisions of the procedural codes, in general, govern the basic principles of legal process, whether of the courts or public authorities, and they do not represent the subject of frequent legislative changes. The relative stability of the principles of legal process is undoubtedly related to the fact that it is characterized in its essence, which usually does not change in cases where there is a partial change in procedures

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in: Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác, Košice 2015, p.115-128; M. Štrkolec, Náčrt možností vybraných inštitútov daňového práva v predchádzaní daňovým únikom na DPH, in: Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác. II. diel Košice, Košice 2015. p. 301-3012.; A. Románová, Few reflections on application of principle of proportionality in view of fight against tax frauds and tax evasion, in: Daňové právo vs. daňové podvody a daňové úniky: nekonferenčný zborník vedeckých prác. II. diel Košice, Košice 2015, p. 181-190.

6 Judgment of the Supreme Administrative Court in the Czech Republic 2 Afs 173 /2005-69.

7 The Constitutional Court of the Slovak Republic, Judgment I. ÚS 241/07.

by the competent authorities and parties. Similarly, this is not different in the case of tax law and it has to face too many amendments annually. Thus the amendment of the provisions of section 3 subsection 6 Act No. 563/2009 Z.z. /Coll./ on tax administration (The Code of Tax Procedure), effective from 1 January 2014, certainly did not escape the attention of professional practice and jurisprudence. All the more when the will of the legislator expressed in the explanatory statement should be implementation the so far non-existent general prohibition explicitly called unlawful tax optimization, which is now opened to debate in several countries around the world.

2. The importance of the Code of Tax Procedure in the fight against tax evasion and tax fraud

In developed countries, (in relation to the existence of taxes) tax pluralism is a typical phenomenon. In practice, the number of the stored types of taxes is levied mainly as a combination of direct taxes and indirect taxes. This has a significant psychological effect on the perception of the tax burden on taxpayers. In the Slovak Republic, the following taxes are levied: value added tax, excise taxes, income tax (which has two components – personal income tax and corporate income tax), and tax on motor vehicles whereas municipalities can levy local taxes on a facultative basis.

Tax pluralism is a logical barrier in the reception of a single "Tax Code", which would govern substantive and procedural aspects of taxation. The legal regulation would be extremely large and also amendments would be enormously numerous. For this reason, there are specific acts on concrete taxes. On the other hand, it is possible to unify the procedural aspects of their administration. As we said above, a general legal act of tax procedure in the Slovak Republic is Act No. 563/2009 Z.z./Coll./ on tax administration (The Code of Tax Procedure). The impact of the provisions of the Code of Tax Procedure in the fight against tax evasion and tax fraud can be seen on several levels, in particular in the existence of mechanism which have a preventive, controlling and punishing function.

A fiscal function of tax law- as its most important function – is expressed directly *in initio* of The Code of Tax Procedure. It stipulates that The Code of Tax Procedure regulates the administration of taxes, rights and obligations of taxpayers and other individuals incurred in connection with tax administration. Tax administration is a process connected with ensuring of payment of taxes under this act or special regulations. The legislator, however, is aware that the taxpayer seeks ways how to minimize their tax duty, even in the form of illegal activity. The Code of Tax Procedure is the appropriate instrument to incorporate institutes effective in the fight with tax fraud and tax.

3. A few comments on selected institutes of the Code of Tax Procedure

If we had to select some of the preventive and control institutes within the framework of the The Code of Tax Procedure, we would definitely include there, for example, the institute of the registration process, tax control, local enquiry or searching activity.

The registration proceeding of entities is a proceeding under the conditions laid down by special regulations governing concrete taxes and thus the Code of Tax Procedure provides only for the registration procedure, but not the actual conditions. A taxable entity which is registering itself with a tax administrator according to special regulations shall be obliged to submit to the tax administrator a registration application on the form the sample of which shall be determined by the Ministry of Finance. A tax administrator shall verify the data stated in a registration application and in the attachments thereto and if it has any doubts about their correctness or completeness, it shall invite the taxable entity to clarify, modify or supplement the data, and shall also specify the time limit within which the taxable entity is obliged to comply with the invitation. If a taxable entity does not comply with the invitation of the tax administrator within the specified time limit and in the scope requested, the registration application shall be considered to have been filed on the date of the original filing. If a taxable entity does not comply with the invitation of the tax administrator, the tax administrator shall

issue a decision rejecting the registration application unless otherwise provided for by this Act. An appeal may not be filed against the decision.

During the searching activity, the tax administrator shall be entitled to collect information about taxable entities, search for unregistered or non-enrolled taxable entities, verify the completeness and correctness of records or registration of taxable entities, and detect further facts decisive for the correct assessment of tax and recovery of tax arrears. The tax administrator may also perform the searching activity without direct cooperation of the taxable entity. If the tax administrator finds out that the taxable entity has ceased to perform activity or receive taxable incomes, it shall take measures needed for a swift assessment of tax or recovery of tax arrears in respect of all taxes.

Local enquiry means the activity of a tax administrator within the framework of which the tax administrator searches for evidence, verifies and detects the facts required for the purposes of tax administration. For the purposes of tax administration and in relation to the provision of cooperation with authorities according to a special regulation, the tax administrator shall be entitled to perform local enquiry also outside the district of its territorial scope of activity.

By means of tax audit (known as tax control as well), a tax administrator shall find out or verify the facts decisive for the correct determination of tax or for the compliance with the provisions of special regulations. Tax audit shall be performed in the extent which is imperative for achieving its purpose. Tax audit of the same tax for the tax period for which it has already been performed may be performed at the same taxable entity repeatedly:

a) if the taxable entity requests a tax refund in a supplementary tax return;

b) if the taxable entity requests refund of an amount according to special regulations;

c) on the initiative of the Ministry or the Financial Directorate;

d) at the request of prosecuting authorities.

4. Anti-abuse clause

The provision of section 3 subsection 6 of the Act no. 563/2009 Coll. Tax Administration (Tax Code) and on amendments to certain laws used to be identical to section 2 subsection 6 of the previous Act no. 511/1992 Coll. on administration of taxes and fees, which came into force from 1 January 1993, without any substantive changes. The principle of informality of tax proceedings had the effect that in the application of different tax regulations in tax administration, the actual content of the act or other events crucial to finding the levying or the collection of tax were taken into account. From 1 January 2014, the provision was amended in the following way: *When special regulations are applied to tax administration, the actual contents of a legal act or of any other fact decisive for the determination, assessment or collection of tax shall be taken into consideration.* A legal act or any other fact decisive for the determination, assessment or collection of tax which do not have economic justification and which result in purposive circumvention of tax liability or obtaining of such tax advantage to which the taxable entity would not be otherwise entitled or which result in purposive decrease of tax liability shall not be taken into consideration in the process of tax administration.

Based on the explanatory statement, the main aim was to enable the tax administrator to take into account actions that fulfill features of law abusing, for example artificial transactions and structures created to unwanted optimization of tax liability. The objectives of the amendments were inspired by the action plan to strengthen the fight against tax fraud and tax evasion and recommendations to the Commission regarding aggressive tax planning issued by the European Commission on 6 December 2012. The systematic inclusion of the prohibition of abuse of rights to the provisions of section 3 subsection 6 the Code of Tax Procedure was justified in the explanatory statement as supplements to the general anti-abuse rule (i.e. substance over form). According to the authors, in some cases this principle could be and can be applied also in favor of the taxpayer.

The principle of informality means that the tax authority is obliged to search whether the formal designation of a legal act corresponds to its actual content. If compliance is not found, it shall always take into

account the actual content of the act, which is the only authoritative basis for the determination and collection of the tax.

To meet legislative hypotheses expressing prohibition of abuse of tax law in section 3 subsection 6, the Code on Tax Procedure requires that the following cumulative conditions are fulfilled:

- legal action or any other event for the detection, levying or collection of tax has no economic justification as well as
- a result of that transaction or other facts determined in finding the levying or collection of tax is purposeful avoidance or obtaining such a tax advantage which would not be otherwise eligible to a taxpayer, or deliberately reducing tax. The legislator chose a fairly strict formulation of the absence of economic justification because every fact relating to taxes should have some economic justification. We have to say that economic justification is also very important in reducing tax liability, which is undoubtedly reflected in the economic sphere of the taxpayer.

5. Conclusion

The Code of Tax Procedure includes several provisions which can be applied in the fight against tax evasion and tax fraud. In their essence, we can consider them as an enforcement of a fiscal function of tax legislation. Especially so called anti abuse rules represent an institute which is applied by tax authorities and courts very frequently. General prohibition of abuse of tax law in the judicial practice was also applied before the amendments to the Code of Tax Procedure effective from 1 January, 2014. An addition of the informality principle of prohibition in section 3 subsection 6 of the Code of Tax Procedure has not brought a new substantive rule of conduct, but it just settled practice into a legislative form. The opposite conclusion would lead to impermissible genuine retroactivity. The grammatical expression of the prohibition of law abuse allows different interpretations and it will be important in practice to interpret it in the light of the existing judicial practice of either national courts or the European Court of Justice. Abuse of law is considered with regard to the economic justification of the transaction and the outcome in terms of obtaining a tax advantage or reduction of tax liability.

Abstract

The Code of Tax Procedure represents a set of legal norms regulating legal relationships which arise, change and merge in the process of tax administration. Without the existence of the Code of Tax Procedure, the exercise of tax administration would be undoubtedly more complicated and tax legislation would be disarranged. The Code of Tax Procedure establishes conditions for tax administration and completes legal acts on taxes. Some of its provisions also play an important role in the fight against tax evasion and tax fraud. The authors of this paper deal with the impact of the Tax Code of Tax Procedure and the role of its selected provisions in the fight against unwanted behavior of taxpayers which fulfil the definition of tax evasion or tax fraud.

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THE CONCEPT OF THE CCCTB DIRECTIVE AS A PROPOSAL OF A TAX CODE FOR INTERNATIONAL HOLDING COMPANIES

Dominik J. Gajewski[1]

1. Introduction

Taxation of international holding companies is one of the most absorbing issues not only for the European Commission itself but for individual Member States as well. The problem of international tax avoidance is becoming more and more acute, which increases the motivation to introduce changes in the law. It is not unimportant that tax optimisation pursued by international holding companies is related to the phenomenon of international tax avoidance.

A new CCCTB concept would be an antidote to tax avoidance and, simultaneously, become a tax code for holding companies conducting cross-border activity in the European Union.

Currently, international holding companies exploit the tax regulations of countries where their subsidiaries operate in order to design their tax strategies. International agreements on avoidance of double taxation are also being exploited. And finally, international holding companies that operate in the European Union are obliged to apply the EU law. All these regulations are being used by international holding companies. The number and particularity of these regulations cause them to be frequently used to develop strategies that directly contribute to tax avoidance. It should also be stated that, in principle, there are no special tax regulations dedicated to holding companies despite the existence of solutions of little importance such as the tax capital group (and similar ones in other EU Member States). There are

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also no other EU regulations that would regulate taxation of international holding companies.

In consequence of the fact that the problem of international tax avoidance is becoming more and more acute in the European Union and the number of cases of siphoning incomes to tax havens is rising, the European Commission has decided to propose a draft directive about the common consolidated corporate tax base (CCCTB). It was meant as a remedy for tax avoidance pursued by international holding companies. The concept was intended to create a tax code dedicated to international holding companies whose incomes are subject to taxation in various countries. The project had been under development since 2004 and its effect was the proposal of the CCCTB Directive for Member States (2011). However, the project involved controversial constructions that encountered opposition from some of the Member States (including Poland and Sweden). One of the chief solutions that were questioned was the non-compulsory character of taxation of holding companies with the CCCTB. The holding companies were to decide whether they would accept such a form of taxation or continue to settle their matters with tax offices in line with the rules that had been applicable so far. Such a solution posed a threat that the CCCTB construct would only be used if it contributed to tax optimisation.

The fact that the problem of international tax avoidance is becoming more and more acute has placed the European Commission under pressure to develop a new and effective legal construct which, on the one hand, will contribute to combating tax avoidance and, on the other hand, offer an attractive form of taxation for holding companies.

The European Commission has concluded that the majority of the solutions proposed by the CCCTB meets the above-mentioned expectations and thus decided to amend (correct) the CCCTB concept. One of the most controversial stipulations regarding the non-compulsoriness was removed and this form of taxation has been made obligatory. Simultaneously, the Commission has announced that the CCCTB is to be considered the beginning of creation of new tax law applicable to holding companies. The ultimate objective of the European Commission is to develop a tax code for international holding companies

operating in the European Union. The basis of such a regulation is to be the proposed new CCCTB concept.

Bearing the above in mind, it is worth presenting the concept underlying a future directive that is intended to shape the tax system of holding companies conducting cross-border activity.

2. General foundations of the CCCTB proposal

The personal scope of the CCCTB proposal includes four categories of entitled entities:

1) individual entities,
2) associated companies,
3) CCCTB Group members,
4) members to a CCCTB Group undergoing consolidation[2].

Individual entities include individual companies of residents in the EU, individual permanent establishments in the EU belonging to a company of a non-resident of the EU, individual companies of residents in the EU having one or more permanent establishments in the EU, and individual companies of non-residents in the EU having one or more permanent establishments in the EU.

Associated entities with the level of ownership of over 20 per cent are referred to as associated companies, with the level of ownership of over 50 per cent – the CCCTB Group, and over 75 per cent – a CCCTB Group undergoing consolidation.

All the entities – in line with the CCCTB proposal – would follow the same principles for calculating a tax base but only members to a CCCTB group subject to consolidation would apply the legal regulations regarding consolidation of a common corporate tax base and its division. That is why, as far as the other entities are concerned, one should use

2 CCCTB: Possible Elements of a Technical Outline, CCCTB/WP057/doc/en, p. 4.

the term Common Corporate Tax Base – CCTB and not a Common Consolidated Corporate Tax Base[3].

The basic category of entities subject to corporate taxation in member states is comprised of legal persons conducting business activity.

The personal scope of the CCCTB is based on domestic legal regulations, taking into consideration the principle of mutual recognition of the provisions of law applicable in individual member states in this respect. Whereas national regulations define which entities are subject to corporate taxation[4].

The CCCTB is available to EU companies (from states listed in an annex to the CCCTB Directive) which are subject to taxation with corporate taxes enumerated in another annex to the directive (or any other tax which may be replaced by one of those taxes). Thus this method of defining the personal scope of the CCCTB is analogous to the method applied in the adopted directives concerning taxation of holding companies[5]. The CCCTB can also be used by third country companies (enumerated on an open list of examples) which have a legal form that is similar to the legal form of EU companies subject to taxation with the taxes listed in the annex to the directive and having permanent establishments on the territory of a member state. Therefore, the personal scope includes residents of the EU as well as non-residents as far as taxation of their foreign establishments situated on the territory of the EU is concerned[6].

It is expected that the CCCTB proposal will be precise and clear so that any possible doubts as to interpretation can be avoided, which advocates compilation of a closed list of entities included in its personal scope. It is worth considering thus whether it is possible, for the purposes of the CCCTB, to adopt the solutions regarding circumscription of the personal scope which were introduced in the 90/434/EEC, 90/435/EEC, and 2003/49/EC Directives. The personal scope of these directives is very explicitly defined. It has been possible due to the fact that they are

3 Ibidem.
4 Ibidem.
5 Ibidem, p. 5.
6 Ibidem, p. 5.

intended to solve certain specific problems[7]. Therefore, such a precise definition of the group of entities that the directives are concerned with seems sufficient. Whereas in order to produce a far-reaching effect of removing tax barriers hindering the development of the internal market, the CCCTB proposal should offer comprehensive solutions available to as large a group of entities as possible. Therefore, doubt has aroused whether circumscription of a personal scope by way of providing a list similar to the one offered in the above-mentioned directives is sufficient for the purposes of the CCCTB.

This solution involves another risk as well. If an entity subject to taxation with taxes imposed on holding companies in one of the member states assumed a novel form, the closed list of entities would have to be changed in order for such an entity to be included in the scope of the CCCTB. It is thus essential that the Community legislative process take place, which might turn out time-consuming and difficult.

It is necessary to provide a definition of tax residence for the purposes of the CCCTB as otherwise it might turn out that the personal scope of the CCCTB in individual member states would be different as a result of the existence of dissimilar definitions of tax residence in member states. Differences between countries as far as the definition of tax residence is concerned will allow a holding company to avoid taxation in line with the CCCTB proposal by means of transferring its tax residence from a state using a wide definition of this term to a state using a narrow one.

Another threat is collision between tax jurisdictions of two (or more) states. Thus it is inevitable that the term permanent establishment be defined for the purpose of circumscribing the personal scope of the CCCTB. The definition of a permanent establishment will be necessary for the purpose of demarcating tax jurisdictions appropriately, allowing to determine which state and to what extent is entitled to impose tax on a given entity's income from conducting business activity. The CCCTB

7 C. Staringer, Requirements for Forming a Group, (in:) Common Consolidated Corporate Tax Base, (ed.) M. Lang, P. Pistone, J. Schuch, C. Staringer, Wien 2008, p. 121-122; M. Supera-Markowska, Wspólna skonsolidowana podstawa opodatkowania jako koncepcja harmonizacji opodatkowania korporacyjnego w UE, Warszawa 2010, p. 84-88.

proposal stipulates that the definition of a permanent establishment would be based on the one adopted in the OECD MC[8]. It appears that such a solution would allow to avoid (at least to some extent) conflict with definitions adopted in AADTs concluded with third countries based on the very OECD MC[9].

It is difficult to imagine how member states currently having dissimilar systems of taxation would agree to have a common tax base without – an explicit or implicit – broad consensus over certain fundamental tax principles.

The CCCTB proposal has offered the following general tax principles: simplicity, transparency, certainty, flexibility, consistency and coherence, enforceability, efficiency and neutrality, equity, and effectiveness[10].

The **simplicity principle** allows to minimize costs of operation of systems of taxation. If the principle of simplicity is observed, the number of disputes between taxpayers and tax authorities as far as interpretation of the provisions of tax law and countering avoidance or evasion of taxation is concerned will be limited[11].

The **principle of transparency** is manifested in exhaustive and clear regulation of the rules of tax law, which prevents negative processes of avoidance and evasion of taxation. The more intelligible and precise the wording of an act of law containing tax rules is, the greater the certainty that inappropriate application of the provisions of the law by tax authorities will not take place[12].

The **certainty principle** expresses the demand for stability of unchanging provisions of tax law. Certainty in terms of taxation is, first and foremost, based on communicating information about rules of

8 K. Knapik, P. Kwaśny, Rozliczenie strat transgranicznego zakładu przez polskiego przedsiębiorcę a zasada swobody przedsiębiorczości, Państwo i Prawo 2005, no. 12, p. 9-10; M. Supera-Markowska, op. cit., 84-88.

9 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 5-6.

10 CCCTB: Possible Elements of the Administrative Framework, CCCTB/WP061/doc/en, p. 5.

11 General Tax Principles, CCCTB/WP/001Rev1/doc/en, p. 2; M. Supera-Markowska, op. cit., p. 84-88.

12 U. Schreiber, Evoluating the Common Consolidated Corporate Tax Base, (in:) A Common Consolidated Corporate…, op. cit., p. 125.

taxation before they are introduced, expressing the provisions of law in a communicative, clear, and intelligible language, and efficient operation of fiscal authorities.

In accordance with the **principle of elasticity**, the tax base should take into account the forever changing market conditions and practices followed in business. The principle should be observed in such a way so that the tax in a form in which it has been introduced can adjust to a change in a demand for funds or the amount it is imposed on.

The **principle of consistency and coherence** means that if two transactions have the same economic effect, they should have the same fiscal effect as well.

The **enforceability principle** – tax rules must be fit to be introduced. If they are not, the tax system will be neither neutral nor marked by equity[13].

The **efficiency and neutrality principle** means that the tax system should be neutral in respect of decisions that entrepreneurs make in order to avoid efficient allocation of resources. In line with this principle, taxes should remain neutral – they may not exert influence on investment decisions made by entrepreneurs, which are supposed to be made only on the basis of economic criteria. Breach of neutrality may result from dissimilar treatment of operations containing a foreign element and containing solely domestic elements as well as from differences among tax systems operative in individual member states[14].

The **principle of equity** means that entities faced with the same situation should be treated in the same way. Compromising the principle of equity takes place by way of discriminating legal regulations. As far as international tax law is concerned, the principle is mainly adhered to by way of equitable distribution of a tax base among individual states where international holding companies conduct their business activity[15].

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13 General Tax Principles, op. cit., p. 2.

14 M. Desai, J. Hines Jr., Economic Foundations of International Tax Rules, A Paper prepared for the American Tax Policy Institute, Washington 2003, p. 68.

15 J. Freedman, G. McDonald, The Tax Base for CCCTB: The Role of Principles, (in:) Common Consolidated…, op. cit., p. 228.

The **effectiveness principle** is concerned with the fundamental functions of taxes: accumulation of public incomes and exerting influence on various processes and phenomena by the state through tax incentives. Collection of taxes must be effective, meaning that it should be easy to control and, consequently, it will be possible to prevent tax fraud and taxpayers' mistakes. There is serious apprehension that if the CCCTB proposal is adopted, member states will not be able to use tax instruments in order to fulfil their political and social aims[16].

One should remember though about the role that tax principles play in the current economic reality. They do not usually have a legally binding character and their significance is based on the fact that they are used by the legislator (to a smaller or a larger extent) in order to create the fundaments of a system of taxation and build it.

Additionally, in order for the general rules of the CCCTB to be sufficiently used in the process of applying this solution, they should be explicitly stated in the CCCTB Directive, which has not been done.

One of the key elements of the CCCTB proposal is the description of nature of the CCCTB Group. The definition of the CCCTB Group determines the range of possibilities for full offsetting of cross-border losses and discharging the burdensome responsibilities with respect to transfer pricing, which in consequence has a profound influence on the amount of income subject to taxation[17].

For the purpose of defining the CCCTB Group, it is necessary to specify the type and minimum level of ownership among entities which would be able to form it. The CCCTB Group is defined on the basis of criteria of ownership of voting rights and the minimum threshold is set at the level of over 50 per cent. Entities having such an ownership link could apply for using the rules for taxation stipulated in the CCCTB proposal.

16 P. Bielen, International Accounting Standards, International Financial Reporting Standards and Corporate Tax Base Design, Conference Tax Compliance Costs for Companies in an Enlarged European Community, 6-9.07.2006, Rust, Austria 2006, p. 16; M. Supera-Markowska, op. cit., p. 86-89.

17 B. Van der Made, The CCCTB – Coming Soon to the Theater Near You, International Tax Review, 2006 no. 12/2007 no. 1, p. 1; M. Supera-Markowska, op. cit., p. 95-99.

Adoption of the legal criterion of shareholding in the definition of the CCCTB Group would allow holding companies to carry out certain abuse. They might manipulate the level of their shareholding by way of purchasing or disposing of shares for a period of a few days exclusively for the purpose of entering or leaving the CCCTB Group in a given time and the fiscal factor would become one of the incentives for making decisions regarding restructuring. Therefore, the criterion of ownership of the voting rights was used in the definition of the CCCTB Group[18].

The minimum level of ownership entitling to create a CCCTB Group is set at a threshold of over 50 per cent (the CCCTB Group members may apply for using the CCCTB) but only the CCCTB Group members enjoying the ownership level of more than 75 per cent may undergo consolidation (the CCCTB Group members subject to consolidation).

Fixing two ownership thresholds: one to establish a CCCTB group and the second for creating a CCCTB Group undergoing consolidation when the consolidation threshold is set high (over 75%) excites considerable controversy with regard to differentiation of those and their level[19].

It is difficult to provide arguments advocating differentiation between the situations of the CCCTB Group with an ownership level of over 50 per cent and the one of over 75 per cent. For a wide group of taxpayers, it results in actual transformation of a *common consolidated corporate tax base* into a *common corporate tax base*. The possibilities open to those taxpayers with respect to reaping the benefits of consolidation would be significantly limited; first and foremost, they would not be able to fully offset cross-border losses and be completely relieved from the responsibilities regarding transfer pricing. Associated entities forming a CCCTB Group but not undergoing consolidation on the basis of the proposal would still be forced to settle transactions between them in line with the arm's length principle. In accordance with this proposal, such an obligation would be imposed on the CCCTB Group enjoying

18 M. Devereux, S. Loretz, The Effects of EU Formula Apportionment on Corporate Tax Revenues, Oxford 2007, p. 23.

19 M. Supera-Markowska, op. cit., p. 247-252.

ownership of over 50 per cent but not if it enjoyed the ownership of over 75 per cent[20].

I believe that the introduction of two levels of association will lead to splitting-up of CCCTB Groups. Two thresholds of association for the CCCTB Groups will not only make the CCCTB less attractive but also due to the fact that the CCCTB is complicated, its application and effective administration will pose too many difficulties. In consequence of the adoption of the CCCTB as an optional solution and determination of two different levels of association for creating a CCCTB Group and undergoing consolidation as part of it, associated entities will find themselves in a situation in which they might apply one of the 29 systems of taxation (28 member states' systems and the CCCTB's one). Exclusively, the CCCTB Group members undergoing consolidation would actually use the common *consolidated* corporate tax base. The remaining entities, including the CCCTB Group members not subject to consolidation, would in fact use the rules for a *common corporate tax base*. Apart from that, all the entities might alternatively still apply domestic rules. In such a case, it is difficult to think about meeting the demand for comparability of tax burdens or reduction in adjustment or administrative costs resulting from differences between systems of corporate taxation.

One must also note that the higher the minimum ownership level, the more entities will not enter the CCCTB Group subject to consolidation, which will cause the extent of elimination of tax barriers in conducting cross-border business activity to be reduced. One must bear in mind that the positive influence of the CCCTB proposal will be ensured not only by the common set of rules for calculating a tax base but also by its consolidation. Since it is the consolidation itself that will make it possible to offset cross-border losses and alleviate the problems regarding transfer pricing[21].

One should note that – in accordance with the CCCTB proposal – responsibilities arising out of transfer pricing would be eliminated only

20 D. Enders, A. Estreicher, W. Scheffler, Ch. Spengel, The Determination of Corporate Taxable Income in the EU Member States, Frankfurt 2007, p. 84-89.

21 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 4; M. Supera-Markowska, op. cit., p. 247-252.

with respect to transactions among the members to a CCCTB Group undergoing consolidation. They would be still applicable though to the CCCTB Group members that would not be subject to consolidation and to the so called associated companies.

Associated companies are defined for the purposes of the CCCTB as entities with an ownership link of over 20 per cent but no more than 50 per cent. It is proposed that a wide definition of the links be adopted, which are concerned not only with the voting rights but also with shareholding, institutional, or personal links[22]. The links would encompass exercising control by one entity over another, dependency of one entity on the control of another, or dependency of entities on the control of another entity, while the controlling entity might also be a natural person. The links might also be maintained by directors or relatives of associated entities.

If such a broadly defined (for the purposes of the CCCTB) group of associated entities still had to apply the arm's length principle (especially with respect to transactions among the CCCTB Group members and the entities associated with it but not belonging to the CCCTB Group subject to consolidation), doubt arises with regard to the way responsibilities concerning documentation of transfer prices should be specified with respect to associated entities. The CCCTB proposal does not offer any particular suggestions with regard to this matter. It has only been stated that the arm's length principle should be applicable not only to interest on loans granted by one entity to another associated with it but also to the amount of the loan itself. Thus further reaching responsibilities with respect to transfer pricing would be introduced than the ones existing now, which should be assessed negatively. Besides, it is hard to imagine how the amount of a loan could be estimated in line with the arm's length principle[23].

The following closed list of associated entities could establish a CCCTB Group:

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22 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 4; M. Supera-Markowska, op. cit., p. 252-257.

23 Ch. Spengel, C. Wendt, A Common Consolidated Corporate Tax Base for Multinational Companies in the European Union: Some Issues and Options, Oxford University Centre for Business Taxation, Said Business School, WP 07/17, p. 17.

1) a parent company which is a resident of the EU and its subsidiaries which are residents of the EU as well as permanent establishments in the EU, regardless of whether the parent company were dependent on the control of a parent company from outside the EU or not;
2) a permanent establishment in the EU and a subsidiary being a resident of the EU, which are subject to control exercised by a company being a non-resident of the EU;
3) subsidiaries being residents of the EU controlled by one parent company being a non-resident of the EU;
4) a company which is a resident in the EU with a permanent establishment in the EU;
5) two permanent establishments in the EU subject to control exercised by a company being a non-resident of the EU[24].

The CCCTB proposal concerning a common consolidated corporate tax base has, in fact, a broader extent than merely harmonization of the rules for calculating a tax base. However, if no common rules were established, it would not be possible to carry out consolidation based on the CCCTB proposal.

There are three **methods for consolidation** based on the CCCTB proposal:

1) each company belonging to a CCCTB Group would calculate its tax base in accordance with the rules offered by the CCCTB proposal and intragroup transactions would be disregarded; in the end, the final result of the CCCTB Group would be calculated;
2) each company belonging to a CCCTB Group would calculate its tax base in accordance with the rules offered by the CCCTB proposal and intragroup transactions would be taken into account with respect to their actual costs; then consolidation of the tax bases calculated in such a way would take place and the CCCTB Group's result would be determined;

24 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 22-23; M. Supera-Markowska, op. cit., p. 252-257.

3) each company belonging to a CCCTB Group would calculate its tax base in accordance with the rules offered by the CCCTB proposal and intragroup transactions would be taken into account on the basis of internal transfer prices; subsequently, unrealized gains and capital losses would be ignored and consolidation of tax bases calculated in such a way would take place thus determining the result of the CCCTB Group[25].

It must be pointed out that all the methods for consolidation offer the same result in the end. In line with the first method, each company belonging to a CCCTB Group calculates its tax base in accordance with common rules provided in the CCCTB proposal and disregards the intragroup transactions. The flaw of this method of consolidation is the fact that tax bases of individual companies do not reflect the full picture of intragroup transactions.

In accordance with the second method, each company belonging to a CCCTB Group calculates its tax base in line with common rules provided in the CCCTB proposal and intragroup transactions are taken into account by each company with respect to their actual costs. Subsequently, consolidation of tax bases calculated in such a manner takes place. The advantage of this solution is that the tax bases of individual companies reflect the full picture of intragroup transactions. The method does not require application of the rules for transfer prices, however, it is a more work-intensive method than the previous one[26].

The third method consists in using the existing provisions of law regarding transfer pricing, however, no audit-related activity, or other justifying the use of prices, would need to be undertaken as the effects of transactions would be neutralized at consolidation. Since this method is the most complicated, it seems the least attractive.

Irrespective of which method is selected in the end, there should only be one system adopted and CCCTB Groups should not be offered choice in this respect. It should also be noted that due to simplicity of

25 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 8; M. Supera-Markowska, op. cit., p. 269-272.
26 Ch. Spengel, C. Wendt, op. cit., p. 36.

application, it is advisable to adopt the first or the second method for the purposes of the CCCTB.

The CCCTB proposal offers principles for **offsetting losses** within a Group:

1) loss incurred by a taxpayer before entering a Group is not subject to offsetting against the Group's income but it may be offset against the share in the CCCTB ascribed to the taxpayer who incurred loss;
2) loss incurred by a taxpayer after entering a Group would be subject to compensation and if the Group as a whole generated a negative result, the loss would be transferred forward and would reduce the amount of future income of the Group before the CCCTB is divided;
3) no loss or share in loss would be ascribed to a taxpayer leaving a Group;
4) in case a Group dissolved, losses which had not been offset would be ascribed to the taxpayers belonging to the Group at the moment of dissolution[27].

The right solution is to ensure that loss incurred before entering a CCCTB Group does not influence the amount of a common consolidated corporate tax base but can be taken into account after division of the base by the taxpayers who incurred the loss. This ensures that losses of taxpayers calculated in line with domestic provisions of law will not exert influence on tax revenues of other member states (by way of reducing their share in a CCCTB). It is logical and adequate that those losses should be offset in line with the domestic rules on the basis of which they have been calculated[28].

The taxpayers' losses suffered after entering a CCCTB Group would be included in the common tax base. Two situations are possible; despite losses suffered by individual Group members, the total result of the whole Group is positive or owing to the fact that the losses have

27 Ch. Spengel, C. Wendt, op. cit., p. 36; M. Supera-Markowska, op. cit., p. 270-275.
28 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 26-27; M. Supera-Markowska, op. cit., p. 282-285.

been incurred, the Group as a whole generates a negative result. In the second case, it is possible to follow two approaches to further offsetting of losses:

- transfer of a loss forwards and offsetting it against income of the whole Group and then division of the income reduced in such a way among individual Group members in accordance with the adopted division method;
- transfer of a loss forwards, where the loss is ascribed to individual Group members on the basis of the selected division method and offset in the future against the share in the tax base ascribed to them.

It is sometimes advocated that loss should be ascribed to individual CCCTB Group members. It is argued that otherwise there will be no symmetry in treatment of income of a Group (subject to division) and its loss (not divided but deducted from future income of the Group as a whole). I do not see this claim as justified. Division of a positive tax base is essentially merely a technical means of ascribing tax revenue (generated through taxation of a share in a CCCTB) to individual tax jurisdictions. If, however, a Group does not earn such revenue (in the year in which loss is incurred), there is no need to carry out division. If in the next fiscal period, a CCCTB Group still held loss which had not been offset and a given taxpayer were leaving the Group, they would not be entitled to "take part of this loss with them"[29].

Such an approach is, however, in line with the principle of treating a CCCTB Group as a legally independent unity and meets the demand for coherence within the CCCTB proposal. It is also certainly less complicated that ascribing a share in loss to a taxpayer. Is such an approach fair and economically sensible? It rises doubts in the context of dissimilar regulations which would be applicable if a CCCTB Group was going to dissolve (stipulating that loss be ascribed to individual Group members). Nevertheless, if a CCCTB Group is dissolved and it no longer exists as a unity, there is no other possibility but ascribe losses to the

29 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 26-27; M. Supera-Markowska, op. cit., p. 284-286.

members, while if only one member leaves a Group, there is, in fact, a different possibility. Moreover, such an approach is consistent with the prohibition against ascribing losses incurred by individual members to the CCCTB group, which have been incurred before entering the Group. Therefore, if a given member leaves a CCCTB Group, they should not be entitled to "take the loss with them"[30].

An analogous problem as in the case of losses suffered before entering a Group presents itself with respect to unrealized capital gains. Both at restructuring transactions and sale of assets, the problem of unrealized capital gains may present itself. The problem is concerned with capital gains related to assets of a given CCCTB Group member that have been created before the member entered the Group. If unrealized capital gains are revealed due to the sale of assets during the period of membership to the Group, should they be included in the Group's income and be subject to consolidation and division, or should they be excluded? I believe they should be included. Such a solution would be symmetrical with the treatment of loses incurred before entering a CCCTB Group and would serve satisfaction of the demand for coherence and cohesion within the CCCTB proposal[31].

An important aspect of the CCCTB proposal is the **territorial scope of the CCCTB**. It specifies which incomes are to be covered in it. The following categories of income may be discerned:

1) incomes of residents of the EU from a source situated in the EU;
2) incomes of residents of the EU from a source situated in a third country (incomes generated by permanent establishments of residents of the EU located in third countries, dividends received by residents of the EU from their subsidiaries from third countries, and interest and royalties from third countries);
3) incomes of non-residents of the EU from a source situated in the EU (incomes generated by permanent establishments in the EU owned by a company which is a non-resident of the EU or permanent establishments in the EU owned by a subsidiary,

30 Ch. Spengel, C. Wendt, op. cit., p. 33-36.
31 Ch. Spengel, C. Wendt, op. cit., p. 36; M. Supera-Markowska, op. cit., p. 273-277.

non-resident of the EU, owned by a parent company which is a resident of the EU).

Therefore, the CCCTB proposal differentiates between incomes from third countries and from the EU member states[32].

Income from third countries:

- generated by permanent establishments would be exempt from taxation and it would be possible to use the method of tax credit but in such a case this income would be divided among the CCCTB Group members and the credit as well;
- generated by subsidiaries-major shareholdings (i.e. a link of at least 10%) would be exempt from taxation and it would be possible to use the tax credit method but in such a case this income would be divided among CCCTB Group members and the credit as well;
- generated by subsidiaries-shareholdings below 10% (portfolio divided income) would be taxable and divided among CCCTB Group members and tax credit would be divided similarly;
- royalties, patent income, and interest would be taxable and divided among CCCTB Group members and tax credit would be divided similarly[33].

Income from EU member states:

- generated by permanent establishments would be consolidated;
- generated by subsidiaries-major shareholdings (at least 10%) would be consolidated (a link of over 75%) or exempt from taxation (participation between 10% and 75%);
- generated by subsidiaries-shareholdings below 10% (portfolio divided income) would be consolidated – the so called shared credit;

32 D. Gajewski, Główne założenia koncepcji Dyrektywy o Wspólnej Skonsolidowanej Korporacyjnej Podstawie Opodatkowania (CCCTB), "Monitor Podatkowy" 2012, No. 5, p. 13-14.

33 Ch. Spengel, C. Wendt, op. cit., p. 36; M. Supera-Markowska, op. cit., p. 273-277.

– royalties, patent income, and interest would be consolidated – the so called shared credit.

Taxation of income generated by EU residents on the territory of the EU rises no controversy and causes no major problems. Taxation of income generated by EU residents on the territory of third countries was based on the rule of unlimited tax liability with exemption as the basic method for elimination of double taxation. This income would not be consolidated. In some cases, the method of exemption would be replaced by the tax credit method and then income from third countries would be subject to consolidation and division; the tax credit would be divided similarly[34].

Currently, most member states ensure solutions partially or completely eliminating the consequences of double taxation by way of using the principle of unlimited tax liability with respect to its residents. They may arise from mutual and multilateral AADTs concluded by individual member states or implementation of the provisions of law preventing double taxation into domestic legal systems of member states. Exemption and tax credit methods may be distinguished[35].

The CCCTB proposal must choose a method for avoidance of double taxation. It is of particular importance due to the fact that elimination of double taxation of cross-border movement of capital is one of the basic reasons behind creation of the CCCTB proposal in the first place. Although no EU law gives priority to any of the methods for avoidance of double taxation, the exemption method should be used due to its simplicity. It appears that the only sensible solution would be the introduction of the exemption method as the only method for avoidance of double taxation (possibly making an exception with respect to the switch over clause).

The fundamental problem that the method of tax credit poses is concerned with its connection with tax rates, while the CCCTB proposal

34 International Aspects in the CCCTB, CCCTB/WP/019/doc//en, p. 5.

35 W. Loukota, The Credit Method and Community Law (in:) Tax Treaty Law and EC Law, (ed.) M. Lang, J. Schuch, C. Staringer, Netherlands 2007, p. 126-148; M. Schilcher, Exemptiom Method and Community Law (w:) Tax Treaty…, op. cit., p. 152-189; M. Supera-Markowska, op. cit., p. 283-285.

does not provide for the harmonization of tax rates. The adoption of the method of full tax credit would at least partially solve the problem but this method is not well-known and thus taxpayers and tax authorities might have trouble with its appropriate application.

Furthermore, the use of the tax credit method for the purposes of the CCCTB requires that it is determined which member state taking part in sharing of a CCCTB is to take on the burden placed by it. If it were only one in a situation in which many more participate in the division process, it would be "unfair". Therefore, a mechanism for the division of a tax credit among states participating in sharing a tax base, which might be based on similar rules as division of this base, would have to be developed. However, this solution makes the CCCTB proposal further complicated[36].

It is thus clear that the method of tax credit is quite a complicated mechanism for elimination of double taxation for the purposes of the CCCTB, which advocates the method of exemption as the more appropriate choice.

The exemption method already solves the problem of elimination of double taxation at the level of a tax base and not at the level of tax liability as is the case if the tax credit method is used. This solution is more attractive for entities from member states which make investments in third countries since their total tax base is exempt from tax. In contrast, in the case of the method of tax credit, they only credit tax paid in a third country against tax payable in member states[37]. The method combined with the principle of unlimited tax liability eventually brings about the same effect as the adoption of the principle of limited tax liability. The use of the exemption method should increase competitiveness of European holding companies investing in third countries in comparison to entities from those countries. Therefore, although the EU law does

36 An Overview of the Main Issues that Emerged on the First Meeting of the Subgroup on International Aspects, CCCTB/WP/029/doc/en, p. 3; M. Supera-Markowska, op. cit., p. 288-290.

37 M. Supera-Markowska, op. cit., p. 288-290; D. Weber, A. Russo, The CCCTB at Possible Elements of a Technical Outline: The "Switch-Over" Clause, (in:) Common Consolidated Corporate…, op. cit., p. 753-770.

not favor any of those methods in the CCCTB proposal, the exemption method and not the method of tax credit should be adopted.

The proposal, however, advocates the use of the method of tax credit in two situations:

1) with respect to dividends from shareholdings below 10 per cent (portfolios) and income from royalties, patents, and interest,
2) with respect to the switch-over clause[38].

The credit would be shared in an analogous way as a tax base. It would be standard tax credit. If income that the credit is related to would have its source in several states, the credit would be established separately for each state and each type of income.

The fact that the principle of unlimited tax liability is followed in the CCCTB proposal may pose a serious problem with regard to AADTs concluded between individual member states and third countries.

There are many possibilities for the emergence of inconsistencies between income calculated and ascribed in line with the CCCTB rules and in line with the rules stipulated in treaties concluded with third countries[39]. This is a consequence of the fact that most agreements that member states and third counties have entered into are based on the arm's length principle. Thus this principle will have to be preserved with regard to relations between CCCTB Group members and entities form third countries. An ultimate solution of this problem is re-negotiation of treaties towards conclusion of multilateral agreements among EU member states and third countries. However, it is possible only at a later time[40]. Moreover, certain doubt arises whether third counties will be willing to re-negotiate those agreements at all. They might be reluctant to do so as due to those changes, tax revenue of entities using the CCCTB

38 CCCTB: Possible Elements of a Technical Outline, op. cit., p. 12; M. Supera-Markowska, op. cit., p. 288-290.

39 D. Gajewski, Is a Common Consolidated Corporate Tax Base (CCCTB) an alternative to Polish holding companies?, (in:) E. Ruśkowski, J. Stankiewicz, M. Tyniewicki, U. Zawadzka-Pąk (ed.), Annual and Long Term Public Finances in Central and Eastern European Countries, Białystok 2013, p. 388-389.

40 Survey of the Implementation of the EC Corporate Tax Directives, IBFD Publications, Amsterdam 2013, p. 45; Ch. Spengel, C. Wendt, op. cit., p. 48.

might increase and, in consequence, third counties would have to grant them a higher tax credit.

Participation exemption is concerned with major shareholdings. The word major denotes a link of at least 10 per cent maintained by an uninterrupted period of one year. This legal regulation is similar to the solutions adopted in Directive 90/435/EEC but the period in which the link must be preserved for is shorter by one year, which should be evaluated positively from the perspective of the demand for competitiveness of the CCCTB proposal. Provisions stipulated in the Directive should constitute a certain minimum in relation to which the CCCTB proposal should contain solutions more attractive for holding companies[41].

As far as movement of dividends within a single CCCTB Group undergoing consolidation is concerned, two situations may be observed. In the first case, a dividend encompasses profits from the years before the taxpayer receiving it enters a CCCTB Group and thus should not be included in a CCCTB. However, a dividend based on profits generated in the period in which the taxpayer is a member to a Group will be subject to consolidation and thus problems regarding double taxation of such a dividend is nonexistent[42]. Whereas elimination of double taxation of dividends received from entities not belonging to a CCCTB Group subject to consolidation should be ensured by legal regulations contained in the CCCTB proposal. Both in the case of transfer of a dividend between entities belonging to two different CCCTB Groups and transfer of a dividend from an entity not using the CCCTB but being a resident of the EU to an entity using the CCCTB, the same legal regulations should be applied. This is because a different approach dependent on whether the CCCTB proposal is in operation or not would be discriminatory[43].

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41 CCCTB: Possible Elements of the Sharing Mechanism, CCCTB/WP/060/doc/en, p. 7.

42 D. Gajewski, Is the Concept of the Common Consolidated Corporate Tax Base an innovative measure in the context of the economic and tax-related consequences? (in:) Tax Management and Tax Evasion (red. K. Raczkowski, L. Sulkowski), Wyd. Peter Lang 2014, p. 79-81.

43 A. Agundez-Garcia, The Delineation and Apportionment of an EU Consolidated Tax Base for Multijurisdictional Corporate Income Taxation: a Review of Issues and Options, Taxation Papers – Working Paper 2006, no. 9, p. 32-37.

As far as dividends paid to entitles from third counties as part of applying the CCCTB proposal is concerned, certain common regulations should be adopted with respect to imposition of withholding tax as otherwise the phenomenon of tax competition among member states with regard to this issue might emerge. This is relevant for other passive incomes of non-residents as well. The problem of imposing withholding tax on payments among members to a CCCTB Group subject to consolidation will disappear since intragroup transactions will be neutralized. However, there is controversy whether such tax should be imposed on payments made by individual entities and between two CCCTB Groups[44].

The introduction of the CCCTB as a consolidated base gives rise to a necessity to specify the method for ascribing income of a CCCTB Group to individual member states so that they can impose a domestic tax rate on it. The issue is concerned with the **division of the CCCTB**.

The division of a common consolidated corporate tax base would be possible on the level of member states or at the level of companies. The CCCTB proposal adopted the second solution assuming that if in a given member state there are several CCCTB Groups, income of each Group should be ascribed separately[45]. Thus, all tax bases calculated in a given EU member state should not be summed up in accordance with the rules offered in the CCCTB proposal and divided directly among member states afterwards.

Basing the division of the CCCTB on a microeconomic approach is supposed to ensure that the relation between income from business activity conducted by CCCTB Group members in a given member state and a share in a CCCTB subject to taxation in this state is maintained and that ascribing a tax base (perceived as a combination of taxation in a given jurisdiction with an entrepreneur's ability to pay tax in this state) to individual member states is fair. The microeconomic approach is encountered in the following methods:

44 An Ovierview of the Main Issues that Emerged During the Discussion on the Mechanism for Sharing CCCTB, CCCTB/WP/052/doc/en, p. 3.

45 J. Mintz, J. Martens-Weiner, Exploring Formula Allocation for the European Union, International Tax nad Public Finance 2003, no. 10, p. 6.

1) added value or

2) formulary appointment.

In the method of added value, the division of the CCCTB would be carried out on the basis of a ratio between added value ascribed to a CCCTB Group member and added value of the whole Group. In the method of formulary appointment, division is carried out on the basis of a formula, taking into account factors generating a Group's income (e.g. assets, employment, sales)[46].

The fundamental flaw of the method of added value is the necessity to use transfer pricing for intragroup transactions, which is inevitable for the purpose of determining the added value worked out by individual CCCTB Group members.

The method of formulary appointment is simpler and clearer and its application may not generate excessive costs. It should also give no room for tax abuse ensuring fair sharing of a tax base.

The division of the CCCTB in accordance with formulary appointment would replace the rules for calculation of incomes of members to international groups used until now in line with which individual entities belonging to a group calculate their results separately and the transactions they make among one another are carried out in accordance with the arm's length principle. Such a system gives rise to numerous and burdensome responsibilities with respect to transfer pricing[47].

If income of an international holding company is divided in accordance with formulary appointment, there is no longer a need to distinguish incomes of entities from different tax jurisdictions. The Group first calculates its total income and only then ascribes it to individual states where it conducts business activity. The division on the basis of formulary appointment is not intended to precisely determine

46 M. Gerard, Reforming the Taxation of Multijurisdictional Enterprises in Europe (in:) Competition in a Bottom-up Federation, IFIR Working Paper 2006, no. 10, p. 32.

47 J. Martens-Weiner, Company Tax Reform in the European Union. Guidance from the United States and Canada on Implementing Formulary Apportionment in the EU, New York 2006, p. 79-83.

the geographical source of income but only generally estimate income generated by business activity of a Group conducted in individual tax jurisdictions.

In order to minimize the risk of manipulation of formulary appointment and ascribe income in the best possible way, it is advisable to base it on several factors. In the CCCTB proposal, formulary appointment is based on:

1) the employment factor,

2) the assets factor,

3) and the sales factor.

As far as the significance of the particular factors is concerned, currently it is assumed that there is a balance between them.

The **employment factor** is meant to reflect the workload necessary to generate revenue. Allocation taking into account this factor would be based on the amount of remunerations paid to employees or on the number of people employed. The most serious problem that may present itself here is related to the differences in employees' effectiveness and lack of a common definition of an employee[48].

Essential problems concerned with allocation on the basis of a company's **assets factor** are related to taking intangible and financial assets into consideration or not. In an attempt to preserve simplicity of the CCCTB proposal, it has been proposed that intangible, financial, and personal assets be excluded from the assets factor.

Allocation on the basis of the **sales factor** is built on the assumption that sale of goods and services is a factor generating revenue. It is possible to determine the sales factor according to a source state (i.e. a state that the sold goods and services originate from) or according to a state of destination (i.e. a state where the goods and services are purchased).

48 Ch. McLure, Replacing Separate Entity Accounting and the Arm's Length Principle with Formulary Apportionment, Bulletin of International Fiscal Documentation 2002, no. 56, p. 31; A. Russo, Formulary Apportionment for Europe: an Analysis and a Proposal, Intertax 2005, no. 1, p. 35.

3. Conclusion

Having analysed the solutions offered by the CCCTB concept, it should be noted that despite many positive aspects of this proposal, it also represents threats posed by the introduction of this regulation in the EU Member States. On the one hand, the CCCTB concept is supposed to become the so called tax code for international holding companies and, on the other hand, it is mainly intended as a measure for combating the phenomenon of international tax avoidance.

It is worth considering whether the introduction of the CCCTB proposal will contribute to solving the above-mentioned problems and serve to develop the internal market. Doubts which arise are concerned with the following issues:

1) further breaching of the principle of neutrality of taxation;
2) maintaining the existing and creating new phenomena of avoidance and evasion of taxation;
3) difficulties in comparing tax burdens imposed in individual member states are not eliminated and might even become greater;
4) tax barriers to conducting cross-border business activity are not fully eliminated or even new are created (e.g. problems related to transfer pricing are not fully eliminated and new problems connected with formulary appointment are introduced);
5) numerous risks arise with regard to division on the basis of formulary appointment;
6) many negative phenomena and risks emerge as a result of the adoption of the CCCTB proposal as part of enhanced cooperation.

Differences among systems of taxation of holding companies operative in the EU lead to a breach of the demand for tax neutrality on the scale of the whole European Union. The differences are concerned with the construction of tax bases and construction and level of tax rates. As a result of the adoption of common rules for calculating tax bases, only tax rates will remain to exert influence on investment decisions of holding companies.

Abstract

Taxation of international holding companies is one of the most absorbing issues not only for the European Commission itself but for individual Member States as well. The problem of international tax avoidance is becoming more and more acute, which increases the motivation to introduce changes in the law. It is not unimportant that tax optimisation pursued by international holding companies is related to the phenomenon of international tax avoidance.

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A FISCAL CREDITOR IN ENTREPRENEURS' RESTRUCTURING

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1. Introduction

The Statute of 15 May 2016 – Restructuring Law, introduced regulations whose aim was, among others, to prevent approving an arrangement between creditors[2] and debtors which would violate not only national legal provisions but also the European Union law. In case of restructuring fiscal commitments, a tax creditor may possess a status of a public aid donator in the arrangement, which would make it necessary to confront with widely comprehended legal provisions, not only the Restructuring Law. It is worth pointing out here that the analysed problems are of a multidimensional nature. On the one hand, there appears an interesting problem of public aid in the arrangement, which demands very good knowledge of the rules being in force in this area from the part of an entity creating arrangement proposals, while the role of the commercial court will be to examine the conformity of the concluded arrangement with the legal provisions being in force.

2. January 2016. A "New" Restructuring Law

The legislator, wishing to satisfy numerous postulates presented by the representatives of both the commercial practice as well as the judicature, has divided the legal substance of the proceedings into

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2 It ought to be also underlined that the concept of a creditor (as a participant of a restructuring proceedings) covers not only creditors in the subjective legal sense but they will also be entities entitled to receive public legal benefits. Therefore, the concepts of a debtor and a creditor, similarly to the Restructuring Law, have a wider scope than in the civil law.

announcing bankruptcy and remedial (restructuring) ones, placing relative regulations in two separate legal acts: the statute of 15 May 2015 – Restructuring Law (the Journal of Laws of 2015, item 978, further called RL) and the statute of 28 February 2003 – Bankruptcy Law (consolidated text: the Journal of Laws of 2015, item 233, further called BL) [3]. Having analysed the statistics in the field of the remedial law proceedings in the recent years (2012 – 39, 2013 – 23, 2014 – 12, 2015 – 20) [4], it ought to be stated that the 'recoveries' of the entities till the end of 2015 were used sporadically in the commercial practice. The situation changed after the Restructuring Law came into force. The analysis of the registries of commercial cases in the first quarter of 2016 explicitly shows the increased interest of the entities in 'rescuing' their business activities. There have been notified 89 openings of restructuring proceedings, 14 after starting accelerated restructuring proceedings, 3 after opening arrangement proceedings and 5 after starting reorganizational proceedings[5]. One may forecast that in the second quarter of 2016, the number of motions will increase. The first quarter has already shown first interested entrepreneurs who have used the possibility of taking up actions in order to reorganize their enterprises, which may become good examples for others.

According to Art. 1, the Restructuring Law regulates: 1) concluding an arrangement with creditors by the insolvent or an endangered by bankruptcy debtor and its effects; 2) conducting reorganizational actions. This may be achieved by choosing one of four kinds of restructuring proceedings[6], which will enable the entities[7] to select a way depending

3 Derogating the provisions on the remedial proceedings (presently: Restructuring Law) in the statute of 28 February 2003 – Bankruptcy and Remedial Law (the Journal of Laws of 2015, item 233) enforced the necessity to change the statute's title into 'the Bankruptcy Law'. A thorough revision of the Law concerned the institutions which did not meet the requirements of the commercial practice, while a part of the provisions was arranged according to the postulates being the effect of the experience of using the bankruptcy and remedial law for ages.

4 See the record of cases in the common courts according to the fields of law and instances in the years 2012-2015. The Ministry of Justice, Statistical Information.

5 The record of cases in common courts according to the fields of law and instances in the first quarters of the years 2015 and 2016.

6 Proceedings on approving the arrangement (Art. 210–226 of the RL), accelerated arrangement proceedings (Art. 227-264 of the RL), arrangement proceedings (Art. 265-282 of the RL) and reorganizational proceedings (Art. 283-323 of the RL).

7 1) entrepreneurs as provided by Art. 43^1 of the law of 23 April 1964 – Civil Code (consolidated text: the Journal of Laws of 2016, item 380 with amendments); 2) capital companies not conducting business trade; 3) the partners of commercial personal companies bearing

on their economic and financial situation (meeting the criteria[8]) or their own needs in order to conclude an arrangement with their creditors.

It is worth paying attention to the fact that the legislator has provided the fundamental objectives which the Restructuring Law is intended to reach. The first place is occupied by the implemented regulations which are supposed to ensure entrepreneurs and their contractors effective instruments for restructuring, along with the simultaneous maximization of the creditors' rights protection (e.g. the fiscal creditor, too). The legislator's intention was to guarantee institutional autonomy of the restructuring proceedings in isolation from the stigmatizing bankruptcy one. Moreover, it was to introduce a principle of the bankruptcy proceedings' subsidiary as *ultima ratio* towards the business restructuring fiasco. Another aim was to increase the rights of active creditors through maximizing the rapidity and effectiveness of restructuring. The adopted regulation is supposed to enable exercising the policy of 'a new chance', i.e. ensuring a possibility of a new start to those entrepreneurs in case of whom their business enterprise fiasco is sometimes an effect of an unfavourable change of economic facilities[9].

3. Fiscal Commitments in Restructuring Proceedings

In Art. 5 of the Law of 29 August 1997 – Fiscal Ordinance (consolidated text: the Journal of Laws of 2015, item 613 with amendments) the legislator included a legal definition of a fiscal commitment. According to this provision, a legal commitment is a taxpayer's obligation following from his fiscal duty to pay a tax for the benefit of the State Treasure, voivodeship, district or commune, in

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responsibility for the company's obligations by their whole estate without any limit and 4) the partners of a professional partnership.

8 Restructuring proceedings will be determined by certain criteria (contentiousness <15%/>15%, protection of the debtor's assets, their management or individual collecting of the votes), which will influence the choice of particular proceedings in order to enable conducting the restructuring of the debtor's obligations and, moreover, to a different extent, also his assets, the way they are managed and the employment. A. Hrycaj, Cztery postępowania restrukturyzacyjne (Four Restructuring Proceedings), "Doradca restrukturyzacyjny", no. 1/2015.

9 From the substantiation to the draft of the law of 15 May 2015 – Restructuring Law and wider E. Janik, Zakres regulacji prawnej Prawa restrukturyzacyjnego, Prawa upadłościowego oraz transformacji i likwidacji spółek handlowych, in: Od restrukturyzacji do likwidacji spółek handlowych, ed. A.J. Witosz, E. Janik, UE Katowice, Katowice 2015, p. 11 & further.

the amount, term and place determined by the tax law provisions. A fiscal commitment belongs to the legal relations containing an element of masterfulness, where an indication of the taxpayer's will is only a proposal of the legal relationship's content established by the fiscal authority. Forming the taxpayer's legal situation is legitimated exclusively by the law. The masterfulness of the fiscal authority, which is explicitly bound by the statute in granting the tax commitment's content, has its legal limits, which are not allowed to be exceeded. Forming a legal relationship of a fiscal commitments is put in the legal frames, while its subjects posses only rights and duties attributed by the legal norm in certain situations[10].

According to the Restructuring Law, private creditors may claim their dues equally to the State Treasure[11]. It can take place after satisfying, among others, employees' claims, alimony ones, disability pensions or the proceedings costs. On the grounds of the new law, the arrangement may cover only the claims from before the opening of the restructuring proceedings (issuing an order by the court), together with the secured claims by transferring the ownership of things, claims or other rights as well as the interest coming from these claims during the whole period of the delay in realizing the benefit and claim depending on the condition if it has been fulfilled during the arrangement's conducting.

It ought to be underlined that the creditors entitled to tax arrears secured on the debtor's property may be excluded from the arrangement in the part covering the value of the object of security only in case of mortgage or tax lien. Moreover, the creditor's will is important here for he can give his consent to be covered by the arrangement (Art. 151 par. 2 of the RL). Personal claims regarding the debtor which were secured by mortgage or tax lien on the property belonging to the third party are covered by the arrangement but it does not violate the rights arising

10 R. Mastalski, Prawo podatkowe, Warsaw 2012, p. 203 & further.; K. Lasiński-Sulecki, W. Morawski, Powstanie zobowiązań podatkowych, in: Prawo podatkowe. Teoria. Instytucje. Funkcjonowanie, ed. B. Brzeziński, Toruń 2009, p. 215 & further.

11 The legal regulations which were in force in case of an arrangement on the basis of the statute of 28 February 2003 – Bankruptcy and Remedial Law (the Journal of Laws of 2015, item 233 with amendments) decisively privileged the State Treasure, which claims exercised priority in being satisfied before other claims of private entities (which claims were satisfied only in the fourth category, after satisfying the fiscal commitments).

from the mentioned forms of security if they were established on the third party's estate Art. 167 par. 1 of the RL). Therefore, the creditor may demand to pay only the arrangement amount from the personal debtor, on the conditions and terms determined by the arrangement, but he can achieve full claim satisfaction of the primary amount from the charged object[12]. Fiscal commitments, which were changed by the arrangement provisions (concluded by the required majority of votes during the creditors' assembly and approved by the court order in which the claim discontinuance has been stated to the extent arising from the arrangement provisions), may be restructured. However, one ought to bear in mind that even in the situation of partly amortized fiscal commitments, the debtor may receive public aid coming from the state resources.

4. Unlawful Public Aid

Art. 107 of the Treaty on the Functioning of the European Union (further TFEU) determines that: 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. This provision does not contain a precise definition of state aid but only enumerates its basic features. Lack of the definition is not occasional for Art. 107 of the TFEU is to be a security which gives the European Commission and the Court of Justice of the EU wider interpretation possibilities in the field of public aid. This way, while estimating whether a certain aid fulfils or not the criteria of public aid, it is required, besides the legal acts analysis, to pay attention to the position of the European Commission and the judicature of the Court of Justice[13].

From the analysis of the content of Art. 107 of the TFEU it arises that, in principle, financial support may be qualified as public aid in case

12 A. Hrycaj, A. Jakubecki, A. S. Witosz (ed.), Prawo restrukturyzacyjne i upadłościowe, Warsaw 2016, p. 372 & further.

13 More extended: A. Jakowlew, Prawo restrukturyzacyjne, Warsaw 2016, p. 180 & further.

it meets jointly four conditions below; 'with which not meeting any one of them excludes a possibility to apply for public aid'. An augment is public aid when: a) it is granted by a Member State or from the state means; b) it is a profit for the beneficiary of the support (entrepreneur); c) it is of a selective nature (it privileges a certain entrepreneur or certain entrepreneurs, or producing certain goods by a manufacturer); d) it threatens the disruption or disrupts the competition and influences commercial trade between the EU Member States.

Even if all the conditions mentioned above are fulfilled, there are still situations in which the aid may be considered to be unlawful. The Treaty on the Functioning of the European Union provides the following exceptions in this scope: the aid is allowable by virtue of law[14] and the support is regarded to be compatible with the internal market by the decision of the Commission[15].

Besides the abovementioned, public aid determined as *de minimis* is considered to be compatible to the rules of the common market in any case because such aid implicitly cannot violate the rules of completion in commercial trade between the EU States. The arbitrary border between *de minimis* aid granted to one beneficiary in different forms is the equality of 200 000 Euro, as a rule, awarded within the three following years[16].

14 The aid allowable by virtue of law (i.e. automatically) has been provided by Art. 107 par. 2 of the TFEU, which enumerates three kinds of aid always compatible with the internal market: the aid having a social character, granted to individual consumers; the aid to make good the damage caused by natural disasters or exceptional occurrences and the one granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

15 A positive decision of the Commission results in the right of a Member State to be granted public aid for the benefit of selected entrepreneurs. The aid provided by Art. 107 par. 3 of the TFEU is considered to be allowable. Firstly, it is the aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Art. 349 of the TFEU (e.g. remote, insular or small size regions). Secondly, it is the aid to promote the execution of important projects of common European interest or to remedy a serious disturbance in the economy of a Member State. Thirdly, it is the aid to facilitate the development of certain economic activities or of certain economic areas (where such aid does not adversely affect trading conditions to an extent contrary to the common interest). Finally, it is the aid to promote culture and heritage conservation. Moreover, it should be underlined that the catalogue included in this provision is open because, according to it, the Council on a proposal from the Commission can take a decision specifying another category of public support to be compatible with the common market.

16 For entrepreneurs: 1) in the sector of road haulage foods – 100 000 Euro, 2) in the agricultural sector – 15 000 Euro and 3) in the sector of enterprises delivering services in the general economic interest – 500 000 Euro.

According to the TFEU, public aid is the public means transferred to an entrepreneur in 'any form'. Therefore, two basic forms are pointed out here: the first one can be a direct expenditure from the public finance, the other one is more 'refraining from executing due financial means by the state than strictly public finance expenditures, which then translates into the depletion of payments into the budget'. According to the system adopted by the European Commission's practice, there are distinguished four groups of forms of public aid granting, determined as A, B, C and D, which relatively contain: tax subsidies and allowances[17], capital and investment subsidies, the so-called soft crediting, warranties and guarantees. It is important to underline here, that the basic form of aid called indirect are tax allowances determined by the legal provisions. Moreover, there are also used discretionary reductions, which mean dividing the debt into instalments or adjournment of the term of payment of the budget dues.

It is worth pointing out here three possible situations whose creation will depend on the adopted legal constructions. Firstly, the allowances can take such forms that they are not public aid at all. Secondly, they are placed within the limits of *de minimis* aid. Thirdly, they are connected with the purposes promoted by the EU law, i.e. they frequently cover the aid encompassed by group exclusions (e.g. for research and development, for environmental protection, as an aid granted in order to prevent or liquidate disturbances in economy of a supra-sector character)[18].

5. Duties Arising from the Restructuring Plan

Conducting a test of a private creditor or a private investor is a means which allows to estimate whether the exact financial support granted to the entrepreneur from 'the public (state) resources' does not violate the rules of fair competition.

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17 On the Polish legal ground there function all the above forms of public aid. Their detailed catalogue is provided by the Order of the Council of Ministers of 7 August 2008 on the Reports about the Granted Public Aid, Information on Non-granting Such Aid and the Reports on Arrears of the Entrepreneurs in Payments of the Obligations Due for the Benefit of the Public Finance Sector (consolidated text: The Journal of Laws of 2014, item 1065).

18 More extended: A. Dobaczewska, Prawo pomocy publicznej, in: Prawo gospodarcze publiczne, ed. A. Powałowski, Warsaw 2011, p. 437 & further.

According to Art. 10 of the RL, the justification of arrangement proposals will be reflected in a so-called restructuring plan, as a result of which the fulfilment of the arrangement will be possible to be controlled, by way of which its feasibility will be monitored[19].

Because of the non-existing obligations the restructuring plan must contain the evaluation conducted on the basis of the above tests in the first place. Chapter V of the Restructuring Law has been dedicated to public aid in the restructuring proceedings. It ought to be underlined that each support granted by public entities (or from public resources) is considered to be public aid. Firstly, the test of a private creditor or a private investor decides whether a certain aid is a public aid.

According to Art. 140 of the RL, the private creditor's test contains: 1) the information on the anticipated level of satisfaction of particular public law creditors in the frame of the arrangement fulfilment. To determine the forecast extent of the satisfaction of creditors being public aid donators, the following elements ought to be pointed out: a) the amount of the debtor's dues towards particular public law creditors covered by the arrangement; b) the content of the arrangement proposals towards particular public law creditors; 2) the information on the anticipated level of satisfaction of particular public law creditors in bankruptcy proceedings which would be conducted towards the debtor. The legislator points out that comparing a potential bankruptcy dividend with the restructuring one is an essential factor motivating the market behaviour of the public aid donators. To show the degree of satisfaction in potential bankruptcy proceedings, such data are determined: a) the value of the debtor's assets depicting the charges; b) the anticipated amount of the costs of the bankruptcy proceedings; c) the category in which particular public law creditors would be satisfied in bankruptcy proceedings; d) evaluation whether the claims of a public law creditor will be satisfied to a larger extent in case of concluding and fulfilling the arrangement, or in the bankruptcy proceedings.

19 Supervisor – an arrangement supervisor, a court supervisor – informs the debtor on available financing resources with public aid in it as well as co-operates with him in order to receive such finance.

A private investor's test is the estimation of the actions undertaken by a financing entity conducted in order to state whether the support is not public aid. It is not indeed, in case it is made on the conditions to be also accepted by the private investor. The private investor's test especially comprises information on: the anticipated level of the repayment from the involved capital; the average degree of the repayment of the engaged capital of the comparable investments; the forecast risk extent accompanying the investment; the average level of the risk of the comparable investments.

Using the test will allow to answer the question whether the given support is granted on the market conditions, in other words, whether it could be awarded on the identical principles by a private entity bearing only its own economic interest. In case of a positive respond, the support is not treated as public aid[20].

The European Union regulations allow to donate public aid if it is placed on the level which cannot assumingly disorder the free market functioning (*de minimis aid* in agriculture and fishery). Establishing the above facilities in the restructuring proceedings is of fundamental significance. The commercial court should not approve the arrangement which would provide donating pubic aid violating the law.

Using the test will let estimate the actions undertaken by the public entity in the situation of granting the reductions or other facilitations in repaying the public commitments, or in evaluation whether the entrepreneur would be able to finance his activity on the private crediting market on comparable conditions.

It is also worth noticing that the test will enable to answer a question whether the public entity behaves *in casu* as a private creditor who, acting in 'normal market conditions', aims at regaining the due amounts together with the interest, or at recovering the benefits in a higher amount than the one which he would receive in case of selling the enterprise during the debtor's bankruptcy. If the conditions settled by the public entity are possible to be accepted by the private, rationally

20 The substantiation to the draft of the Law of 15 May 2015 – Restructuring Law, the Print of the Sejm no. 2824, the Sejm of the Republic of Poland of the VII term of office.

behaving investor/creditor, the test result is estimated positively which, in consequence, allows to assume that we do not deal with public aid[21].

6. Allowances in Repaying Tax Commitments

According to Art. 67a and 67b of the Tax Ordinance as well as Art. 55, 60 and 64 par. 1–4 of the Law on the Public Finances, the allowances in repaying fiscal commitments and other public tributes will take place most frequently in the form of public aid. Firstly, the allowances not exceeding the limits of *de minimis* aid provided by the EU legal acts may be granted by the proper authority without any obstacles, meeting only the requirements contained in the provisions of Art. 67a § 1 and Art. 67b § 1 point 2 of the Tax Ordinance and Art. 64 par. 2 point 2 of the Law on the Public Finances. Secondly, the allowances being public aid (*scilicet*, exceeding the limits of *de minimis* aid) may be granted if they are allotted to employment, the development of small and medium-sized enterprises and restructuring (Art. 67b § 1 point 1 leter g, h, i of the law Tax Ordinance and Art. 64 par. 2 point 3 letter g, h, i of the Law on Public Finances)[22].

It is worth pointing out that granting public aid (with the allowance of repaying tax commitments in it) which does not disturb commercial trade between the EU Member States is not unlawful public aid. The task of the fiscal authorities is to solely settle the abovementioned facilities. In case the entrepreneur conducts his activity exclusively on the national/local market and does not participate in the trade on a larger scale, i.e. when his basic recipients are national entities, one may assume that the aid granted by the authority in the frame of the provisions of chapter 7a of the Tax Ordinance will not lead to the mentioned competition disturbance, and thus will not influence negatively the trade within the

21 S. Gurgul, Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz, Warsaw 2014, p. 1096 & further.

22 More extended: H. Dzwonkowski, Ordynacja podatkowa. Komentarz, Warsaw 2014, p. 573 & further. J. Glumińska-Pawlic, Ulgi i zwolnienia podatkowe jako formy pomocy publicznej udzielanej przez organy samorządowe, in: W. Miemiec (ed.), Stanowienie i stosowanie prawa podatkowego, Wrocław 2009, p. 344.

EU. Therefore, it will be the allowance which is not public aid provided by the EU provisions[23].

It is worth invoking the results of the interesting research here, conducted by R. Dowgier titled 'The Influence of the Regulations Related to Granting Public Aid on Creating and Executing Tax Law in Poland'[24]. The author underlines that the regulation in the field of public aid does not belong to the tax law, but he notices that it has great influence on its functioning. He signalizes the necessity to verify the operating legal solutions concerning public aid granted in the form of tax preferences in the context of their practical significance and realization of the objectives put before them. The author states that it is substantiated to create a model of public aid granted in the form of tax preferences which, on the one hand, would facilitate the estimation of the admittance of granting such aid by fiscal authorities while, on the other hand, it would enable the entities applying for support a relatively simple verification of the conditions which they would have to meet in order to receive such aid.

7. Conclusion

In the conclusion, it is worth referring to the opinion of S. Gurgul, who points out that according to the Restructuring Law, in the restructuring proceedings there will not appear the necessity to use Art. 108 and 109 of the TFEU at all, particularly the notification of the fact of granting the debtor any financial support from the 'state resources' made by the European Commission. The author legitimately depicts that in practice there seldom happens that the benefit received by the debtor as a result of concluding the arrangement covering public law claims accruing to the entities of the public finance sector could exceed the limits of *de minimis* aid[25]. In the mentioned situation, the EU law does not require to notify the European Commission on granting aid to the debtor. Moreover, in the future the practice of executing the provisions

23 H. Dzwonkowski, Ordynacja podatkowa. Komentarz, Warsaw 2014, p. 574 & further.

24 Extendedly: R. Dowgier, Wpływ regulacji dotyczących udzielania pomocy publicznej na stanowienie i stosowanie prawa podatkowego w Polsce, Białystok 2014, project NCN number DEC-2011/01/B/HS5/01091.

25 I.e. the equality of 200 000 Euro, and exceptionally – 100 000 Euro, 15 000 Euro and 500 000 Euro.

for the Restructuring Law will probably disclose such examples, but so far the cases in which the aid granted to the debtor as a result of the arrangement has had negative influence on the trade between the EU Member States have been very seldom (even if this aid exceeded the limits of *de minimis* aid). Not meeting this condition causes the situation when the financial support granted to the debtor cannot be considered public aid as provided in Art. 107 of the TFEU. Moreover, the conditions of the arrangement are principally equal for all creditors (private and public), therefore one may assume that thus the test of a private creditor/investor has been conducted and that its result is positive (here it ought to be taken into account that in the bankruptcy proceedings both groups of the creditors are satisfied in the same category – Art. 341 par. 1 point 2 of the BL). Applying allowances in repaying taxes and other public tributes is public aid, as a rule, however, it is admissible if the benefit received by the debtor aims at, among others, restructuring his obligations. Although the discussed solution relates to the usage of allowances in tax proceedings, it ought to be also accepted to be used *per analogiam iuris* in the reviewed restructuring proceedings[26].

For the purpose of restructuring proceedings and, first and foremost, in order to secure the obligations towards the State Treasure, an important element of the restructuring plan will be the estimation (made on the basis of the test of a private creditor/investor) whether the support granted in the restructuring proceedings and during the fulfilment of the arrangement will be considered public aid. As a consequence of introducing the provisions relating to granting public aid for the purpose of conducting restructuring, entrepreneurs, basing on clear rules, will be able to use it, which will cause the acceleration of procedures as well as increase the effectiveness of such proceedings.

Abstract

This paper deals with the situation of a fiscal creditor in entrepreneurs' restructuring. It covers the Restructuring Law binding

26 S. Gurgul, Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz, Warsaw 2016, p. 1113 & further, P. Zimmerman, Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz, Warsaw 2015, p. 1529 & further.

from 2016 and fiscal commitments in restructuring proceedings. Within the frames of this article the unlawful public aid and duties arising from the restructuring plan were depicted. The article also presents allowances in repaying tax commitments applicable to entrepreneurs that struggle restructuring proceeding.

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PENALTY UNDER THE TAX PROCEDURE CODE (IN THE CONTEXT OF THE CASE LAW OF THE SUPREME ADMINISTRATIVE COURT)

Marie Karfíková[1], Zdeněk Karfík[2]

1. Introduction[3]

The legislation in the Czech Republic after 1989, when there was a huge change in social relations, has undergone major qualitative and quantitative changes. It was also the case of financial law, and especially of its subfield tax law.[4] The importance of taxes as revenues for public budgets has increased and taxes have become an inseparable part of life for all legal entities (natural and legal persons) that have become the real taxpayers.[5]

On January 1, 1993 a new tax reform was implemented as the new tax legislation became effective, resulting in the changes in the tax system[6] and tax procedure[7] in the form of an act.

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4 See more (in Czech language) in: M. Bakeš, M. Karfíková, P. Kotáb, H. Marková a kol., Finanční právo, 6. upravené vydání, Praha 2012, p. 12-14.

5 Decision of the Extended Chamber of the Czech Supreme Administrative Court dated October 16, 2008, ref. 7 Afs 54/2006-155, No. 1778/2009 Sb. NSS, www.nssoud.cz. The Supreme Administrative Court in this context maintains its conclusion concerning the unilateral nature of the tax law. The Court is fully aware that a tax is no punishment against the tax entity in the sense that it would be retaliation for its behaviour deemed undesirable by law. The unilateral nature of the tax law should be understood in the way that the tax entity is required to pay a tax without receiving an appropriate compensation tied directly or indirectly to the amount of tax paid. Those who pay taxes are simply not always identical with those who receive benefits from taxes paid; often it is just the opposite. Charging taxes requires – precisely because of their unilaterally perceived nature (just like any public law sanction) ensuring a sufficient degree of legal certainty to the charged entity, i.e. to a private person.

6 Act No. 212/1992 Coll., on the Tax System as Amended by Act No. 302/1993 Coll. The legal basis for the validity of this Act in the Czech Republic was provided by the Constitutional Act of the Czech National Council No. 4/1993 Coll., on Measures Related to the Dissolution of the Czech and Slovak Federal Republic.

7 Act No. 337/1992 Coll., on Administration of Taxes and Charges (hereinafter the "Act on Administration of Taxes and Charges").

Tax procedure law provides for the general rights and obligations of tax administrators, taxpayers and other persons involved in tax administration in order to fulfil the basic objective of tax administration which is to ascertain and determine a tax and ensure its payment. The currently effective basic source of tax procedure law was passed on January 1, 2011 as the new Tax Procedure Code.[8]

Already under the former Act on Administration of Taxes and Charges, case law became increasingly important in the domain of tax administration. In the 90s of the 20th century and the first years of the 21st century, tax administration was affected in particular by rulings of the Constitutional Court on constitutional complaints and by judgments issued by various regional courts in administrative justice. Since 2003, when the Supreme Administrative Court (hereinafter "SAC") has started to operate and began to decide on appeals in cassation pursuant to the Administrative Procedure Code, tax administrators had to focus on the case law of this institution in tax matters. In the second half of the first decade of the 21st century, also the decisions of the SAC's Extended Chamber on the interpretation of various provisions of the Act on Administration of Taxes and Charges became more and more significant. On the basis of the case law in the area of tax administration and tax procedure, administrative practice has begun to apply new principles and also changed the approach to the interpretation of many provisions of the Act on Administration of Taxes and Charges. The case law affected tax administration in such a manner that the concerned provisions were reinterpreted and their application changed although the wording of these provisions was the same. It is also interesting to point out that under the influence of the court rulings, tax administrators changed their established procedures. In some cases, as a result of interpretative shifts, even amendments to the Act on Administration of Taxes and Charges were adopted.[9]

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8 Act No. 280/2009 Coll., Tax Procedure Code (hereinafter the "Tax Procedure Code").

9 In December 2008, the Constitutional Court in its judgment No I. US 1611/07 expressed its legal opinion on the conditions for tax assessment. According to this judgement, tax duty shall expire after three years from the end of the tax period in which the tax became chargeable (i.e. 3+0) and not from the end of the tax period in which there was an obligation to submit a tax return (i.e. 3+1). The Constitutional Court insisted that the former interpretation of the wording of section 47 (1) of the Act on Administration of Taxes and Charges was making out of the three-year period a four-year period and was therefore unconstitutional. Given that the

Case law affects tax administration even under the Tax Procedure Code effective as of January 1, 2011. After this day the SAC has issued many significant rulings, as for example a set of its decisions from 2015 where the Court interpreted the provisions on timely granted power of attorney to a tax consultant,[10] a decision on the interest on unlawful actions of a tax administrator,[11] a decision on the period for tax assessment,[12] a decision on the judicial review of legal grounds for taxing a long-service pension,[13] a decision on the waiver of deferment interest,[14] and last but not least a judgment on the penalties pursuant to the Tax Code.[15]

2. Penalty in General

The institute of penalty is used both in private and public law. In private law there are provisions concerning this issue contained primarily in the new Civil Code.

Law creates a specific system of civil guarantees aiming to ensure that obligations are discharged properly and in due time. On the one hand, these guarantees operate in such a way that the obligations are met, on the other hand, they may themselves provide for security so that the obligation is actually even met through them. A contractual relationship can be secured just by one instrument, by a set of multiple civil law guarantees, or it does not have to be secured at all. The effective legislation contains the term "penalty" but does not provide any definition of this term.

The Civil Code[16] states in section 2052 that the provisions on a contractual penalty shall also apply to a penalty provided by a legal

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cited provision allowed two possible interpretations, the Constitutional Court gave priority to the one that is more favourable to the addressees of human rights and freedoms. On the basis of the Constitutional Court judgment a new amendment was passed in the Parliament (Act No. 304/2009 Coll. with effect from 1.1.2010) that reflected this interpretation of section 47 (1) of the Act on Administration of Taxes and Charges.

10 The judgement of the SAC dated May 15, 2015, ref. 4 Afs 68/2015-35.
11 The judgement of the SAC dated August 28, 2014, ref. 7 Afs 94/2015-53.
12 The judgement of the SAC dated April 30, 2015, ref. 2 Afs 1/2015-49.
13 The judgement of the SAC dated April 14, 2015, ref. 9 Afs 40/2014-39.
14 The judgement of the SAC dated January 28, 015, ref. 6 Afs 101/2014-36.
15 The Resolution of the SAC dated November 24, 2015, ref. 4 Afs 210/2014-57.
16 Act No. 89/2012 Sb., Civil Code (hereinafter the "Civil Code").

regulation for a breach of contractual duty (penalty provided by a legal regulation). This provision applies to the fine which is not agreed by parties in a contract but which is provided by a legal regulation (act) for a breach of a contractual duty. The connection between such penalty and a contract lies in the fact that a prerequisite for the entitlement to a penalty payment is a contractual relationship that establishes the rights and obligations of the parties. Conditions for the entitlement to a penalty payment become a part of the contract automatically on the basis of a law. Given the fact that this section provides for the application of provisions on contractual penalty, including the penalty provided by a legal regulation, a creditor is entitled to its payment regardless of whether the breach of obligations incurred any damage (the penalty does not affect the right to compensation for damage). Likewise, payment of the penalty does not relieve the debtor of the duty to discharge the main obligation. The Civil Code also provides for a penalty in section 2535, according to which if an organiser cancels a package tour less than twenty days before its commencement, he shall pay the customer a penalty of 10% of the package tour price.

A court may reduce an excessively high amount of penalty provided by a legal regulation on the application of the debtor under the same conditions as for the moderation of the contractual fine (section 2051). The law does not provide the court with any explicit clues for the assessment of an excessively high amount of penalty. The court shall undoubtedly rely on the functions and purpose of the penalty and its discretionary power. It will also have to consider the reasons that led to the stipulation of such excessive penalty in the case under consideration and reflect the circumstances of the negotiation process, for example which party proposed the penalty.

3. Penalty under the Tax Procedure Code as a Criminal Charge

The provisions on penalty are contained in Part Four of the Tax Procedure Code, entitled Consequences of Breach in Tax Administration, more specifically in its section 251:

(1) The taxpayer shall be obliged to pay a penalty from the amount of the assessed tax as determined in comparison with the last known tax in the amount of:

a) 20%, if the tax is increased,

b) 20%, if the tax deduction is reduced, or

c) 1%, if the tax loss is reduced.

(2) The tax administrator shall reduce the penalty referred to in paragraph 1 (a) by the penalty referred to in paragraph 1 (c) if the obligation for its payment arose from the application of the loss reduction in the amount of reduction of tax loss, which was penalized.

(3) The tax administrator shall decide on the obligation to pay a penalty by issuing an additional payment notice and at the same time prescribe it in tax records. The penalty shall be due on the same day as the additionally assessed tax.

(4) If the tax is additionally assessed based on additional tax return or additional accounts statement, there is no obligation to pay a penalty from the amount which is mentioned therein.

Penalty prescribed by section 251 can be waived pursuant to the provisions of section 259a in the following cases:

(1) The taxpayer is entitled to ask the tax administrator for the remission of penalty if the tax which resulted to additional assessment and penalty was paid.

(2) Based on the assessment of the extent of cooperation of the taxpayer in the procedure leading to additional tax assessment, the tax administrator is authorized to waive in his own discretion up to 75% of penalty. The tax administrator is not bound by the application of the taxpayer.

(3) The application for the waiver of penalty can be filed within three months from the date of legal force of the additional payment notice which imposed the obligation to pay a penalty was decided.

(4) The deadline for filing an application pursuant to paragraph 3 is not running during the period of:

a) proceeding on the permission to defer tax payment of which additional assessment resulted in imposed penalty;
b) permitted deferment of tax payment of which additional assessment resulted in imposed penalty.

The relation between the penalty under the Tax Procedure Code and the crime of evading taxes, fees and other mandatory payments was examined by the SAC in a decision issued in this matter No. 4 Afs 210/2014-57 dated November 24, 2015, in which the SAC concluded that penalty pursuant to section 37b of the Act No. 337/1992 Coll., on the Administration of Taxes and Charges (hereinafter referred to as "AATC") in the wording effective from January 1, 2007 until December 31, 2010 and section 251 of the Act No. 280/2009 Coll., the Tax Procedure Code (hereinafter "TPC"), has the character of a punishment which necessarily leads to the application of Art. 40 (6) of the Charter of Fundamental Rights and Freedoms and Art. 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is necessary and interesting to point out that the SAC clearly stated its position towards general public. Besides that, one of the disputed points, which was subject to many opinions reflecting diverse views on the relation between tax and criminal proceedings, has been answered, although many questions remain unanswered until now.

The current concept of tax penalty was introduced into the Czech tax system by the Act No. 230/2006 Coll., which amended the Act No. 337/1992 Coll., on the Administration of Taxes and Charges. It legalized sanction mechanisms in the form of penalty and default interest with effect from January 1, 2007. Thus, the concept of penalty gained a new content – it is a one-off sanction calculated as a percentage rate from the amount of tax, tax deduction or tax loss incorrectly stated in a tax return.

When examining in detail the concept of penalty, it is not possible to ignore its feature tied to the "tax debt" which implies that it is a sanction for the offense in the area of tax assessment (within the tax discovery procedure) linked to the additional tax assessment on the basis of control mechanisms of a tax administrator (typically based on the results of tax control). The penalty arises obligatorily ex lege and relates to failure to comply with tax obligations, wherein due to incorrect tax

statement, the administrator proceeds ex officio with the additional tax assessment. Thus, the state penalizes taxpayers for their misconduct that had to be revealed through the tax administrator following his own actions. It is therefore clear that a penalty is not imposed in the case of additional tax assessment based on an additional tax return.

It results from the above that tax administrators have no discretionary power to adjust the amount of penalty. Thus, the taxpayer is charged a penalty regardless of his fault. The decision on the imposition of a penalty is always part of the decision on additional tax assessment within the additional payment notice. It follows from this fact that imposition of a tax penalty is not decided in a separate procedure, i.e. conditions for its imposition are not subject to taking of evidence. Despite the undeniable conclusion that penalty is ultimately a sanction for failure to carry the burden of proof resulting directly from the law regardless of the state of personal tax accounts of a taxpayer, we cannot overlook other features of this tax law tool. We are coming to the conclusion that without doubts its reparation function must be underlined. It lies in the fact that it represents a form of a lump compensation for the harm incurred to the state, i.e. the state had to assess the tax obligation ex officio because the taxpayer failed to comply with this obligation at the very beginning. Other functions are then designed for prevention, i.e. deterring the taxpayer from a similar conduct in the future and last but not least for repression, i.e. compulsion leading taxpayers to submit n additional tax statement.

The SAC in its case law also approached the question whether imposition of a tax penalty constitutes a "criminal charge" pursuant to Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms which states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him". Then follows Art. 7 (1) of the Convention according to which "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". Nor shall a heavier penalty be imposed than the one that was applicable at the time

the criminal offence was committed. Art. 7 (1) of the Convention is in its penal dimension applicable to all conventional minor offenses which can be characterized as administrative offenses. It is no secret that the European Court of Human Rights includes "tax disputes" (where a sanction of repressive character might me imposed) into criminal matters. This might by for instance also the area related to imposition of tax penalties.[17] It is indisputable that Art. 6 (1) of the Convention can be applied also to tax disputes, i.e. to the decisions of tax administrators, and its applicability is not limited even by the fact that a particular matter was not decided by an impartial and independent court.

The SAC's case law is based on the application of the so-called "Engel-criteria" to determine whether an action is a "criminal charge" in the meaning of the Convention (see also the judgment Engel and Others v. The Netherlands dated June 8, 1976, applications No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) including the classification of the offense in the law of the respondent state, the nature of the offence and the possible punishment. The last two criteria are alternative, i.e. the fulfilment of just one implies the application of Art. 6 of the Convention. However, on the other hand, this conclusion does not preclude the evaluation of the two criteria in relation to one another. This method (or analysis) respecting the mentioned criteria had its importance in connection with the fact that the SAC previously stated in its decision-making that tax penalty shall not be viewed as a sanction for administrative offense and, therefore, such legal obligation cannot be regarded as a sanction in terms of administrative punishing because it is auxiliary to a tax and subject to the same tax rules as the tax itself.[18]

By using the "Engel-criteria" to determine whether an action is a "criminal charge", the SAC came to the conclusion that the second of the criteria leads towards the observation that penalty is not a lump compensation for the harm incurred to the state but has rather a punitive character, although there is a certain form of motivation. In

17 See more (in Czech language) in: SAC ref. 4 Afs 210/2014-57 the judgment in its full extent available at www.nssoud.cz. Further see also: ECHR judgement dated November 27, 2014, Dev v. Sweden (application No. 7356/10).

18 See more (in Czech language) here: SAC ref. 1 Afs 1/2011, 9 Afs 27/2011 and 5 Afs 28/2013 the judgments in their full extent available at na www.nssoud.cz

the evaluation of the third "Engel-criteria" it was noted that in terms of severity the tax penalty affects property of taxpayers and, therefore, inherently constitutes punishment sui generis. In the light of these factors, the SAC came to the conclusion quoted in the introduction of this article. This finding is not compatible with the assertion that penalty payment is to be viewed as an administrative law sanction of a reparative character. In connection with the above mentioned statements and the adopted conclusions, the question is raised even about the unity of the deed and dual proceedings. Finally, Art. 4 (1) of the Protocol No. 7 to the Convention implies that "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". Basically, the main problem lies in the question whether the offense for which the applicant was prosecuted was the same (idem) and whether there was no dual proceeding (bis). The principle of ne bis in idem is seen as one of the human rights requirements and as such guaranteed by numerous international treaties. For instance, the International Covenant on Civil and Political Rights (that has been promulgated in the Czech Collection of Laws under No. 120/1976 Coll.) states in Art. 14 (7) that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." [19]

It is also impossible to neglect the fact that in proceedings concerning offenses (whether it be criminal or administrative offenses) the ne bis in idem principle encodes the rule that "no one shall be prosecuted and punished again for the same offense".[20]

Findings of the SAC in combination with the principle of ne bis in idem (i.e. the right not to be tried and punished twice for the same offense), therefore, opens the door for taxpayers who have already been imposed penalties, however, the criminal proceeding is still ongoing or has yet to start. Because in such a case the prosecution should be

19 P. Taranta, ASPI ID LIT 167785, Penále podle daňového řádu.

20 See more (in Czech language) in: H. Princip ne bis in idem v řízení o správních deliktech. Trestněprávní revue č. 3/2012, p. 53 f. and see the judgement of the Supreme Court July 22, 2004, ref. 11 Tdo 738/2003 in its full extent available at www.nsoud.cz

terminated with respect to the principle described above. In conclusion, it is necessary to underline that all of the above mentioned applies only to individuals, not to legal entities.

4. Conclusion

Although the SAC has given in its case law an answer to a long time debated issue, it does not mean the end of all problems. As the SAC itself points out, it is highly important to resolve the question of the unity of the deed and dual proceedings, i.e. especially Art. 40 (5) of the Charter of Fundamental Rights and Freedoms and Art. 4 of the Protocol No. 7 to the Convention, which was – in the then addressed case considered of an abstract character – thus without a proper connection to factual and legal circumstances. It is therefore necessary to wait for further developments in this area of the Czech and European law.

We consider the SAC's sound and unambiguous message to the general public of a fundamental importance. Besides that, one of the disputed points which was subject to many opinions reflecting diverse views on the relation between tax and criminal proceedings, has been answered, although many questions remain unanswered until now.

Abstract

This paper deals with problems related to tax procedure, especially to tax penalty payment with a special focus on the issues caused by the case law of the Supreme Administrative Court of the Czech Republic[21].

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CODES ON FINANCIAL MARKET IN FRANCE

Mariola Lemmonier[1]

1. The origin and scope of the Monetary and Financial Code

MFC is one of the most changed French modern codes. Also Act No. 2008-776 of August 4, 2008, hereinafter referred to as the LME Act, and the regulations adopted for its implementation have brought many changes to MFC. This principally resulted from taking over this area because financial crisis from 2008/2009 was a typical example of the necessities of a continual adaptation of the rules of law to practice. 2013 introduced specific regulations on brokering banking, and especially arranging banking operations and payment services (IOBSP, Art. R. 214-1 et seq.). In 2014 an act was passed on the agency in participatory financing. In 2016 MFC was changed under the angle of the implementation of the Directive of 2014/17/EU on home loans, especially in the part concerning intermediaries in banking transactions and payment services. The Financial Safety Act (LSF *Loi sur sécurité financière*), also known as the "Mer law" from the name of the then Finance Minister Francis Mer, was adopted by the French Parliament on 17 July, 2003 in order to strengthen the legal provisions relating to the management of the company. Like the American Sarbanes-Oxley Act, the French Financial Security Act refers specifically to the increased responsibility of financial managers, strengthening internal control and reducing sources of conflict of interest. The LSF Act included later in MFC was published in 2003[2] and it was similarly and repeatedly amended. The revision of statutes on the financial security (LSF) included all joint-stock companies and the companies quoted on the regulated market.

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1 Professor, University of Warmia and Mazury in Olsztyn (Poland).
2 J.O. No. 177, 2003-706, 01/08/ 2003.

The Monetary and Financial Code consists of seven books. The first one deals with currency and the French monetary system. The second book relates to the financial-economic products. The third book regards bank-financial services. The fourth book discusses bank-finance institutions. The sixth book refers to the subjects providing bank-finance services. The seventh book depicts special positions on the theme of French overseas territories.

2. MFC in French law

Money and finances are not the only key to the victories or the result of a good policy, but they also impact economic growth, redistribution of income, policy and social patterns. A famous sentence of Baron Louis says "Faites-moi de bonne politique, je vous ferai de bonnes finances" – Make good policy and I will give you a good finance[3]. This sentence also seems to fit the legislative policy that in France sometimes takes the side of users and offers convenient tools in the form of modern codes.

The modern code in France is not a source but a logical collection of certain legal principles applicable in the field. Practitioners (lawyers or not) do not need to search for provisions scattered in different acts, including the texts changing previous provisions. It makes changes or repeals more readily available and uniformity has gained importance. As in other modern codes, laws and regulations in MFC are preceded by the letter L – provisions of the rank of law, R- (the Decree of the Council of State) or D- (plain) for implementing provisions. If there are three digits, they specify the code, book titles and chapters, if the numbers are separated by a dash followed by the serial number containing 1 up to 3 Numbers, that correspond to the division of the chapter into sections and subsections.

If the adjustment is made in two separate codes, French Commission on Codification, which makes necessary choices in legislative codes, chooses The "Code of Guiding"- "a code pilot" which is a model, and

3 P. Baubeau, P.C. Hautcoeur, L'histoire bancaire, monétaire et financière française depuis 1980, p. 165, https://hal-pjse.archives- ouvertes.fr/halshs-00754816

also a so-called "following code" – "code suiveur", which resembles a provision by reference. For example, certain provisions on commercial companies issuing transferable securities are dealt with essentially in the Trade Code, and not in the MFC.

It is worth mentioning that the French Civil Code of 1804 does not have a division into parts designated by the letters L or R/D as its character as a code is different.

In the system of sources applied for a financial market in France, an important place is occupied by the order of Establishment of Supervision by Financial Markets (hereinafter referred to as AMF – Autorité des Marchés Financiers). The name and sphere of disposition, specifying technical and very detailed adjusting, and self ordinance have an executive character, and many articles specified in MFC in the parts designated by the letter L or R refer to the above-mentioned disposition.

3. The institutions of the French financial market

Supervisory Authority over Financial Markets (AMF, the Autorité de.s Marchés Financiers) exercises its regulatory function in France since 2003[4]. At the heart of its creation is a long institutional evolution started in 1967 by the creation of Stock Transaction Commission (COB, Commission des Opérations de Bourse) – first independent administrative authority that until 2003 served as protection for investors. While fulfilling the function of regulating the professional acts of the Council for Financial Markets (Conseil des Marchés Financiers), it was founded in 1996, following the merger of the Council for Exchanges (Conseil des Bourses de Valeurs) and the Council for the Futures Markets (d'un Conseil des Marchés à terme). AMF currently employs several hundred people and currently still plans to increase staff by more employees.

In the past, in some cases, the powers of the authorities (CMF, COB) duplicated themselves, and each one held its "General Regulations" approved by the Minister of Economy and Finance. Now MFC defines AMF in Article L 621-1: "the AMF, which is an independent State

4 Articles 1 to 21 of the Act ° 2003-706 on financial safety.

body with a legal personality, ensures the protection of funds invested in financial instruments and all other publicly traded investments on the transmission of information to investors as well as to the proper functioning of the markets in financial instruments. AMF contributes to the regulation of these markets on the European and international level"[5].

Because of the dual function of protecting investors and regulation of intermediaries on the financial market, the AMF often fulfills opposing roles. It is often impossible to co-ordinate the matters of all participants of the market – saving funds and their organizations pelt that AMF has a tendency to superfluous goodwill in relation to professionals that touches even superfluous connivance, while the last criticism of AMF involved unnecessary meticulousness and assistance to the deficit of competitiveness of the Parisian financial platform (Euronext) that occurred as competition for the exchanges in London, Milan, etc.

Independence of AMF as to institutional issues is the legacy of the COB. It is about independence in relation to the competent Minister (Economy and Finance), who gave up his traditional powers due to the high specialization of casework. In the matter of a legal personality – AMF continues the legacy of the Council for Financial Markets and this means that AMF bears direct responsibility for its actions in the case of dysfunction which brings injury to intermediaries or investors, as in the case of dysfunction, COB entailed the responsibility of the state. The composition of AMF is regulated in Articles L 621-2, R 621-1 to R 621-9 of the MFC. Another current authority of prudential control and regulations in the financial market is l'Autorité de contrôle prudentiel et de résolution-(ACPR).

SICOVAM (Société interprofessionnelle pour la compensation des valeurs mobilières) is a compensating chamber on the French regulated market. General principles of operation determined by SICOVAM were

5 « L'AMF, autorité publique indépendante dotée de la personnalité morale, veille à la protection de l'épargne investie dans les instruments financiers et tous autres placements donnant lieu à appel public à l'épargne, à l'information des investisseurs et au bon fonctionnement des marchés d'instruments financiers. Elle apporte son concours à la régulation de ces marchés aux échelons européens et international ».

left in the general regulation of Bennies[6]. The first traces of that authority can be found in the year 1816 although its existence, under the name "Central Deposits and Securities Transfers" (Caisse centrale de dépôt et de virement des titres), was only documented in statutes of 1941 and 1943. It was the historical stage of materialization of securities on the stock market. All bearer of shares and companies listed on the stock exchange had to submit to the SICOVAM in order to facilitate and make settlements arising from securities transactions. The Decree of 1949 to restore freedom of securities to bearers and the market created SICOVAM, which in 1950 was recognized as a continuer of Central Deposits and Securities Transfers. The owners of securities could apply for their physical form but they had to provide evidence of deposit.

Dematerialization of securities in 1981 did not entail the abolition of SICOVAM but made it mandatory for a transitional stage for all bearers of securities issued in France according to the account. Dematerialization also concerned the issuers of securities or eligible securities intermediaries.

SICOVAM manages current accounts of its members established for all categories of securities through a system of transfers. Despite using the term "settlement"in both cases, the SICOVAM differs from classic clearing houses that are not accounted for net balances received over a period of time and that are limited to the transmission of the boards of the summary statements obtained by its members. As a result, in each chamber there is a settlement pursuant to Art. 1289 of the Civil Code, and the SICOVAM participates in this as a higher level entity. The capital of SICOVAM belongs to the Banque de France Central Bank of France in 40% and to Prestataires de Services d'Investissement-brokers of investment services.

4. Selected code regulations of securities

Before dematerialization of securities in 1981 regulated by law and implementing regulation in 1983, securities were movable things that

6 H. de Vauplane & J.-P. Bornet, Droit des marchés financiers, Litec 2001, p. 220.

you could sell, give, lend, pledge, turn to drop, etc. Dematerialization of securities changed them into laws – immaterial to the bearer irrespective of whether they are subjectively determined (personal laws) or not, however, not changing in any appearance of operating chances. From the point of the historical and economic view, there are two types of securities – shares (share titles) and bonds (debt instruments). The concept of security in these two basic elements is derived from the French Civil Code, Art. 529, paragraph 1: "under the law, movable things are bonds and equities with a due amount or other movable property, shares or interest in financial, commercial or industrial companies although real estate attached thereto belongs to the companies. These stocks and bonds shall be deemed to be movable property only in relation to each of the partners as long as they are partners"[7].

The above determination comes from the years 1804-1816. MFC provides a more modern concept of security in Article L 211-2: "securities are issued by legal, public or private persons submitted by entry on the account or issue providing the same rights in the same category and, directly or indirectly, to a certain amount of capital of the issuer of the legal person or the general law claims to his estate. Papers are also valuable shares in investment funds and in companies[8].

The code does not define the concept of action, which means the "participation in the capital of the" three types of French trading companies: joint-stock company (SA), limited liability partnerships (SKA), and a simplified joint stock company (SAS, société par actions simplifiée). Share of the capital is a part of the company's capital to specify the rights of each shareholder in the company, their scope (the right to participate in the decisions of collective bargaining, the right

7 C.Civ., Article 529, alinéa 1er: « Sont meubles par détermination de la loi, les obligations et les actions qui ont pour objet des sommes exigibles ou des effets mobiliers, les actions ou intérêts dans les compagnies de finance, de commerce ou d'industrie, encore que des immeubles dépendant de ces entreprises appartiennent aux compagnies. Ces actions ou intérêts sont réputés meubles à l'égard de chaque associé seulement, tant que dure la société.

8 « Constituent des valeurs mobilières les titres émis par des personnes morales, publiques ou privées, transmissibles par inscription en compte ou tradition, qui confèrent des droits identiques par catégorie et donnent accès, directement ou indirectement, à une quotité du capital de la personne morale émettrice ou à un droit de créance général sur son patrimoine. Sont également des valeurs mobilières les parts de fonds communs de placement et de fonds communs de créances.

to profits and liability to cover losses) is proportional to the number of shares in the capital held by the shareholder, and this number is proportional to the value of the contribution made[9].

Shares are traded on a regulated market or in an over-the-counter market while shares are disposed of under the conditions laid down in the Civil Code or the Commercial Code and/or in the statutes of the company, depending on the type of a company. This has two consequences. The first is that each shareholder is a partner, every action is the participation in the capital but not every part of the capital is an action. On the other hand, only the company SA, or SKA may be listed on the stock exchange, the company SAS is not quoted on the stock exchange[10]. The mode of the emission of shares by SA and SKA is under Articles L from 228-1 to 228-97 of the French Commercial Codes in range relating to internal functioning of these companies.

Bonds, unlike shares, are ordinary debt instruments. MFC distinguishes bonds from other marketable debt instruments. In Article L 213-1 MFC, we read that "marketable debt instruments are securities issued in accordance with the will of the issuer, tradable on regulated market or OTC, which has a right to a claim within a certain time"[11]. In Article. L 213-5: "Bonds are transferable securities which during the same broadcast are given the same rights to claim for the same nominal value"[12].

Marketable debt instruments that are not bonds are regulated in Articles 120 of the Civil Code, in Articles of 1843-2, 1844 and 1844-1. 121 of the Commercial Code, Article L 227-2 of MFC also points to "securities issued by the State" (the State bonds and Treasury bills). In Article L 213-22 L 213-31) KMF "State loans" corresponding to " the Treasury bonds " (OAT, obligations assimilables du Trésor) are governed which deviate from the general definition of a bond in terms

9 Civil Code, Art. 1843-2, 1844, 1844-1.
10 Commercial Code, Art.L 227-2.
11 Les titres de créances négociables sont des titres émis au gré de l'émetteur, négociables sur un marché réglementé ou de gré à gré, qui représentent chacun un droit de créance pour une durée déterminée.
12 Les obligations sont des titres négociables qui, dans une même émission, confèrent les mêmes droits de créance pour une même valeur nominale.

of wording "when the same issue" and other certificates that are eligible to share in the profits[13].

Due to their diversity, shares or bonds have undergone a significant evolution, whether through diversification within each category of "action" or "bond", or by creating bridges between these two types of securities. Different types of shares and related securities were in particular regulated in the Code of Commercial Law and mentioned in MFC. For example, it is possible to favor financial actions and retrieving[14], registered shares[15], preference shares in respect of dividend[16], shares representing the share capital of the company[17], and certificates and the certificate of the right to vote. The same applies to the various types of bonds: bonds with priority rights[18], convertible bonds into shares[19], and bonds exchangeable for shares[20].

5. Best practices codes

Codes of good practice is a non-legislative form of financial regulation, which is closely aligned to the law of financial markets because of its pragmatism. The advantage of the code created by professional participants of the financial market is its quick adaptation to technical problems and limitations, which are gaining acceptance of the people, which the code applies. It also allows to develop a set of principles of good practice in a flexible manner that allows their modification according to your needs. Developed rules and their subsequent modifications should be simple and not costly. High adaptability of the code to meet the needs of professionals in the market as well as its responsiveness and speed adaptation or modification make it a valued means of adjustment. Besides, in the absence of the world's

13 Article L 213-32 à L 213-35, D 213-26 do R 213-29.
14 MFC, Art. L 212-1 (suiveur) ; Com. Code. Art. L 228-7 (pilot).
15 MFC, Art. L 212-2 to L 212-4 (suiveur); Com. Code., Art. L 228-9 (pilot).
16 MFC, Art. L 212-6 to L 212-6- 4, R 212-2 (suiveur); Com. Code, Art. L 228-111 to L 228-20 (pilot).
17 MFC, Art. L 212-10 & R 212-14 (suiveur), Com. Code L 228-91 – L 228-97 (pilot).
18 MFC, Art. L 212-7 (suiveur), Com. Code., Art. L 225-150 – L 225-158 (pilot).
19 MFC, Art. L 212-8 (suiveur), Com.Code Art. L 225-161 – L 225-167 (pilot).
20 MFC, Art. L 212-9 (suiveur), Com. Code, Art. L 225-168 – L 225-176 (pilot).

regulators, the alignment of practices moves on the international plan. The financial crisis of fall 2008, highlighted the importance of the code.

Codes of good practice are aimed at meeting the professional practice, which from the point of view of the rules of law, are of a high technical level. By specifying the professional rules meticulously, they allow to leave legal standards or regulatory concerns about general issues[21].

Rules of conduct apply to professional intermediaries dealing with financial management as well as credit rating agencies or the media. The texts of codes contain two types of provisions, the principle of deontological of a mandatory nature directed solely to management professionals and recommendations addressed to investors or to the media. The above code of pragmatism and good practice does not, however, exclude competition as a result of the multitude of codes of good practice, for example, the rules of conduct for investment advisers (CIF, conseillers en investissement financier). The French Financial Security Act of 1 August 2003 (LSF) gave advisers a specific status. The introduction of the status of advisers allowed the professional activities of a set of rules and guarantees for people who dedicate themselves professionally to strengthen consumer protection. The French legislature opted for the principle of "reduced self-regulation", that is to say for the adjustment made by the investment advisers, but through their associations and under the control of the AMF. All consultants must belong to the Association responsible for the collective of their representation and the protection of the rights and interests of their members. The approval of such associations is made by AMF. Each association must have a code of conduct for its members and also be approved by AMF. Such a code must contain at least recommendations set out in the implementing legislation of AMF, requiring advisers to behave loyally and provide fair treatment of the interests of their clients, to conduct business in a way that is competent, diligent, proper and as best suited to the situation of the client, to the use of resources and the necessary procedures for the effective implementation of the activities to use with the client's knowledge and experience in the field of financial

21 I. Riassetto, M. Storck, op. cit. p. 672.

investments, and to transfer customers to all the information useful from the point of view of the decisions. So far six associations have received the acceptance, each of which has committed its members to comply with the code of good practice. The competitiveness of the Association reflects the flexibility conceived by controlled self-regulation-advisers having different codes of "best practices", falling within the scope of the fundamental principles laid down by the legislative authority[22].

The development of a code of good law is not without certain shortcomings. First of all, it may be the attitude of professionals that can see in the code the opportunity to demonstrate good will before the binding regulation imposed "from above". The code of good practice can also appear as a veil for doubt as to the purity of the intent of the creators of codes by regulatory initiatives of hybrid instruments or hedge funds or alternative funds. Talking about instruments or funds the objective of which is a high profit, evolving with the development of markets through the use of complicated speculative strategies using derivative financial instruments, the leverage effect is used in the technique of borrowing of cash or securities, or short sale. In the face of the crisis in the financial market there appeared votes for the establishment of binding European regulations proposed by the Hedge Fund Working Group, comprising fourteen most important managers hedge funds in the UK, which published in 2007 "standards of best practices" and then the best practices code[23]. The development of such a code can become a tool of power as attested by the fact that it was introduced during the financial crisis rather than a result of political pressure. For example, you might use the French code on bonuses and bonuses for the boards of the companies developed by MEDEF (L'Association Française des Entreprises Privées) and by the AFEP (Mouvement des Entreprises de France) as a result of government pressure. In similar circumstances, the best practices code on lending territorial authorities were made. The debt of local authorities in France in the early years of the credit operations based on risky structured products resulted in urgent need to renegotiate financial loans that were not indexed only for inflation but also to other,

22 I. Riassetto, M. Storck, op. cit., p. 673.
23 Ibidem, p. 675.

more risky parameters. The Association of Local Governments and Banks engaged in developing such a code under the influence and control of Financial Inspector and Minister of Economics and Finance.

The best practices code, however, has several weak points due to the adjustments thereof. Already at the stage of development, doubts may arise as to the too targeted approach, conducive to the interests of the industry and passing over the balance of interests in the financial market. Therefore, a good practice is the inclusion of financial supervision or ministerial representatives working on the code. In addition, the auto sector may in some cases give birth questions as to its legality. For this reason, before the code is accepted, its creator (professional organization) must be recognized by the entire industry. Otherwise, you can worry about the formation of the subsequent codes. There is no doubt that the existence of multiple best practices codes relating to the same scope of activity stimulates competition for determining the principles that guide the sector, although it can also complicate subsequent appeal. Without the mechanism belonging to industry associations, it is likely that some operators might have a tendency to individualize the provisions. By rejecting the entire scope of the code, individual tuning would create "à la carte" of its own code by selecting from other codes single policies most consistent with their situation.

Implementation of the best practices codes in life results from good will and is based on the Anglo-Saxon principle "comply or explain" (apply or explain why don't you follow). Because of this, it is characterized by weakness inherent in the voluntary use of best practices, and especially with the control of the compliance with the standards contained therein. You can put the question whether there is a real control of the application and, if so, who is responsible for this, i.e., whether it is a professional organization that has issued the code. If these problems are not so much relative difficulties at a national level, by far the situation gets complicated after crossing the borders due to the lack of international supervision. Mortgage crisis in the United States became an opportunity for credit rating agencies to give visibility to this phenomenon. Regulations contained in codes of good practices consist mostly of recommendations that are not binding, and their violation entails many consequences. The wording in the form of orders or

prohibitions results in only the internal disciplinary sanctions laid down by the professional organization (warning, reprimand, exclusion). As a result, by the lack of consolidation of the code or its provisions by legislative or regulatory rules, the barrier of binding hierarchy of norms does not exceed. On the one hand, the financial crisis has laid bare the boundaries of professional entities in terms of rules of conduct in situations where markets experience nervousness but, on the other hand, it realized the superiority of the intervention of legislation, which does not always contain "beauty" sanctions.

Regulation of financial practices in the form of codes developed by professional associations may be a transitional measure to the relevant provisions. These codes can also get the current character thanks to the approval of the regulatory authority or their inclusion in the regulations approved by the AMF or issued by the public authorities. The association of professionals that coordinates and carries out preparatory work to the end plays a decisive role in the development of principles of best practice before they are applied in practice. Because the mission of the association is, inter alia, to ensure compliance with best practices, they are gaining importance in regulatory authorities.

Starting from the current existence to their legal recognition, the rules of proper conduct in the financial market provide a lot of possibilities for the relationship between the codes. Not all have this privilege but many of them can achieve the status of a rule of law of a binding nature.

Abstract

French Monetary and Financial Code (hereinafter the MFC) was introduced by Law 99-1071 of 16 December 1999, by Regulation No. 2000-1223 of 14 December 2000 (for the legislative parts) and Decree No. 2005-1007 dated August 2, 2005 (for the regulatory parts). As a consistent whole it appeared only in 2005. The code is a set of uniform legal standards, in particular as a whole, which are in legal force. Other codes appearing in our times in trading are types of codification-consolidation such as MFC and they do not implement changes of

fundamentals rules as they are aimed mainly at the systematization of legal norms being in force in a given field[24].

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24 I. Riassetto, M. Storck, Les codes de bonne conduite en droit des marches financiers, Mélange a l'honneur de prof. G.Wiederkehr, Strasbourg, Dalloz 2008, p. 670-671.

REMISSION OF TAXES AND THEIR ACCESSORIES IN CZECH TAX LAW[1]

Michal Liška[2], Petra Snopková[3]

1. Introduction

The authors of the article draw attention herein to the problem of remitting taxes closely linked to moderation and thus assessment, additionally, the assessment of tax in the right amount respectively. It is obvious that the current legislation, which extends into basic substantive and procedural laws of sub-branches of financial law by numerous additional amendments, has some gaps in their adjustment. These gaps are, in the opinion of the authors, important in relation to the issue of tax remission. This article, therefore, focuses on a more sectional overview of problematic issues linked to the existence or non-existence of the possibility to remiss the tax or its accessories.

2. Tax law, financial law and the tax

To begin with, it should be recalled that the Czech legal order has been created upon the ideological concept regarding financial law from two points of view during the passage of time. According to the first one, financial law is perceived as a comprehensive set of norms with a common subject and other branch-creating criteria, and secondly as a coherent set of norms related to public finances. Tax law is a specific part of public finance law because it is closely linked to public budgets, respectively cash funds, carrying a public sense of its existence and purpose towards the fulfillment of objectives of its public nature. These

1 This article is the outcome of the research project MUNI/A/1356/2015 "Charta místní samosprávy vs. financování obcí".
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funds then form a fiscal part of financial law which is assuring and using public money vicariously through the above-mentioned funds by financial activities. Thus the tax law ensures the creation of a material base for the exercise of state power in the community organized by the state. Tax law is assessed as an independent branch of law, for example, in Poland. The authors intend to present at least a basic outline of the tax law.

Tax law is by its nature non-limiting law *sensu largo*. Generally, this concept encompasses all benefits regulated by tax legislation. A broad concept of tax law and its scope is based on the legal science of the First Republic and historical foundations, of course, when the concept of tax-like contribution preceded a more modern concept of tax, which has diversified flowing institutes of a fiscal part of financial law. Mrkývka already hinted in the lectures on financial law that among the institutes fulfilling the nature of tax according to the First Republic's understanding, tax falls within the meaning of tax-like contribution being a part of Social Security Law. The above-mentioned was confirmed, for example, by Rozehnal in his dissertation[4]. Taxes *sensu largissimo* are essential sources guaranteeing the possibility of operation of the state[5] and, therefore, even the public sector. As far as the self-government sector, it is also financed from the amount of a fiscal part of financial law.

The concept of tax, from the beginning of its existence, especially after the entry into force of the Act no. 280/2009 Coll., The Tax Code, as amended (hereinafter "the Tax Code"), considers issues regarding the scope of this concept. In this Act, a sort of a tax test is created, which states which monetary performance is taken as tax according to the wording of the law. At first, it is provided that the subject of the administration of taxes are taxes that are revenues of the public budget or those that decrease it. Subsequently, the Act defines the concept of a public budget. In paragraph 3 it is, therefore, defined as a tax:

a) cash transactions which the Act refers to as a tax, customs or fee,

4 T. Rozehnal, Problematika právních zásad aplikovaných v daňovém řízení. Brno 2015, p. 79-80. Retrieved from: http://is.muni.cz/th/61238/pravf_d/

5 Tax revenues and revenues for social security together constitute 96.5% of state budget revenues for 2014 (excluding revenues from the EU).

b) cash transactions if the Act provides that upon its administration they are proceeded under this Act,

c) cash transactions within the divided administration.

Therefore, we must remember that it is income or drawback of the public budget which also fulfills the provision of paragraph 3 and possibly paragraph 4 and 5 of Article 2 of the Tax Code. The authors recall that tax in this concept monitors, or at least should monitor, the needs of the administration of taxes. The issue of a definition of the concept of tax in this manner was examined by almost each o major Czech "Tax Advisor", whereas it is particularly appropriate to recall Boháč and his article "The concept of tax in the tax laws", which reminds the authors who have written something about the concept of tax under the meaning of the Tax Code that does not agree with the fact that this meaning of the concept of law is a legislative abbreviation. The authors fully agree with that. In the opinion of the authors, the academic conception of tax was integrated with practical knowledge deduced mainly from the problems of application practice (combination of teachings of tax-like contribution and conclusions of jurisprudence about the nature of some monetary performance).

The intention of this article is then to further point out some captiousness of the codification of certain segments of financial law, combined with the current, rather broadly-defined, concept of tax specified in the Tax Code.

3. The tax and self-government

The concept of taxes, among others, embraces charges when it is generally accepted in the tax theory that the main difference between the charge and the tax is irregularity of the charge and the equivalent provided in the form of a chargeable act. It can also be said about charges that they respect, as well as direct taxes, the taxpayer's income situation. The above-mentioned fact is in favor of higher equivalence of taxes *in personam* rather than charges, which is associated with the advantage of self-application. Charges are collected for a certain purpose (some legal acts) but tax assignation in the Czech Republic is mere

theoretical possibility *de lege ferenda*[6]. With the purposefulness of the majority of charges even a nuisance is bounded, considering the fact that it is a monetary performance with some equivalent which is funding of a public authority which performs a chargeable act. These bodies can then be, for example, tax offices (fees for different applications), courts (court fees) or local self-government units (local taxes).

Purposefulness of charges, therefore, affects the right to self-government, respectively one of its tripartite components – economic basis of a local government unit[7]. This is then projected into the question of the competence to remiss taxes under the Tax Code. According to the authors, the possibility to tax remission is linked to the concept of tax under the provisions of Article 2 paragraph 3 of the Tax Code, under which the charge is understood as a tax as well as monetary performance realized within the divided administration. A remission of taxes for all taxes was possible already beyond the efficiency of Act no. 337/1992 Coll., on administration of taxes and fees, but in force at the decisive period (hereinafter "AATF") could occur in rare cases directly on the intervention of the right to self-government, prior to the amendment of Article 16a and 16b of the Act no. 565/1990 Coll., on local charges, as amended (hereinafter "the Act on local charges"). The above situation is not ultimately resolved since the taxpayer may file a request for "accessory" remission of tax under Article 259 et seq. because the Act of local charges does not give him this option. Then it is necessary to recall that, as the Constitutional Court of the Federal Republic of Germany in matters Solange I and Solange II adjudicated, it is always necessary to investigate and apply a higher protection of fundamental human rights. The aforementioned has been confirmed by the decision of the Federal Constitutional Court of Germany of 15th December 2015 in Case 2 BvR 2735/14. In this case, the Tax Code gives more reasons for tax remission than the Act on local fees. It may result in the intervention of the tax administrator if the request of the tax subject to tax remission with the right to self-government at the expense of the exercise of the right of ownership is handled positively. The above, however, only concerned

6 Tax assignation has been adopted to legal orders of neighboring countries such as Poland, Hungary or Slovak Republic.

7 See P. Průcha, Správní právo, obecná část. 6. dopl. a aktualiz, Brno 2004, p. 188-189.

cases where the deciding body could be distinct from the municipal body responsible within the municipal jurisdiction.

As far as the remission of court fees is concerned, it involves the problem of a more substantive nature since there is no tax administrator identical under the proceedings on the assessment of charges and proceedings on its payment[8]. Thus a situation may occur that a court fee for which there are no grounds for its release can be remitted, for example, in the amount of its accessories by the tax administrator, which is a part of the executive branch, not the judiciary. We will encounter a situation where public power intrudes upon the judicial power and its right to independence.

4. Remission of taxes

Talking about the remission of taxes, it needs to be stated that this is a legal institute occurring in different forms. It may be a question of international etiquette and, subsequently, usages formalized into a written law[9]. According to the Supreme Administrative Court[10], the sense of tax remission is based on the fact *that the remission of tax debts has always been perceived as a grace, as special exemptions specific case of the general tax liability. It is indeed a throw-back of the royal graces and pardons when the state waives a tax asset on which it has the claim. This character of remitting of taxes has also been preserved until today, and it can be concluded that the decision on tax remission under Article 55a of the Tax Code is a decision issued in the sphere of administrative discretion while the administrative body even in the fulfillment of legal requirements can remit tax but does not have to*[11]. Last but not least, there is the understanding and purpose of this institute established by the explanatory report that remission of tax and its accessories consolidates primarily with the provision of procedural equality to tax entities. The introduction of tax remission is, according to amendment no. 35/1993 Coll., *particularly important at the present time when the introduction of*

8 Procedural rules for administration of taxes are divided between two administrative bodies (substantively divided administration).

9 See also the judgment of the European Court of Justice (First Chamber) of 5th December 2005, European Central Bank against Federal Republic of Germany in case C 220/03.

10 The decision of the Supreme Administrative Court of 21st July 2009, no. 8 Afs 85/2007-54.

11 All direct quotes are translated from the Czech language by the authors.

the new tax system must assume the emergence of irregularities and hardness, especially with regard to the circumstances under which the new tax system formed is.

This implies the question whether, currently, tax remission which is envisaged only in cases of tax irregularities or incidents of natural disasters, which is set across the board with regard to the prohibition on public aid, is the right solution reflecting all the possibilities of correct tax assessment. Lately, it has become an acute voice of the existence of a strangling effect in the case of, for example, a photovoltaic power plant and a levy[12] imposed on it. How should a tax administrator proceed if the strangling effect was actually found? In the opinion of the authors, it is possible to interfere with the discretion of the Ministry of Finance in the matters of issuing individual acts. The Supreme Administrative Court expressed its opinion in this matter already in the decision of 17th December 2013 in case no. 1 Afs 76/2013-57, where it was stated: *The most apposite means to be taken into account with regard to the individual effects of the levy assessed under the law but falling on individuals with a strangling effect under the current law is the institute of tax remission. The provisions of Article 259 of the Tax Code assume that subjects that qualify for tax remission or its accessories as well as powers to this remission will be established by one of the public authorities upon either individual laws or directly the Tax Code (see the Explanatory report to the government draft of the Tax Code of 19th November 2008).* The above-mentioned is manifested in commitments to the constitutionality of legislation and the issue of commitment of the executive power in the application of law by legal norms of higher legal force. If the Ministry of Finance violates their obligation to abide the law by the spirit and purpose of the constitutional order in the form of inactivity in the context of issuing subordinate legislation, they are violating the separation of powers and the nature of their act of nobility may be replaced by a court decision. This jurisdiction of the court is beyond the powers conferred by law, but it is in accord with the Constitution and the meaning and purpose of the existence of the Supreme Administrative Court. Jurisdiction of the Supreme Administrative Court is already stated in the provisions of Article 2 paragraph 1 point. a) Act no. 309/1999 Coll., on the Collection of Laws and Collection of International Treaties, as amended, in conjunction

12 This is a levy on electricity from sunlight.

with Article 87 paragraph 3 of the Constitutional Act no. 1/1993 Coll., Constitution of the Czech Republic, as amended. The European Union slowly breaks the model of administrative justice which adjusts the correctness of decisions of the public administration bodies and raises the possibility of a complete case assessment (therefore the matter of facts) and a decision *ex nunc*.[13] The Supreme Administrative Court then, however, stated that the decision about tax remission is an act of a mixed character. Yet, this is not a case falling under the jurisdiction of the Constitutional Court. We can summarize that the judicial power can provide merely suggestions for the issuance of sovereign acts of a mixed nature to the executive power and these then examine them themselves. The gaps in the law were fulfilled by the Supreme Administrative Court, for example in the case of Kordárna[14]. Another ad hoc issue, which would likely be resolved in the framework of the institute of tax remission, is exceeding the time limit for tax assessment in case of litigation about the existence of tax obligations for a period longer than this period.

It can be said about the institute of taxes remission and their accessories that this is an institute with the nature of extraordinary relief. It corrects the amount of tax when it is evident that the tax is not equivalent to the performance of a monetary nature. The above-mentioned should not fully occur with regard to all taxes, therefore it is necessary for the legislator to proved a general legal rule of a general nature to certain branches of law paying attention to the specific nature of each ad hoc case. Thus, this cannot be forbidden public aid but correctly assessed taxes. When assessing the ban on providing public aid, it is necessary to base it on the meaning and purpose of state aid. If it is a purpose that even covertly has no signs of a taxpayer's advantage in the context of business competition, it cannot be state aid prohibited in the area of tax remission. Of course, this must be very strictly assessed in the proceedings of tax remission in a significant amount where the

13 See Article 46 par. 3 of the Directive 2013/32/EU of the European Parliament and of the Council of 26th June 2013 on common procedures for granting and withdrawing international protection (recast), which sets: "In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance".

14 The decision of Supreme Administrative Court of 5th November 2014, no. 7 Aps 3/2013-34.

advantage would lie not in providing pecuniary funds from the public budget but rather in a favorable approach towards similar cases in the EU, normative rules of conduct of a single addressee respectively. In the opinion of the authors, however, in these cases it is the liability of the European Union institutions to find out whether the particular aid was a violation or abuse of rights.

The institute of taxes remission is not the only institute offering the afore-mentioned correction of certain practices of tax administration because the administrative court may, in accordance with Article 78 paragraph 2 of Act no. 150/2002 Coll., Administrative Procedure Code, as amended, moderate the amount of penalty for an administrative offense. Thus a question arises of what is included under the concept of an administrative offense and when the decision to impose this penalty, respectively punishment, will be distracted. Moderation only applies rather in excessive situations in which the amount of the penalty is clearly not a generalizable concept of adequacy and fairness of the sanctions[15]. In the light of the foregoing, tax remission is a moderation institute of tax administration in administrative proceedings regarding fiscal offenses[16]. It should be added that moderation is only possible on the proposal.

Another stimulus and the last one mentioned in this work in relation to the remission of tax or rather tax accessories, is a situation of hitting the same punishment that may occur twice. The European Court of Human Rights in the case of Lucky Dev v. Sweden, dated 27th November 2014, application no. 7356/10, spoke in favor of providing "full" protection of Article 4 of Protocol no. 7 to the Convention of tax entities, to which fell the obligation to pay the penalty under Article 251 of the Tax Code and other surcharges and penalties fulfilling so called "Engel-criteria". The European Court of Human Rights, however, did not provide protection only against criminal prosecution of the same conduct twice (in tax proceedings and in criminal proceedings), but this decision also brought the possibility for taxpayers to seek the imposition

15 Cf. Soudní řád správní, komentář. 1. vyd., Praha 2014.

16 For example Regional Court in Brno in case no. 31 Af 45/2014 outside of hearing stated that there would be possibility to moderate penalty for being late in sending tax returns/declaration.

of lighter penalties for the violation of tax laws of a criminal nature. The afore-mentioned can, for example, directly affect the remission of a levy on budgetary discipline violation and the question of sanctions imposed under the Act no. 137/2006 Coll., on Public Procurement, as amended (hereinafter "the Public Procurement Act")[17].

5. Conclusion

The authors, therefore, see the institute of tax remission, on the one hand, as very appropriate means of intervention and tax administration or executive power body in general, as they can remit taxes on the assessment of tax liability. Recesses of tax remission in relation to the right to autonomy, independence of the judiciary power and the Public Procurement Act were outlined herein. In this article, the authors came to the conclusion that the possibility to remit taxes in which there were ad hoc pronounced strangling effects or other ills associated with their injustices, respectively illegalities, found by a court, should be created by the legislator or the Ministry of Finance. By this time, at least for the area of administrative offenses, respectively fiscal offenses, the possibility of moderating their amount by a court, but only on the proposal, have been expressed. To summarize, as far as the impossibility of tax remission as a response to the court decision is concerned, in the opinion of the authors, it is a problem that needs to be adjusted either by the Ministry of Finance or through the legislative process.

Abstract

In the tax law there is still a delicate question concerning individual assessment of each tax case as well as imposition of adequate sanctions. Under the valid Tax Code, we no longer encounter individual options to remiss the tax under the Act on Administration of Taxes and Fees. In this article, the authors collectively want to point out drawbacks of current legislation and alternatives pertaining to the possibility of moderating the amount of tax liability.

17 With respect to violation of the right to self-government.

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Soudní řád správní: komentář, Vyd. 1, Praha 2014.

THE CZECH REPUBLIC DIRECT TAXES DEVELOPMENT TENDENCIES

Hana Marková[1]

1. General Reform Canons in the Direct Taxes Area

Basic Constitutional principles and compliance thereof must remain the cornerstone of any tax area reform. In accordance with Art. 2 paragraph 3 of the Constitution, the state power shall serve all citizens and may be exerted only in matters within confines and by means provided for in a law. Under Art. 2 paragraph 2 of the Charter of Fundamental Rights and Freedoms, obligations may be imposed only by law within its confines only while respecting the fundamental rights and freedoms[2]. Moreover, there is a need for respecting limits stemming from the constitutionally guaranteed protection of ownership. Art. 11 paragraph 5 of the Charter also limits the state's power, in furtherance of the aforementioned, when stipulating that taxes and fees may be levied only by a law[3].

Even The Supreme Administrative Court[4] was assessing whether the tax had been imposed lawfully, in accordance with the Charter. The court ruled that the fundamental rights and freedoms may not be expounded only by the limits determining whether the tax is imposed by a law (i.e. formally subordinated to a particular legal provision). The rule of law enjoins that the protection has to be applied to cases of application and interpretation of a particular provision, which sets forth the obligation as well. The tax burden is deemed to be an interference with the rights

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2 Art. 4 paragraph 1 of the Charter.

3 This paper has been elaborated within the framework of the project "PRVOUK – P06 Public Law in the context of Europeanization and globalization" which is realized at the Faculty of Law of the Charles University in Prague in the year 2016.

4 Cf. judgment NSS case 5 AJS 4/2005-56 from 12.1.2006.

to use property by the European Court of Human Rights case law since it deprives the concerned person of a part of their assets, i.e. the amount that must be paid. This interference is, however, justifiable in accordance with Article 5 paragraph 11 of the Charter, which enshrines the exception concerning payments of taxes and fees.[5] The tax reform that is from time to time being carried out by the state is always a vital and systemic change of the tax system and is usually a reaction to a substantial change of economic, social or political conditions.

The tax reform is subsequently responsible for tailoring the tax system to these changes and ensuring economic growth and greater tax fairness. A tax reform is, however, not a mere change of rates or reductions, tax-exempts, etc. Either new taxes have to be introduced or the current ones repealed so that tax changes can be deemed as a tax reform. Since November 1989, it has been obvious that the existing tax system has to be changed given the need for modernization of the whole tax system and its adjustment to the European standards.

Therefore a draft of a tax system concept was drawn up by the former federal Ministry of Finance in May of 1990. A drastic tax reform, effective by January 1, 1993, meant the formation of a new tax system. Even though the main objectives were labeled as a fiscally political, more equitable distribution of primary incomes, economic goals realization, opening up of the domestic economy to abroad while achieving flexibility and efficiency of the tax collection were to be attained as well. Economic objectives complemented financial-psychology ones, which meant that the tax system was to be such as to its construction went with general awareness of law. Flourishing business environment and a greater tax fairness were to be created by the reform (the same taxation regardless of the nature of ownership, regardless of the source of income respectively).

The income tax system that was introduced divided revenues into two basic groups: those subjected to the individual income tax and those taxable under a corporate income tax. The accommodated approach has

5 Cf. Commission decision WASA Liv Ömsesidigt, Försäkringsbolaget, Galanda Pensionsstiftelse, 1988, Bufalo, s. r. o., v. Itálie, 2003, ECHR decisions 1/2004, p. 7 in Re Orion Břeclav, s. r. o., v. Czech Republic 13.1.2004.

so far been maintained[6]. There have been both major and minor changes in all forms of direct taxes – income and property ones, since the 1992 legislation adoption. The same process has taken place in the area of indirect taxes, however, none of these changes can be depicted as tax reforms.

Changes that were carried out in 2004 that were called forth by the Czech Republic entering the European Union and by the need for implementing the acquis communautaire could be deemed as overhaul ones. Furthermore, 2007 may be mentioned as a year when the process of public finances consolidation was started, which was manifested by the inception of a new phase of tax changes even though it was apparent it would have been better to start from the expenditures reform.

The Act on stabilization of public budgets[7], which took effect from 1 January 2008, commenced certain tax changes by introducing a uniformed individual income tax rate (often referred to as a flat tax rate) and by lowering corporate income taxes, which was, however, offset by a tax basis expansion to a great extent. Additionally, the Act introduced taxation according to the principle of the so called "supergross" salary, expanded employees' public health insurance participation and established a general maximum assessment basis. The aforementioned law, however, didn't bring about changes in income taxes but only encompassed further indirect taxes related to energy resources too (energy tax). A new legislation related to property taxes was introduced from 1 January 1993 when a realty tax was introduced by the Act no. 338/1992 Coll., an inheritance and a gift tax by the Act no. 357/1992 Coll., and a road tax by the Act no. 16/1993 Coll.

2. Pension Taxes

Income taxes are generally considered as one of the basic components of the tax system, not only in the Czech Republic. Income taxes rank among direct taxes, income-related taxes in particular. The

6 J. Široký, Daňové teorie s praktickou aplikací, 2.vyd., Praha 2008, p. 34-46.
7 Act no. 261/2007 Coll., On stabilization of public budgets, as amended.

importance of income taxes is most often expressed by the stating that it assures a substantial part of the income flowing to the public budgets, i.e. resources to be redistributed to different areas of public domains. Moreover, it could be characterized as a universal and synthetic tax. Synthetic tax is a tax that affects taxpayer's income comprehensively (i.e. regardless of its source)[8].

Concerning tax collection, income taxes are payments that could be collected by withholding or by a tax return. In most countries, personal income taxation is exerted throughout a personal income tax and, in addition, by means of public insurance premiums. Individual income tax is a form of personal income tax that is deemed to be the most important form of taxation in majority of developed countries due to its highest comprehensiveness, fairness and economic efficiency. In terms of a tax theory, public insurance premiums are deemed to be taxes, even though remaining outside the Czech tax system. Various types of individuals' or households' personal incomes are subjected to a personal income tax.

On 1 January 1993, an individual income tax was introduced in order to tax every individual's global income so there would be no tax deviations originating in different income sources. Personal income taxes are, unlike indirect taxes, imposed with an assumption that they will be levied on the same subjects effectively and statutorily. The underlying logic of the creation of personal income taxes is the idea of a different taxation of different types of income.

Generally, it is assumed that all forms of individuals' incomes can be divided into three categories: labor incomes, business incomes and property incomes. The income division is more sophisticated in the Czech Republic when divided into five partial tax bases in particular. Partial tax bases are focused on incomes from employment, incomes from independent activities, capital gain incomes, rental incomes and other incomes. Two reasons are emphasized for the income division into partial tax bases – namely, different rules for expenditures, costs

8 Unlike analytical taxes, which are taxed separately by each income source, and thereby are detrimental to the neutrality of a tax base for individual taxpayers.

of individual types of income respectively, and different conditions regarding losses creation and implementation.

The income tax changed in 2008 when a calculation of income dependent activity tax was changed to a uniform tax rate at 15% for all individuals from the "supergross" salary[9]. This unusual individual income tax base construction is considered by some experts to be an encroachment violating a tax theory, when expunging compulsory expenditure[10] from income tax base. On the other hand, incomes that do not exist, or were never received were added to a tax base. The constitutionality of this tax base adjustment was also examined by the Constitutional Court. The Court didn't not find any violation of the Constitution; however, the decision was not unanimous (four justices had a different opinion) [11]. Corporate income tax is based on a uniform tax basis and rate for all corporations. Differences related to a subject and a tax base concern, for example, taxation of public benefit taxpayers and business entities.

Income taxes haven't exhibited significant evolutionary progress in the harmonization process. Since harmonization in income taxes is perceived as interference into internal affairs and, moreover, it is not necessary for the functioning of the single market, EU haven't required any significant progress in harmonization thereof yet. These tax changes are, therefore, currently in the attention of local politics rather than the EU's.

3. Property Taxes

Property taxation by advocating property taxes can stem from three basic tax fairness principles, namely: the principle of utility, the

9 By the end of 2007, the income taxes from employment and functional benefits were counted only from the gross income, net of social security and health insurance premiums withheld or paid by the employee. Since 2008 amendment to the Act on Income Tax, a fictitious tax base has been established, ie. supergross wage, which for tax purposes includes not only social and health insurance premiums withheld or paid by the employee, but also social security and health insurance which the employer is obliged to pay himself. The principle of grosswage, which was introduced in 2008, is not defined by the law.

10 Expenditure depicted by the special law – the premiums paid by employees.

11 Constitutional Court. No. 24/07 January 31, 2008.

principle of ability to tax payments and the ecology principle[12]. In the theory of taxation there are, besides opinions acknowledging the merits for property taxes, opinions to the contrary. The later ones contest that property taxation is a taxation of the property that has been gained out of already taxed incomes and, therefore, it creates double taxation. In this context, there is a possibility of setting aside property taxes while replacing them with well-designed income tax.

As far as the matter of tax fairness is concerned, it would be appropriate to come out of the net property value taxation, which would, however, be difficult to mete out, especially in terms of tax administration. Concurrently, it should be noted that this system would be applicable only if good tax morality existed. Property taxes are, along with income taxes, classic direct taxes representatives since they are meted out to a taxpayer in regard to his property and are targeted. A taxpayer does not have an option of not paying them and, in contrast to indirect taxes, he or she does know their value. A taxpayer is responsible not only for their payment but also for their calculation. Even though property taxes have only a marginal role on the national level in the Czech Republic, its importance is shifted to lower-municipality levels since revenues therefrom are directed towards municipality budgets. As a revenue source, property taxes are becoming to be an important tool in strengthening the independence of their public budgets.

Effective from 1 January 1993, property taxes became a part of the Czech tax system, some of which had had a form of a notarial fee before respective laws were enacted. A realty tax, an inheritance tax, a gift tax and a realty acquisition tax were among the property taxes from the beginning of 1993. Property taxes also include a road tax, although it is not always portrayed as a typical property tax. In conjunction with the adoption of the New Civil Code, there have been changes in the regulation concerning property taxes. While property taxation is still contemplated by the Act no. 338/1992 Coll., as amended, tax designation was changed to a real property tax.

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12 H. Marková, Daň z nemovitostí (Důvody její existence, perspektivy, mezinárodní srovnání), www.dvs.cz, ze dne 10.12.2003.

Inheritance and gift taxes were repealed and tax without consideration was geared down in the Act on income taxes. Realty transfer tax was changed by virtue of a statutory measure of the Senate no. 340/2013 Coll., to a realty acquisition tax. The new tax came from the former realty transfer tax, and even though its main rate remained the same, its other elements have changed. A road tax remained encompassed in the Act no. 16/1993 Coll., on a road tax, as amended.

Real property tax is a property tax which is related to the real estate register, where property rights to real estates are primarily recorded[13]. The information recorded in the register is crucial for the property taxes tax base determination. Real property tax is composed of two parts, land taxes, building, and unit taxes. The broad ambit of municipalities' mandate enables them to regulate the level of the taxation (via various arrays of coefficients) and could, therefore, provide an important element for strengthening their public budgets' independence.

Inheritance tax is considered to be a classic transfer tax with a very long history. There is currently no inheritance tax in the Czech Republic. The situation when a heir receives assets without consideration so his wealth increases is, in fact, addressed by the Act on income taxes, where the increase of wealth is deemed to be an income, however, usually exempt from paying income tax.

The transfer of property through inheritance is closely related to another form of the transfer of property without consideration – donation. Each tax obligation related to property transfers usually has similar governing legislation. The basis for the assessment of taxation was the question of a form of the property transfer as there also occurs acquisition of property without consideration to the wealth of a person who has not created the value of the transferred wealth.

Unlike in the case of inheritance tax, donation is a transfer inter vivos not mortis causa. The gift tax and the inheritance tax were repealed simultaneously when the income from donation was geared down under the Act on income taxes. Even though the vast majority

13 Although the Act on tax on real property governs the taxation of real property, the concept of real property is defined by the Civil Code.

of these incomes are exempted from income tax, not all of them are exempted, therefore the conditions for the exemption must be examined carefully. Incorporation of these incomes into the Act on income taxes can be discerned as an effort for the tax system simplification while concentrating various incomes under one law that will address questions of all incomes related to individuals and corporations.

Realty transfer tax also belonged into the group of transfer taxes governed by the Act no. 357/1992 Coll., on inheritance tax, gift tax and realty transfer tax, as amended. After the abolition of the law regulating all transfer taxes, there was a need to address the issues related to the transfers of real property by a new, autonomous way. A distinguishing feature among different types of transfer taxes was whether they are connected with a pecuniary form of transfer or passing of the property[14]. Another difference was the fact that in case of pecuniary transfers, only immovable property transfers were taxed while acquisition without consideration was subject to a tax regardless of whether immovable or movable assets, claims and other property rights were involved. The main function of the realty transfer tax was to prevent tax evasion related to gift taxes that could be carried out by fictitious sales contracts[15]. Changes brought about by the statutory measure of the Senate no. 340/2013 Coll., address the question of a person liable for the tax obligation upon the principles determining the tax base. The rate remained unchanged as it was defined by the previous legislation.

Taxes in conjunction with real property exhibit virtually no development in connection with the harmonization process. The reason is that property taxes are not directly affected by the binding EU legislation. It can be assumed that the introduction of the value principle in determining the tax base for immovable property in accordance with the usual price will be the latest possible change in the harmonization development. Accordingly, no transfer taxes are in the center of harmonization, although legislation of taxes differs markedly from the European Union rules. For further development of these taxes we can

14 On this subject, for example: Supreme Administrative Court, judgment sp. Ref. 7 Afs 126 / 2005-75 July 27, 2006.

15 Comp. K. Kubátová, Daňová teorie a politika, 4. přeprac, Praha 2006, p. 256.

expect harmonization changes related mainly to the valuation of real estate for the purposes of these taxes and alignment of the legislation with the usual treatment of these taxes in the European Union.

A road tax is also included in a group of property taxes. Some form of a road tax applies to cars not only in the Czech Republic but, de facto, to cars in all European Union countries. Their taxation principles, however, differ largely. Selected categories of vehicles are liable thereto in the Czech Republic. Only road taxes are changing slowly, even though there are considerations concerning transformation of existing taxes in the context of harmonization. We can assume that these tax adjustments will relate to changes in emission limits introduced to promote environmental protection.

In addition to the tax in the form of a road tax, there are also other methods of taxing motor vehicles in the Czech Republic. One of them is the so called time fee[16]. This is such a payment which is paid for a specific vehicle for a certain period of time in a situation where a vehicle is used for traveling across certain highways in the Czech Republic. This obligation may have a form of a toll for a specific group of users The main reason leading to the introduction of tolls was a strong increase of truck traffic after the Czech Republic became a European Union member.

4. Conclusion

In conclusion, it can be stated that direct taxes are gradually adjusted to rather concentrate incomes of individuals and corporations for the purposes of taxation in the Czech Republic – i.e. taxation within a single tax liability. However, this does not mean that the property would remain completely outside the tax system. Furthermore, it does not anticipate immediate inclusion of real estate taxes into the income tax system. Only in the case of realty acquisition a clear definition of a taxpayer and his connection with the real estate that is being acquired may, as a prerequisite, also address the questions of the tax construction in the future. It is, therefore, not entirely impossible that certain processes of

16 Time fee is generally known as “highway sticker”.

concentration of incomes could in the future lead to the incorporation of payment for the transfer of real property into the income taxation.

In the case of real property taxation, the role of municipalities where the property is located increases. Municipalities are already able to modify the set of coefficients within the statutory authority, thereby altering the tax burden of taxpayers in a given municipality. The municipality's tax proceeds can grow as a result of a proactive approach to real property taxation, which may be an important element in the strengthening of municipal government.

To encourage the trend of strengthening municipal budgets, it could also be attained by a conversion of local fees (and their possible extension) into the system of municipal taxes. This would broaden the ambit of direct taxes levied in the Czech Republic, which would not be levied uniformly throughout the state but their introduction and selection would be decided by municipalities. The scope of payments and their binding elements would remain unified, defined by law and would be binding for all municipalities. Local fees already have a number of tax elements and operate as tax payments, therefore, it would be right to include them among direct taxes.

Abstract

A tax reform is always a vital and systemic change of the tax system and is usually a reaction to a substantial change of economic, social or political conditions. A tax reform is subsequently responsible for tailoring the tax system to these changes and ensuring economic growth and greater tax fairness. Income taxes rank among direct taxes, income-related taxes in particular. Property taxes are, along with income taxes, classic direct taxes representatives since they are meted out to a taxpayer in regard to his property and they are targeted. Direct taxes are gradually adjusted to rather concentrate incomes of individuals and corporations for the purposes of taxation in the Czech Republic – i.e. taxation within a single tax liability. It should also be stated that in the case of real property taxation the role of municipalities where the property is located increases. Municipalities are already able to modify the set of coefficients within the statutory authority, thereby altering the

tax burden of taxpayers in a given municipality. Another possibility for the direct tax changes system could be a conversion of local fees into the system of municipal taxes.

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DUE TAX PROCEEDINGS – SELECTED ISSUES

Artur Mudrecki[1]

1. The concept of due process

Judicial review of tax administration decisions constitutes a guarantee of respect for the rights of taxpayers as expressed in tax law. On the one hand, court decisions are binding the parties to proceedings while, on the other hand, they perform a preventative function in respect of tax authorities, forcing them to respect procedures in force at particular stages of tax proceedings. In addition, the interpretation of legal regulations by the Supreme Administrative Court, because of its authority, plays a significant role in shaping the practice of tax law.

The issue of protection of taxpayers' rights is associated with the right to court, within whose framework the right to due process is contained.

The right to fair trial is one of the foundations of the democratic law-governed state. The Polish Constitution establishes guarantees that this right will be respected in every case declaring that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court (Article 45(1)), as does the European Convention on Human Rights (Article 6(1)), the International Covenant on Civil and Political Rights (Article 14(1)) and the Charter of Fundamental Rights (Article 47). From a broader perspective, a fair hearing is a part of the concept of equitable administration of justice and encompasses many diverse rights, such as the right to an impartial court ruling based on the principles of a

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contradictory, open trial conducted in a reasonable time and with the observation of all procedural rules[2].

The right of taxpayers to due process is among the most fundamental rights, grounded in constitutional regulations and international treaties. It is a universal right, shared by all citizens, but can only be exercised by a specific group of them, namely taxpayers. In addition, the right to due process is of a procedural nature, and that term is reserved for proceedings before a court reviewing tax disputes. There is also no doubt that the right to fair trial before a court is a human right[3].

I have delineated the specific characteristics of proceedings before Poland's administrative courts in tax matters compared to other types of cases:

1) judicial control is exercised over the application of substantive tax law regulations, which are interpreted in a particular manner resulting from the autonomous nature of tax law;
2) as a result of the separation of administrative procedures regulating tax proceedings implemented in 1998 with the adoption of the Tax Code, distinct regulations concerning tax proceedings became the subject of assessment of judicial review of compliance with the law;
3) written interpretations of tax law issued in individual cases are also the subject of appeals submitted to administrative courts (Article 3(2)(4a) ACPA);
4) the Supreme Administrative Court has diversified its jurisprudence through the application of a different interpretative framework in tax cases[4];
5) tax advisors may act as attorneys at law in tax cases before courts of both the first and second instances;

2 A. Mudrecki, Rzetelny proces podatkowy, Warszawa 2015, p. 13.
3 Ibidem, p. 14.
4 Z. Kmieciak, Glosa do uchwały składu siedmiu sędziów NSA z dnia 4 lutego 2007 r., docket no. I OPS 3/07, „Orzecznictwo Sądów Polskich" 2008, v. 5, p. 352.

6) case law of the Court of Justice of the European Union plays an important role in the interpretation of tax law, especially that concerning indirect taxes[5].

2. Protection of taxpayer's rights in international standards, in the European Union and in some countries

Because of its ineffectiveness, the UN system of human rights protection does not play a significant role in ensuring such rights[6]. The most effective system of human rights protection is that contained in documents from the Council of Europe, including the European Convention on Human Rights and Recommendations of the Committee of Ministers of the Council of Europe in such areas as judicial independence and impartiality. The jurisprudence of the Court of Human Rights, which essentially excludes tax cases from its jurisdiction, does not play an important role in respect of due process in tax cases[7].

Incorporation of the Charter of Fundamental Rights into the legal order of the European Union, particularly Article 47 therein, has rendered it the most effective system for protection of taxpayers' rights, particularly in respect of the right to due process in tax proceedings. The Court of Justice of the European Union plays an important role in the protection of taxpayers' rights, frequently referring to the case law of the European Court of Human Rights with regard to the application of Article 6 of the Charter. The CJEU also advances a community-conforming interpretative framework binding on national courts, and responds to applications for preliminary rulings. This jurisprudence, particularly in cases concerning value added and excise taxes, has exerted a significant influence on the evolution of tax law interpretation in Poland, in which systemic and functional interpretations are playing an increasingly important role. Rulings handed down by the CJEU frequently contribute to changes in the jurisprudence of the SAC. It should be noted that administrative courts hearing tax cases experience difficulty in decoding

5 A. Mudrecki, Rzetelny…, op. cit., p. 17-18.
6 Ibidem, p. 32.
7 Ibidem, p. 318.

the guidelines concerning interpretation of tax law contained in rulings from the CJEU, which at times leads to divergent rulings[8].

Various models of judicial control of decisions in tax cases exist around the world, and the ways in which due process is ensured are diverse. One may conclude with justification that specialized financial courts can ensure the most effective means of concluding tax cases owing to the specialization of the adjudicative body. A similar level of protection is provided by submitting tax disputes to administrative courts, under the condition that the judges are specialists in tax matters. In the light of these considerations, the system of administrative judiciary adopted in Poland is consistent with international standards, particularly considering that separate chambers of courts staffed by justices specialized in tax matters are responsible for ruling in such cases. This does not, however, mean that other models of judicial protection of taxpayers' rights present in Europe and around the world fail to ensure due process[9].

Both two-tier and three-tier judiciaries can be identified. In analysing the specificity of both these models, it has been concluded that while the first structure facilitates more rapid resolution of tax cases, the second provides more comprehensive review of rulings. An advantage of the first model is ensuring that cases are resolved in a reasonable time. The second model can lead to protraction of proceedings, which is undesirable in tax proceedings considering the significant impact of the passage of time on the taxpayer. The two-tier judiciary model adopted in Poland ensures effective judicial protection for taxpayers, as it accounts for the fact that before a case is brought to court, it is the subject of rulings by tax authorities in two instances, and parties are afforded the effective and unlimited right to appeal against judgments and other rulings concluding cases handed down by voivodeship administrative courts. Proceedings should not be needlessly protracted by such solutions[10].

8 Ibidem, p. 318.
9 Ibidem, p. 319.
10 Ibidem, p. 319.

Models of judicial protection allow for disputes to be resolved with substantive judgments, cassation rulings and mixed decisions containing elements of both. In Poland, the standard has been cassation resolution of disputes, but in recent times Article 146(2) ACPA has introduced the possibility of substantive judgments in cases referred to in Article 3(2) (4) and (4a). Amendments to the Administrative Court Proceedings Act of 9 April 2015 also include provisions for expansion of substantive rulings in Polish administrative court proceedings. This type of mixed cassation-substantive solution would seem vital in contemporary tax cases considering its capacity for accelerated resolution of disputes.

3. The right of the taxpayer to an independent and impartial court

Separateness of administrative courts in Poland from common courts and the absence of administrative dependence on the Minister of Justice are factors which allow to hope that those courts enjoy greater independence from the legislative and executive branches**.** It should be remembered that administrative courts resolve disputes between citizens and central state organs as well as perform review of the legality of decisions taken by the Minister of Justice. In addition, in tax matters the decisions taken by courts lead to specific financial effects for the state[11].

An important role in the functioning of the administrative court system is performed by the Chief Justice of the Supreme Administrative Court, who is its head. Pursuant to Art. 185 of the Constitution of Poland, the Chief Justice of the Supreme Administrative Court is appointed by the President of Poland for a six-year term of office from among the candidates presented by the General Assembly of the Judges of the Supreme Administrative Court. These regulations are constitutional norms which, in my view, ensure independence of the decision in which a major role is played by the judicial community; it nominates and presents candidates to the President of Poland. Importantly, a candidate for the Chief Justice of the SAC may only be appointed from among

11 Ibidem, p. 134-135.

justices of the SAC. This excludes the imposition of a candidate from the outside, i.e. from not among judges of the SAC. Since candidates for the Chief Justice of the SAC are judges of outstanding substantive and ethical equalizations and are known within the judicial community, this eliminates the possibility of a random candidate being selected. The President of Poland may only select the Chief Justice from among two candidates, and in practice follows the number of votes received from the General Assembly during secret voting. The President's freedom is thus limited, as he/she may not take the initiative in selecting the Chief Justice[12].

The position of the President of the Supreme Administrative Court in the Polish legal system is conducive to the independence of administrative courts, and helps to ensure that the right to an independent court, one of the fundamental elements of due process, is observed. Another guarantee of this independence is ensuring budgetary autonomy for the administrative court system[13].

The right to having one's case heard by an independent and impartial tribunal is a constitutional right. Guarantees of the implementation of this right are found in the Polish Constitution, the Administrative Court Act and the Administrative Court Proceedings Act. Aspects of these laws that provide for judicial independence are the lifetime appointment of justices, the limited catalogue of situations in which a justice can be dismissed, judicial immunity, the democratic manner in which judges are appointed involving the input of the judicial community, and inviolability of justices' chambers during deliberations over judgments. These elements constitute effective guarantees of due process. In addition, the institution of dismissal of a justice serves to ensure the right of review of a case by an impartial arbiter. In spite of the limitations on the circumstances justifying recusal of a justice introduced by the amendments to the Administrative Court Proceedings Act of 9 April 2015, the regulations presently in force have been sufficiently established[14].

12 W. Skrzydło, Komentarz do Konstytucji Rzeczypospolitej Polskiej, Warszawa 2013, komentarz do art. 185 Konstytucji.
13 A. Mudrecki, Rzetelny…, op. cit., p. 137.
14 Ibidem, p. 321.

The most important guarantee of the right to due process is the tax judge, who should act as the protector of taxpayers' rights. Tax judges should fulfil particular standards for thorough knowledge (both practical and theoretical) of the tax system as well as for personal characteristics. Recruitment of such justices should be performed with particular care. A tax judge should be active in interpretation of tax law, resistant to stress and sensitive to violations of taxpayers' rights. In consideration of the fact that judgments are issued by panels of multiple judges, tax judges should also be capable of working in teams. In view of the stringent qualifications set out in the law, in my view, the best candidates for tax judges are academics specialising in tax law as well as individuals who are engaged in the interpretation of tax law on a regular basis, frequently drawn from tax authorities. Reintroduction of the institution of the associate justice, who can be employed on a trial basis for a period of up to five years in order to determine his/her suitability for the position, should be positively assessed. In the future, a sort of administrative judicial apprenticeship could be introduced as a means of preparing candidates for the role of a judge. An effective mechanism of rewards should be created as encouragement for judges to work continually on improving their qualifications. The analysis of legal regulations and observation of courtroom practice leads to the conclusion that the institution of a tax judge is a guarantee of independence and impartiality, which translates into a guarantee of due process in tax proceedings[15].

4. Rights of the taxpayer before Voivodship Administrative Courts in Poland

The right to due process is not articulated in the Administrative Court Proceedings Act, nor in the Administrative Courts Act. It is derived from Article 45 of the Polish Constitution, which can be applied directly by administrative courts on the basis of Article 8(2) of the Constitution. In my view, it would be worthwhile to introduce a guarantee of the right to a fair trial into statutory legislation[16].

15 Ibidem, p. 321.
16 Ibidem, p. 321.

The objective scope of grievances submitted to courts is quite broad. In recent times, taxpayers have frequently requested rulings in disputes over individual interpretations of tax law, which provide them with certainty as to the application of tax regulations. Limits on the right to submit grievances in certain matters should be considered, such as those concerning so-called incidental rulings, in order to avoid enmeshing taxpayers in numerous proceedings which only serve to needlessly extend tax-related matters. Improprieties in cases related to those rulings would be analysed in the course of reviewing complaints filed against final decisions of tax authorities. On the other hand, consideration should be given to expanding the cognition of courts to include grievances filed against other acts or actions which impose significant duties on taxpayers or limit their rights (such as the right to tax refunds)[17].

An important guarantee of the right to due process is providing access to information for taxpayers, particularly when a taxpayer is not represented by a professional attorney. In addition, the taxpayer must have the right to apply for suspension of implementation of the contested decision or act. Courts make limited use of their capacity to suspend the enforcement of contested decisions.

Another important right held by taxpayers is the right to an open hearing of the case, and to active participation in proceedings before the court, *id est* to be present at hearings and to speak freely, as well as submissions regarding evidence from documents[18].

Proceedings conducted in this manner should lead to fair decisions. The court of the first instance should provide relief not only for reasons directly related to the circumstances indicated by the taxpayer, but also when it perceives other grounds than those contained in the complaint. The quashing of a contested action or decision can occur in a broad range of cases. In reviewing the application of substantive law, courts engage in a specific form of interpretation characteristic of tax law. In the event of violations of procedural rules, voivodship administrative courts examine whether tax authorities have infringed the provisions of

17 Ibidem, p. 322.
18 Ibidem, p. 322.

the Tax Code to a degree that could have an impact on the substance of the contested decision[19].

There are grounds for concluding that present regulations and the practice of courts in particular cases create good and very good conditions for due process in tax proceedings. However, it should not be forgotten that this right can be infringed in individual cases, which should be corrected in proceedings before the Supreme Administrative Court. Such a conclusion does not mean that civilizational progress and economic development should not lead to future changes in regulations. Taken from this perspective, we should offer a positive assessment of the amendments introduced to the Administrative Court Proceedings Act of 9 April 2015 as well as the full computerization of administrative courts planned for 2017[20].

5. The right of the taxpayer to an appeal

While the right of taxpayers to appeal against the decisions of the court of first instance cannot be considered a guarantee of due process in its strict sense, it does provide a guarantee of observance of taxpayers' rights during proceedings before voivodeship administrative courts. The regulations presently in effect are consistent with Polish constitutional standards. The objective scope of cassation appeals is very broad as it concerns both judgments and other rulings which conclude proceedings in a given case. In addition, the grounds for cassation appeals laid down in Article 174 ACPA, following changes in practice implemented as a result of resolution I OPS 10/09 of 26 October 2009, should be viewed favourably as they provide an effective guarantee of the taxpayer's right to file an appeal. This does not mean that no consideration should be given to possibilities for amending rules concerning grounds for cassation appeals to make them better adapted to the specifics of judicial review in administrative and tax cases. In addition, attention should be devoted to situations in which a party has obtained what is formally a positive decision, yet demands redress in respect of a detrimental position stated

19 Ibidem, p. 323.
20 Ibidem, p. 323.

in the substantiation, which is binding under the provisions of Article 153 ACPA[21].

The jurisprudence of the Constitutional Tribunal concerning administrative court procedure has served to enhance protection of taxpayers' rights in appeals proceedings. This does not, however, mean that neither the practice of reviewing cassation appeals, nor the quality of legal regulations in that regard are perfect[22].

Taxpayers frequently invoke their right to file cassation appeals, and there is a growing tendency to do so. The effectiveness of cassation appeals is relatively high. As previously mentioned, courts are bound by the complaints set out in the appeal – with the exception of grounds for invalidity referred to in Article 183(2) ACPA. To better protect the rights of taxpayers filing such applications, the grounds for quashing judgments from the court of the first instance should be expanded to include gross violations of substantive or procedural law and incompatibility with rulings of the Constitutional Tribunal and/or Court of Justice of the European Union[23].

Instruments of last resort for eliminating unsound judgements are extraordinary modes of proceedings, which include the institution of reopening of administrative court proceedings. Rulings by the Constitutional Tribunal play an important role in the grounds for reopening court proceedings in tax matters, while motions for a declaration of a legally binding decision unlawful are of only marginal significance in judicial practice.

Regulations concerning the costs of proceedings in tax matters as well as judicial practice in this regard do not constitute a significant barrier in the right to court. Court fees, unchanged for 11 years, are not excessively high. In addition, the costs of services provided by professional attorneys are not an undue burden. Taxpayers (both natural and juridical persons) in a difficult financial situation can request an exemption from court costs and/or appointment of an attorney remunerated by the state. Every application for the right of assistance

21 Ibidem, p. 323-324.
22 Ibidem, p. 324.
23 Ibidem, p. 324.

should be reviewed very carefully. There is no confirmation for the hypothesis that court costs are a barrier to the submission of claims to courts by people of average means. This does not, however, mean that present regulations should be left unchanged, at least in respect of areas indicated by the jurisprudence of the Supreme Administrative Court regarding such issues as the costs of cassation proceedings for the opposing party as well as costs involved in appealing against judgments of the first instance in favour of the complainant due to the content of the binding substantiation (this change should address Article 203 and 204 ACPA)[24].

6. Summary

It can be said that the reform of administrative courts introduced on 1 January 2004 guarantees taxpayers the right to have their case heard in a reasonable amount of time. Regulations introduced in that reform support the hearing of cases without undue delay. The establishment of an administrative court in every province also brought the administration of justice closer to taxpayers. Employing more judges has also facilitated quick resolution of disputes associated with review of individual administrative acts in tax cases.

Legal regulations and court practice in individual cases create the conditions for due process in tax cases at a good and at times a very good level. However, due process should not be taken for granted**.** This is why the need to ensure proper conditions for the functioning of independent administrative courts should lead to the situation when they become objects of continual monitoring in a democratic state under the rule of law.

Abstract

The article presents the right of the taxpayer to due process, which plays an important role in the democratic law governed state. The analysis has been performed of taxpayers' rights in international standards and in

24 Ibidem, p. 325.

the European Union. The greatest role in this respect is played by the Court of Justice of the European Union.

The position of administrative courts in the political order of Poland ensures the independence of justices ruling in tax matters. The rights of a taxpayer before administrative courts, particularly to a case heard in public, to active participation, to information, and to submit evidentiary motions, all contribute to due process.

Legal regulations and court practice create conditions for individual tax cases to be conducted with respect to the principle of due process to a good, and in some aspects a very good, extent.

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THE QUASI-CODE OF COMMUNAL TRIBUTES IN THE SECOND POLISH REPUBLIC

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1. Introductory Remarks

In the period of the Second Republic (1918-1939) an attempt was made to include major communal tributes (i.e. taxes, charges and special levies) in a single legal act being a significant source of income for self-governing units (communal units and poviat unions)[2]. From the review of legislation valid in this period that regulated different aspects of local self-government functioning, also in the area of measurement and collection of public tributes attributable to the local self-government (especially taxes, surcharges to taxes and charges), it may be concluded that the highest level of the tributes codification was reached already in the first years of the Second Republic existence, i.e. in 1923, and this state lasted until the statehood breakdown in 1939 (it was continued after WWII till the end of 1954). It was characteristic that the legislator originally did not have any intention to realize this concept or at least he treated it as an interim solution on the way to the target code of the communal tributes. Such a conclusion comes to mind in the light of the term used in the title of the 11 August 1923 Act which was "on interim regulation"[3]. By 1938 the above mentioned Act was amended as often as 20 times, mainly due to the need for adapting the existing regulations to changing social and economic conditions, including the period of

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2 Another example of partial codification of the fiscal law in this period was the Act of 15 March 1934, Fiscal Ordinance (uniformed text Journal of Laws of 1936 No. 14, item 134 with amendments). – see C. Kosikowski, O nie zrealizowanej koncepcji polskiego kodeksu podatkowego, (in:) Księga Jubileuszowa by Prof. dr. Leon Kurowski. Podstawowe zagadnienia prawa finansowego i polityki finansowej w Polsce w latach 1989-1997, editors E. Chojna-Duch, W. Goronowski, Warsaw 1998, p. 98.

3 The Act of 11 August 1923 on temporary regulation of communal finances (original text: Journal of Laws of 1923 No. 94, item 747) hereinafter "Temporary Act".

the Great Depression in the years 1929-1933, but its fundamental assumptions were maintained.

This Act, in its very limited extent, was valid for two years more after the end of World War II (as of 1 January 1946 the basic part of this Act lost its effect, including regulations that controlled structural elements and the measurement rules for individual communal tributes[4]) and it was formally revoked as of 1 May 1947 by the penal fiscal law regulations[5], in which in Art. 2 par. 7 it was only limited to enumerate the following communal tributes: taxes (tax on lands; real properties; premises; public amusement events, entertainment and shows; mines; communal taxes imposed by self-government unions), special charges and administrative fees. It was not a moment yet that would start decodification of the communal tributes, since structural elements of the tributes and the collection rules were regulated in a separate decree of 20 March 1946 on communal taxes[6], and then in the Act of 26 February 1951 on land taxes[7]. The process of systematic decodification of communal public tributes stared in 1955 and it was continued in the following years. Such communal tribute regulating state is maintained nowadays.

2. The Internal Structure of the Interim Act on Regulating Communal Finances

The interim act included material law and procedural provisions. In order to maintain clarity of its solutions, an internal system was used that consisted in distinguishing eight parts, four of which referred explicitly to communal tributes (titles of this part are: taxes, charges and special surcharges, measurement and collection of communal tributes, penalties imposed for evading communal tributes). Thus, the concept

4 Revoked with the decree of 20 March 1946 on communal finances (Journal Laws no. 19, item 129, as amended).
5 On the basis of Art. 304 § 1 par. 6 of the decree dated 11 April 1947 Penal Fiscal Law (Journal of Laws no. 32, item 140, as amended).
6 Journal of Laws no. 19, item 128, as amended.
7 Journal of Laws no. 14, item 110.

was adopted to include in a single legal act both regulations concerning material as well as procedural law pertaining to communal tributes.

The remaining parts included provisions that concerned: other income sources (short-term and long-term loans; issuance of bills of exchange by self-governments; purchase and sale of real properties; providing benefits by communal poviat unions to rural communities, within former Russian annexed territories also to village communities (*gromada*); subsidies for self-governments from the Treasury or from funds of other communal unions), types of supervisory authorities and their competences toward rural communities, municipal communities and some cities (Warsaw and Gdynia), universal rules aimed to stabilize communal finances (e.g. guarantee to ensure sufficient sources of revenue needed to cover expenditures when the legislator extends the self-government's scope of tasks, thus it was a prototype of the adequacy of tasks to income rules as well as adjusting self-government budgets to the state budget with respect to the budget period and calculative unit), other provisions (e.g. on validity of this Act within the whole territory of the Republic, except the Silesian Voivodeship[8]).

The scope of issues for the Silesian Seym in the field of treasury and, in particular, relation of the Silesian fiscal system to the state fiscal system and interrelation between the state treasury administration and the Silesian treasury administration were regulated in two same text acts: nationwide and Silesian[9]. Drafts of these acts were prepared by the Cabinet in consultation with the Voivodeship Council. Income from taxes and charges collected from Silesia credited the Silesian Treasury that

8 In accordance with the Act of Constitution dated 15 July 1920 that included organic statutes of Silesian Voivodeship (Journal of Laws no. 73, item 497 as amended) the following matters, among others, were reserved to the legislation of Silesian Seym: Silesian administrative authorities system, poviat and communal self-government, administrative division of Silesia, annual Silesian budget and approval of accounting, incurring provincial loans, purchase, exchange and mortgaging voivodeship real properties and accepting financial guarantees by Silesian treasury, imposing taxes and public charges.

9 The Act of 14 April 1924 on interim regulation of communal finances in Silesian Voivodeship in the wording announced in Silesian Governor's Ordinance of 8 July 1926 (Official Silesian Journal no. 17, item 30) as amended by the Act of 7 December 1927 (Official Silesian Journal no. 26, item 48) and the Act of 7 March 1933 (Official Silesian Journal no. 9, item 16) was revoked as of 1 January 1946 by the Decree of 20 March 1946 on communal finances.

managed fiscal administration[10]. From this income the Silesian Treasury transferred for nationwide needs a part that corresponded to the number of inhabitants and Silesia's fiscal force (the amount payable for this title was annually set by the Cabinet based on motions from the Voivodeship Council, and it was published together with detailed justification).

3. Regulations on the Extent of Material Law of Communal Tributes in the Interim Act

The interim act was not restricted only to enumerate the communal tributes but also regulated some elements of their legal structure (e.g. subject of taxation, entities obliged to pay particular tributes, maximal rates and exclusions). The catalogue of taxes, regulated in the interim act in a various subject-object range, was comprehensive and, at the same time, open because its last item was "other taxes". The legislator was not consistent in constructing this catalogue since among communal taxes he also included charges and surcharges to state taxes. In this approach, the communal taxes were: communal surcharges to state taxes on lands and buildings located beyond municipalities, tax on lands within municipalities (charged in the form of surcharge or as an independent tax), tax on mines (coal, salt or crude oil, except salt mines being under state management or subject to the state monopoly), taxes on buildings within municipalities (charged in the form of surcharge and in some cases as an independent tax), tax on premises (communities could also impose "a tax on residential luxury" collected for residential parts that due to their intended use or the number of occupants were regarded as redundant, and also a hotel tax on occupying premises or their parts in hotels, lodging houses, rooms, inns or accommodation facilities), communal surcharge to tax on industry and commerce, shares in revenues from national income tax, communal surcharges to national taxes on consumption, use or production (e.g. wine beverages, beer, spirit and goods transported by rail), surcharge to stamp fees for letters concerning transfer of intellectual property, communal tax on protested bills of exchange, communal surcharge to national tax on inheritances

10 More widely on this subject T. Kruszewski, Budżet Prowincji Śląskiej w XIX i XX wieku, (in:) Z dziejów skarbowości, ed. R. Wojciechowski, Wrocław 2009, p. 131-163.

and gifts, communal tax on posters and signs and announcements (object of this tax might vary in rural and municipal communities), communal tax on public amusement, entertainment and shows, communal tax on the hunting right, and other taxes (e.g. communal tax on dogs and communal tax on luxury products).

The legal structure of the above mentioned taxes (surcharges or fees) was not regulated in a comprehensive manner in the interim act. The legislator was more or less detailed in these elements of the legal structure that could have an effect on efficiency of a given source or revenue or ability to sustain the fiscal load by bound entities, e.g. maximal percentage value of communal surcharges was set for individual national taxes[11], and tax exemptions for all premises occupied by disabled persons, widows and widowers, orphans and pensioners. The interim act also regulated in details the rules for sharing tax revenue between communities and poviats, their unions and the voivodeship self-government.

In the interim act none of the communal taxes (surcharges) was regulated in a comprehensive and complex manner. Along this act, separate fiscal acts were in force[12], whose implementation was necessary in the measurement procedure both for the national tax and the communal surcharge. References in the interim act to respective provisions of the fiscal law were not clear and unequivocal in all cases. In some cases, the references were not used at all (even when measurement of the communal surcharge added to tax required application of separate fiscal law provisions). In the analyzed period, apart from the interim act, fully separate legal acts were in force that regulated legal structures of independent communal tributes, e.g. compensation tax for rural communities charged to the national tax taxpayers (on lands, industry and commerce, and buildings). The compensation tax applied also to state-owned lands, lands belonging to foundations, social care

11 A. Borodo, Podatek od nieruchomości w systemie finansowym samorządu terytorialnego, Toruń 1995, p. 23-27.

12 E.g., Act of 1 July 1926 on stamp duties (uniform text Journal of Laws of 1935 no. 64, item 404 as amended), Act of 1 July 1925 on wine and mead tax (Journal of Laws no. 75, item 525), Act of 15 July 1925 on national industrial tax (uniform text Journal of Laws of 1936 no. 46, item 339 as amended), Act of 15 June 1923 on equalizing land taxes and some building taxes (Journal of Laws no. 65, item 505 as amended), and Act of 2 August 1926 on premises tax (uniform text Journal of Laws of 1934 No. 76, item 718 as amended).

institutions and monasteries in the voivodeships where such lands were exempted from the national land tax[13].

The catalogue of charges and special surcharges in the interim act basically included so called administrative charges[14] (for using communal devices and public benefit facilities, for activities and official certifications of communal authorities, and for partial covering of village mayors' administrative costs). Resolutions on these charges were not subject to acceptance by supervising authorities[15]. However, the supervising authority could request at any time to change or revoke resolutions on charges if they were inadequately high in relation to costs that were financed from them. Special surcharges were taken to cover costs of establishing and maintaining public benefit utilities and facilities and transport enterprises that used special own surface (entities obliged to pay the surcharges were property owners and industrial and commercial companies for whom the utilities and facilities or enterprises brought particular economic benefits or conveniences)[16]. The amount of a special surcharge was to be graduated accordingly to the value of acquired economic benefits or conveniences.

4. Regulations on the Extent of the Procedural Law of Communal Tributes in the Interim Act

They especially indicated bodies authorized to measure and collect independent communal taxes (the community or communal union

13 Compensation tax was measured from 1931 until the statehood breakdown in 1939 under the Act of 20 March 1931 on independent compensation tax for rural communities (Journal of Laws no. 27, item 172 as amended), and then Act of 27 February 1937 on independent compensation tax for municipal communities (Journal of Laws no. 16, item 104, as amended).

14 I. Czaja-Hliniak, Opłaty i dopłaty publiczne w Polsce międzywojennej, Kraków 2013, p. 208 and subs.

15 Supervising authorities in the meaning of the interim act were: for rural communities (in former Russian district also for village communities (gromada)) and municipal, not separated from poviat communal unions – poviat departments; for municipal communities separated from poviat communal unions – voivodeship departments; for Warsaw Capital and Gdynia City and for national communal unions – the Minister of Interior acting in consultation with the Minister of Treasury.

16 I. Czaja-Hliniak, Prawno finansowe regulacje międzywojennego prawa drogowego, (in:) Księga Jubileuszowa by Prof. Ryszard Mastalski. Stanowienie i stosowanie prawa podatkowego, ed. W. Miemiec, Wrocław 2009, p. 103.

board or a body authorized by this board)[17] and communal surcharges added to national taxes and fees (bodies appointed to measure and collect such national tribute to whom the surcharge was related). In addition, it was decided that for the activities pursued by the state authorities that co-acted in the measurement and collection of communal surcharges, the state could deduct 2% from the amounts paid to communities and communal unions for these surcharges. The Minister of Treasury could order communities, upon their consent, to levy and collect national taxes in whole or part, and to pay them some remuneration for this activity (up to 3% of sums collected for the Treasury from such taxes)[18].

The interim act defined the range of authorizations for the bodies in order to ensure that the bodies correctly measured and levied independent communal tributes, including: the right to request from parties or their legal representatives and from witnesses and experts answers to respective questions, and in case of doubts as to the answers, to request submittal of trade and commercial books and other evidences; the right to apply to other community boards and state authorities to provide taxation bases for national and communal taxes disclosed at measurement. It also regulated main duties of the bodies that measured and collected independent communal tributes, e.g. the obligation to keep in secrecy information received during measuring activities; the obligation to inform each taxpayer individually (by giving a measurement statement) unless fiscal acts or statutes anticipated other notification method; the obligation to inform the taxpayer on the amount and payment dates for all independent communal tributes measured on annual basis (at the same time during first two months of a budget year unless the base of an independent communal tribute measure arose only during a current budget year); the obligation to announce to public the amount of levied communal surcharge added to the national tax.

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17 M. Podkowski, Działalność finansowa i jej kontrola wewnętrzna w gminie wiejskiej po uchwaleniu ustawy scaleniowej w 1933 r., (in:) Z dziejów skarbowości, ed. R. Wojciechowski, Wrocław 2009, p. 177-178.

18 For instance, the Ordinance of the Minister of Treasury dated 7 February 1925 on providing to the Municipal Estimating Commission the measure of national income tax in the area of Łódź City, and to commit Łódź City Hall to levy and collect this tax (Journal of Laws no. 19, item 140, as amended).

The subject of regulation included in the interim act were also specified guarantees used to protect taxpayers' rights, first of all including the right to appeal against the measure of independent communal tributes (it provided for a 14-day period for the appeal and for the appeal bodies that were supervising authorities appropriate to the body that made measurement). Separate appeals against the measure of surcharges to national taxes could be risen only in case when the community right to levy such surcharges was negated at all or according to the rate specified in the measurement statement (the rule was to rise appeals against the measure of surcharges to taxes together with claims, complaints or appeals against national tax measurements).

The interim act also formulated some guarantees that were to support relevant stabilization and predictability of used charges for communal tributes. It was assumed that statutes of independent communal tributes should strictly determine deadlines for their payment, and in case when there was not such determination, the payment had to be done in the period specified in the measurement statement. The independent communal tributes that burdened lands were to be paid in two half-year instalments (in April and between 15 October and 15 November). The essential meaning, from the point of view of maintaining a respective fiscal load level, had the rule saying that any national tax increase, decrease, exemption, write off, payment deferral or return, under the law also involved corresponding increase, decrease, exemption, write off, payment deferral or return of pertinent communal surcharge.

The complement of procedural regulations on the extent of communal tributes was the inclusion in the interim act provisions on accruing interests, delay penalties and enforcement costs in case when the communal tributes were not paid in due time. In this extent, the interim act referenced to rules defined in a separate law[19]. What is more, some financial penalties were anticipated, e.g. for: revoking the obligation to pay communal tributes and submitting to respective communal authority untrue or incomplete statements or refusing to answer respective questions, and also for removing objects that were

19 Act of 9 July 1923 on delay penalties and enforcement costs (Journal of Laws no. 31, item 189, as amended).

subject to communal tributes – up to 20-fold amount of the lost tribute or the tribute which was exposed to the loss. The financial penalty would not exempt the taxpayer from the tribute payment. Moreover, financial penalties could be imposed on witnesses that refused to testify or gave false statements, and also on communal officials and officers that failed to follow binding rules concerning the treasury secret protection. The person who was given a penalty note could (orally or in writing) request to settle the case before a court, and the penalty enforcement would be suspended. In case when it was not possible to collect the penalty in a monetary form, the poviat court could change it for a prison sentence for up to 3 months.

5. The Process of Withdrawal from the Communal Tributes Quasi-Code Concept

The communal tributes decodification process became visible only after 1955. For ten years following the end of World War II, despite lifting the interim act (formally as of 1 May 1947), the concept of regulating major communal tributes in a single legal act with a code function was continued. The example of such regulation was the decree of 20 March 1946 on communal taxes, which was in force until 31 December 1950, that regulated in details legal structure elements and measurement rules for the following communal taxes: land, real property, premises, public amusement, entertainment and shows, mines, and other taxes, e.g. on residential parts of premises that due to their intended use or the number of occupants were regarded as redundant (tax on residential luxury). At the same time, measurements of communal taxes on property and capital as well as on possessing property items, articles subject to state monopolies and on benefits of state-owned enterprises or enterprises remaining under state management were clearly excluded. A codification level in the Decree of 1946 was definitely higher compared with the one used in the interim act of 1923.

This concept was continued in the subsequent period when the Act of 26 February 1951 on local taxes was in force, which regulated in details three common (obligatory) local taxes (on real properties,

premises and marketplaces) and four discretionary taxes introduced optionally by municipal or poviat national councils, i.e. urban tax (to cover building and maintenance costs of roads, streets, plazas and municipal devices and facilities), tax on residential luxury (levied on residential parts that due to their intended use or the number of occupants were regarded as redundant), tax on dogs, hunting and fishery. In 1951, the existing concept for regulating communal tributes was not changed yet, despite that already in 1950 the idea of actual local self-government was abandoned for national councils as local bodies of uniform state authority in communities, municipalities and districts of bigger cities, in poviats and voivodeships[20].

It was gradually leading to significant dissipation of provisions that regulated a legal structure of rules for measuring and collecting individual communal tributes in subsequent periods, when turning points were designated by following decrees or acts. In the Decree of 20 May 1955 on some local taxes and charges[21], that was in force for 20 years, the following obligatory communal tributes were regulated: real property tax, premises tax, means of transport tax, marketplace charge and health resort charge. In addition, the national councils could introduce for their budgets the following additional communal tributes: urban tax (income from this tax had to be allocated to cover costs of construction and maintenance of roads, streets and plazas, parks, green areas as well as devices and facilities used to satisfy people's living and cultural needs; the tax could be also levied on residential premises located in buildings related to farms and located within the areas of cities and towns), tax on dog possession, charge on bicycles (levied on physical and legal persons not being the state-controlled entities for having bicycles).

As of 1 January 1976, the Act of 19 December 1975 on some local taxes and charges was in force for 10 years[22], which regulated the following communal tributes: real property tax, premises tax, dogs tax, marketplace charge, means of transport charge, climatic charge and administrative fee for official activities not being subject to stamp duty.

20 Act of 20 March 1950 on local bodies of uniform state authority (Journal of Laws no. 14, item 130, as amended).
21 Uniform text Journal of Laws of 1963 No. 16, item 87 with amendments.
22 Journal of Laws no. 45, item 229, as amended.

In 1982 there was a significant change in the discussed subject as two separate real property taxes were introduced, i.e. one for state-owned units[23] and the second one for any other taxpayers (such a situation lasted until the end of 1989).

The Act of 14 March 1985 that was in force from 1 January 1986 to 19 January 1991 on local taxes and charges[24] regulated: real property tax, road tax, dogs tax, marketplace charge, locality charge and administrative charge. The currently valid Act of 12 January 1991 on local taxes and charges[25] regulates: real property tax, means of transport tax, marketplace charge, locality charge, health resort charge, advertisement charge, dogs charge (until 2006 this Act also regulated administrative fee that was later revoked).

Since 1955, the year that may be regarded as an essential moment in the communal tribute decodification process, apart from the basic legal act that regulated significant, from the point of view of incomes that support local government budgets (priory national councils' budgets), communal tributes, parallel legal acts that regulated the legal structure and measurement rules for remaining communal tributes were or are in force, e.g. agricultural tax (till 1984 land tax), inheritance and gift tax, forest tax, and civil law deed tax. In different periods postulates were risen to simplify the local tax system, also through merging all taxes that charge real properties (agricultural, forest, and others) into one universal real property tax[26].

6. Final Remarks

The Act of 1923 on interim regulation of communal finances, in spite of initial assumptions, appeared to be a legal act with a relatively high stability level of adopted solutions in relation to most communal

23 See Act of 26 February 1982 on state-owned units taxation (uniform text Journal of Laws of 1987 No. 12, item 77 as amended).
24 Journal of Laws no. 12, item 50, as amended.
25 Uniform text Journal of Laws of 2014 item 849 with amendments.
26 J. Harasimowicz, O potrzebie reformy systemu podatków lokalnych w Polsce, (in:) Book to commemorate prof. Apoloniusz Kostecki. Studia z dziedziny prawa podatkowego, Toruń 1998, p. 99.

public tributes. From the view of historic experiences, in particular those after 1945 up to the modern days' solutions in regulating self-government (local) public tributes, it may be said that it fulfilled the function attributable to codes. In this case it was a form of codifying major elements of communal public tribute legal structure. Its original assumptions, planned as temporary, were created in the period when the Constitution of the Republic of Poland of 17 March 1921[27]was in force, and maintaining their fundamental shape, they outlasted the period with designated standards resulting from the Act of the Constitution of 23 April 1935[28].

The solutions of the Act on interim regulation of communal finances well suited the assumptions of the Treasury repair program and the currency reform in 1924[29] (so called W. Grabski's reform). Two significant provisions of this program applied directly to the local self-government, i.e.: delegation of some tasks and activities so far performed by the state authorities (excluding schools and education) to self-governments could only happen after ensuring own sources of income for self-governments; introducing the duty to cover by self-governments expenditures from incomes by way of encompassing self-government finances in strict budget and accounting rigors. The concept of interim regulation of communal finances also appeared to be relatively resistant to negative effects of the great depression (1929-1933) that in Poland lasted, as a matter of fact, till 1935.

It was characteristic that the communal tributes regulation details level was different in the interim act. Relatively precisely it regulated issues concerning independent communal tributes, both in the material law and procedural area. For other communal tributes (surcharges to national taxes) the legislator regulated in details major legal structure elements of communal surcharges (surcharge amount, base for surcharge calculation, and entities obliged to pay it), while in the range of legal structure and measurement rules of national tax there were references to separate fiscal laws.

27 Journal of Laws no. 44, item 267, as amended.
28 Journal of Laws no. 30, item 227.
29 Act of 11 January 1924 on the Treasury repair and the currency reform (Journal of Laws no. 4, item 28).

The term "quasi-code" used in the title should be, therefore, referred exclusively to independent communal tributes and to communal surcharges added to national taxes. The term "quasi" (in the meaning "as if", apparently) is fully justified since apart from the interim Act of 1923 there were remaining – in different periods of the Second Republic – separate regulations concerning some communal tributes, e.g. marketplace charges or other communal special charges (tolls, bridges on public roads, town toll gates, parking on public roads and plazas[30]) as well as independent compensation tax for rural communities.

Abstract

The Act of 1923 on interim regulation of communal finances, which originally was to be a legal act of a temporary character, was in force to the end of the Second Republic's existence. It codified legal regulations concerning several essential communal tributes (taxes, communal surcharges to national taxes, charges and special surcharges). It regulated not only material law issues but also procedural ones (some competences of authorities that measured those tributes, taxpayers' rights and obligations, guarantees of stabilizing loads from communal tributes, and sanctions used in case of evading payments). The concept of codifying major public tributes was continued for a short period after World War II and finally, as of 1955, the decodification process was started in this extent that has been lasting to modern days.

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30 Most special charges were lifted in 1936 on the basis of the Republic of Poland President's decree dated 3 December 1935 on decreasing burden with communal tributes and other changes in communal finances (Journal of Laws no. 88, item 544, as amended).

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SELECTED FISCAL LAW REGULATIONS IN THE FINANCIAL MARKET LAW AS EXAMPLES OF JUSTIFIED FISCAL LAW DECODIFICATION

Zbigniew Ofiarski[1]

1. Introductory Remarks

Codification (fr. *codification*) is gathering, updating, systematizing and formulating of regulations or rules in a manner that they would create uniform entirety[2]. Scientific discourse on the need and extent of fiscal law codification has been conducted in Poland with varying intensity for at least 40 years, initially in the context of the whole financial law codification[3], since the problem of distinguishing fiscal law from the financial law was particularly accented at the time. Along with development of the discussion on independence of the fiscal law, also premises were seen that justified respective codification actions in the range of the fiscal law[4], including basically those that applied to its general part[5]. Fiscal law codification, regardless if limited only to its general part or also to its detailed part, would be a significant reform

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2 Wielki Słownik wyrazów obcych PWN, ed. M. Bańko, Warsaw 2003, p. 639.

3 See, e.g., C. Kosikowski, Problemy legislacyjne polskiego prawa finansowego i jego kodyfikacji, Wrocław 1983, p. 168; C. Kosikowski, Celowość i możliwości kodyfikacji polskiego prawa finansowego, „Biuletyn Rady Legislacyjnej" 1987, no. 9, p. 95-113; C. Kosikowski, Celowość i możliwości kodyfikacji polskiego prawa finansowego, „Finanse" 1987, no. 3, p. 1-11; C. Kosikowski, Problem kodyfikacji polskiego prawa finansowego, „Acta Universitatis Lodziensis Folia Iuridica" 1989, no. 40, p. 5-20.

4 A. Kostecki, Niektóre problemy kodyfikacji prawa podatkowego, (in:) Podstawowe zagadnienia prawa finansowego i polityki finansowej w Polsce w latach 1989-1997. Księga Jubileuszowa prof. dr. Leon Kurowski, ed. E. Chojna-Duch, W. Goronowski, Warsaw 1998, p. 79-95; C. Kosikowski, O nie zrealizowanej koncepcji polskiego kodeksu podatkowego, (in:) Podstawowe zagadnienia prawa finansowego…, p. 96-110; C. Kosikowski, Ogólny kodeks daninowy zamiast ordynacji podatkowej, „Przegląd Podatkowy" 2014, no. 9, p. 11-17.

5 R. Mastalski, Prawo podatkowe, Warsaw 2012, p. 179-182; R. Mastalski, Charakterystyka ogólna prawa podatkowego, (in:) System prawa finansowego, vol. III (Prawo daninowe), ed. L. Etel, Warsaw 2010, p. 383-384.

that applies to the fiscal law structure, also including the structure of its sources[6].

The purpose of this study is to demonstrate that due to relevant needs of other detailed fields of law that show various relations to the fiscal law, in particular the financial market law, which uses specific constructions, it is necessary to leave within its frames particular fiscal law regulations. It means that specific fiscal law decodification understood as maintaining fiscal law in the condition of some dissipation (fragmentation) may be justified. Similar assessments may apply to other detailed areas of law, in which maintaining some fiscal law regulations allows preservation of completeness and required composition of legal institutions characteristic to these areas. Composition (lat. *compositio*) means combining some parts into a consistent system, in which individual components are located and ordered according to its specific concept, and possible decomposition (fr. *décomposition*), i.e., the change of these components layout could lead to its disintegration[7].

Pursuing justification of this thesis, selected financial market law acts have been analyzed, especially banking law acts and capital market laws, in which fiscal law regulations were included. Possible transfer of some regulations to the fiscal code that also includes the fiscal law detailed part could, in result, lead to hazardous decomposition of regulations that are conditional for correct functioning of specific financial market areas.

2. Premises Conditional for Fiscal Law Codification

Codification of a specific law field is a method used for its ordering and stabilizing in a longer term. Therefore, it should be performed taking into account social-economic and political circumstances as well as conditions defined in directives related to creating the law. According to § 9 of the legislative techniques rules[8], the term "code" must be reserved to acts fundamental for a given sphere of matters, so it might

6 B. Brzeziński, Zagadnienie reformy prawa podatkowego, (in:) System prawa… vol. III, p. 486-487.

7 Wielki Słownik wyrazów obcych PWN, ed. M. Bańko, Warsaw 2003, p. 252 and 657.

8 Ordinance of the Prime Minister of 20 June 2002 on "Legislative techniques rules" (Official Journal no. 100, item 908, as amended).

not be the only act that regulates a given type of matters. Beside the code, there may be other acts that include provisions regulating matters of the same or similar type. Codes have the same legal rank as other acts but they are commonly regarded as some material and formal standards for other legal acts in a particular field[9].

The doctrine emphasis specific goals and functions of the acts called codes. The purpose of the code is exhaustive regulation of a wide area of matters and subjugation of the law system. However, the codes' role is exceptional because it consists not only in comprehensive regulation of a wide area of matters but also systematization of individual law domains, determination of their leading rules and, in result, stabilization of a legal status in a particular area and strengthening trust in law[10]. Reaching stabilization effect is guaranteed by developing the following codification rules: wholeness (a code should cover in possible extent all regulations pertinent to a given law domain); distinguished general part (provisions of this code part should be applicable to all its detailed parts); exhausted definition of basic rules for a particular law field; distinguished rules that apply to the entire field of law (also including those of its parts that for different reasons must be left beyond the code); logical systematization of the code matter; determined relations to other fields of law, especially those close in respect of their kind. Codification works must be commenced only when the political, economic and social system, in which the code for a particular law field is to function, is stabilized. It must be also remembered that codification of particular law areas depends, to a large extent, on the existence of codification tradition in a given country and on a position of science in this matter[11]. The view should be fully accepted according to which only those law areas must be regulated in the form of a code that matured for codification in terms of reaching stabilized condition. This postulate is especially important in respect of transformation process in Poland, with which shaping law system should be strictly correlated. Division of normative matter in a particular law field should be performed in a way that the code regulates

9 S. Wronkowska, M. Zieliński, Komentarz do zasad techniki prawodawczej 20 June 2002, Warsaw 2012, p. 49.

10 M. Kępiński, M. Seweryński, A. Zieliński, Rola kodyfikacji na przykładzie prawa prywatnego w procesie legislacyjnym, „Przegląd Legislacyjny" 2006, no. 1, p. 98.

11 M. Kępiński, M. Seweryński, A. Zieliński, Rola kodyfikacji…, p. 101.

its major terms, rules and institutions while separate acts are limited to regulations in specific matters in this field[12].

The need for codification of the fiscal law in Poland, including basically its general part, is being justified by many essential arguments, e.g. the necessity to reflect modern economic and social conditions, and also to formulate general rules for the fiscal law and the catalogue of taxpayer's rights and obligations[13]. In connection with the above, together with codification of the fiscal law general part, the process should be realized to put in order detailed fiscal laws, treated complementary in relation to the above mentioned codification. To a necessary extent, some actions of a consolidating nature may be conducted that consist in transferring fiscal acts from the extent of detailed fiscal laws which are currently included in legal acts regarded as other detailed fields of law. However, in the cases where particular fiscal law regulation included in a separate act is a necessary component of a law institution characteristic to other detailed field of law, it should be left there and treated as a particular type complex (lat. *complexus*), that is a group of many elements which complement each other and create some consistent entirety.

3. Some Fiscal Law Regulations in the Financial Market Law Acts That May Be Subject to Consolidating Operations

Some fiscal law regulations included in the financial market law acts are not components of any particular legal institution. Lack of such a direct relation allows their transfer to an appropriate fiscal law. This postulate may apply basically to regulations that define exclusions or exemptions from taxation. Their transfer to a correct fiscal act would consolidate the tax exclusion and exemption catalogues included in acts that regulate legal structure elements of such taxes, and the solutions used in this extent would be systematized and more transparent. This process may be used for regulation included in Art. 22 of the Act of

12 M. Kępiński, M. Seweryński, A. Zieliński, Rola kodyfikacji…, p. 106.
13 Ordynacja podatkowa. Kierunkowe założenia nowej regulacji, ed. L. Etel, Białystok 2015, p. 15-19.

12 February 2010 on recapitalization of some financial institutions[14], according to which civil law actions taken to execute provisions of this Act (e.g., guarantee agreements to increase own funds of a financial institution or to sale its shares or banking securities) are not subject to taxation with the civil law deed tax, excluding changes in the articles of association (deed of incorporation, company statutes). On the basis of the cited Act provisions, the Treasury could recapitalize the financial institution that faces the risk of losing its liquidity or the risk of insolvency in a way of the guarantee to take shares, bonds or banking securities of this institution. When the institution's financial situation stabilizes (e.g., new investors have been found), the Treasury may withdraw from its commitment in such an institution[15]. Exclusion from taxation by the civil law deeds tax would cause the costs of civil law actions performed under the provisions of this Act to be correspondingly lower.

Similar character and functions are found in the regulation included in Art. 20e par. 4 of the Act dated 14 December 1994 on the Bank Guarantee Fund[16], according to which civil law actions, through which aims of this fund are realized (e.g., granting returnable financial support for co-operative saving-credit funds, purchasing the institutions' debts, and supporting entities that take them over) are free of the stamp duty and the civil law deed tax. Presented above provisions of separate acts that introduce exclusions and exemptions from the civil law deed tax could be included in respective catalogues of exclusions and exemptions formulated in the law on civil law deed tax[17]. In particular, the problem of fuller consolidation of the exemptions from this tax finds justification in the current construction of the catalogue formulated in Art. 9 u.p.c.c. since it lists civil law deeds whose subjects are particular financial market instruments (foreign currencies, government bills and bonds, bills of the National Bank of Poland and other financial instruments as well as market goods).

14 Journal of Laws no. 40, item 226, as amended.
15 Justification of the draft act on recapitalization of some financial institutions – print no. 1691 of RP Seym VI cadence.
16 Uniform text Journal of Laws 2014 item 1866 with amendments, hereinafter BFG Act.
17 The Act of 9 September 1923 on civil law deeds tax (uniform text Journal of Laws of 2015 item 626 with amendments), hereinafter u.p.c.c.

The consolidation process may be also used to some exemptions from income tax for legal persons[18], which are now included in the acts pertaining to the financial market law. An independent character that is not related to any legal institution in the financial market represents the exemption defined in Art. 18 of BFG Act, according to which BFG is exempted from the legal persons income tax. Such exemption is not conditional in any way. It is regarded as justified due to the character of BFG operations (guarantees and supports) and the fact that there are secured financial means allocated to satisfy depositor's claims in case of the bank insolvency[19], and since 2013 also in case of the saving-credit fund insolvency.

While consolidating (integrating) legal regulations concerning exemption from taxation for persons that voluntarily gather means for extra pension, it may be considered to transfer the Act of 20 April 2004 on individual pension accounts (IKE) and individual pension security accounts (IKZE)[20] to the Act of 26 July 1991 on natural person income tax[21]. In Art. 4 of the Act on IKE and IKZE the person saving in IKE has the right to tax exemption on the rules and in the course anticipated in u.p.d.o.f. if under a written agreement for IKE he or she gathers savings only in a single IKE, whilst the person saving in IKZE has the right to deduct from income payments made to IKZE on the rules and in the course anticipated in u.p.d.o.f. if under the agreement for IKZE he or she gathers savings only in a single IKZE. The regulation cited above does not introduce any new significant provisions comparing to the content of Art. 21 par. 1 no. 58a and Art. 26 par. 1 no. 2b of u.p.d.o.f. as in the fiscal law the condition to save in only single IKE or IKZE is a basic structural element of the tax exemption. Therefore, it is possible to remove these regulations from the Act on IKE and IKZE and to reedit correspondingly the above quoted provisions of u.p.d.o.f.

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18 The Act of 15 February 1992 on legal persons income tax (uniform text Journal of Laws of 2014 item 851 with amendments), hereinafter u.p.d.o.p.

19 P. Zawadzka, Ustawa o Bankowym Funduszu Gwarancyjnym. Comment, Warsaw 2009, p. 183.

20 Uniform text Journal of Laws of 2014 item 1147 with amendments, hereinafter IKE and IKZE Act.

21 Uniform text Journal of Laws of 2012 item 361 with amendments, hereinafter u.p.d.o.f.

Continuing possible consolidation process for regulations concerning taxation of benefits from collecting means in IKE, it may be postulated to transfer from the Act on IKE and IKZE to u.p.d.o.f. provisions that constitute the element of legal structure which imposes the rule of saving only in one IKE. According to the Act on IKE, a natural person, before concluding IKE agreement, declares that he or she would not collect means in this system managed by other financial institution nor has IKE in other financial institution but would make a transfer payment (move means to other financial institution). The financial institution that receives such a declaration from a natural person must instruct the person on penal liability for untrue statements or nondisclosure of the truth, and to inform that when savings are gathered in more than one IKE, revenue from collecting savings is subject to taxation in all IKE accounts.

The taxation rules for payments from IKE or IKZE (after acquiring authorization by the means collector or in case of payment for a person authorized in case of the savers' death) are currently dissipated because some of them are included in the Act on IKE and IKZE (the obligation to provide information by the financial institution or the receiver on a single payment or first instalment payment to the head of a tax authority appropriate for the saver in matters relating to natural person income tax), while others in u.p.d.o.f. (including those concerning flat income taxation in IKE for return or partial return). The above mentioned regulations should be moved to u.p.d.o.f. in order to consolidate the legal law structure whose common element is the rule of saving in only single IKE or IKZE. Also, to u.p.d.o.f. should be moved the statutory delegation that authorizes the minister appropriate for public finances to determine in consultation with the minister appropriate to social security, in the course of ordinance, the specimen for the above information and method of its provision in order to ensure verification possibility of the saver's authorization to the tax exemption[22].

22 The ordinance of the Minister of Finances dated 25 October 2011 on specimens and method of informing about payment from the individual pension account and the individual pension security account (Journal of Laws no. 239, item 1428) was resolved on the base of delegation formulated in Art. 22 par. 5 of the Act on IKE and IKZE.

It is also possible to move content of Art. 188 of the Act dated 28 August 1997 on organization and functioning of pension funds[23] to u.p.d.o.p. provisions concerning fiscal law qualification of payments returned to comprehensive pension companies from the Guarantee Fund[24] (they are the companies' revenue in the meaning of u.p.d.o.p.). The Tax Act regulates comprehensively different categories of legal persons' income, including incomes characteristic for various institutional entities in the financial market (e.g. banks) and possibly completion of income catalogues in u.p.d.o.p. with provisions so far included in Art. 188 u.o.f.e. would not lead to legal structure decomposition of the Guarantee Fund as regulated in this Act.

Transfer to u.p.d.o.p., in order to consolidate legal regulations, could be also performed for those regulations of the financial market law acts which give status of deductible expenses in the meaning of u.p.d.o.p. to the periodical and mandatory burdens of the financial institutions. According to Art. 13, Art. 13c and 26b of BFG Act, the annual credit payments (being an essential source for financing the deposit guarantee system in case of the institution's insolvency) are deductible expenses. Art. 15 – 15c u.p.d.o.p. includes different provisions relating to deductible expenses in particular categories of financial institutions (e.g., insurance companies, comprehensive pension companies, banks and cooperative saving-credit funds). Then, currently most expenditures of such institutions that are regarded as deductible are mentioned in u.p.d.o.p., while for some of them such status (mandatory annual payments for BFG) is given in the BFG Act at the same time referring to the Fiscal Law provisions. It is not purposeful to maintain such legal condition where some regulations related to banks' and cooperative saving-credit fund's deductible expenses remain beyond a basic catalogue of these expenses as formulated in the Fiscal Act.

23 Uniform text Journal of Laws of 2013 item 989 with amendments, hereinafter u.o.f.e.

24 From the Guarantee Fund, administered by the Krajowy Depozyt Papierów Wartościowych SA, the fund members' damages are covered that were incurred due to non-performance or undue performance of obligations by the company in the scope of the fund management and its representation, in extent that comprehensive pension company is not in default, or if the damages may not be covered from its bankruptcy estate.

4. Specific Character of Fiscal Law Regulations in the Financial Market Legal Acts

Some legal law regulations included in the financial market legal acts are a part of respective financial market law institution and their possible removal from this institution and transfer to the Fiscal Act could, in result, lead to its decomposition (partial disintegration). In the financial market law act, it would be needed to leave part of its regulations important for the financial market law, but in the fiscal law its repeating would be necessary in order to designate precise limits of usage for the legal law regulation related with this institution of the financial market law. Such method of regulation would be in opposition to the rules of legislative techniques. As an example thereof, the provisions of Art. 24 and Art. 26 of the Act dated 15 January 2015 on bonds[25] may be indicated that regulate provisions on bold holders by the bond issuer allowances from these bonds with the obligatory use of a special account. The issuer may not pay from this account for other purposes than satisfying claims of holders authorized to the revenue bonds unless they apply to amounts of receivable VAT credited in the account that are transferred to the account of the tax authority. Eventual separation of fiscal law regulation and its transfer to the Act of 11 March 2004 on goods and services tax (VAT)[26] could lead to deconcentration of provisions so far gathered in one place.

Recalling similar arguments, we may justify leaving specific fiscal law regulations included in Art. 8b and Art. 8c of the Act dated 29 July 2005 on financial instruments trade[27] that regulate required elements of the agreement for keeping a collective account[28] and the obligations of the entity that keeps such an account. The agreement must contain information on the obligation to submit by taxpayers being natural persons tax statements with the amount of revenue (loss) achieved by them in the fiscal year from selling securities and from execution of

25 Journal of Laws 2015, item 238.
26 Uniform text Journal of Laws of 2011 No. 177, item 1054 with amendments.
27 Uniform text Journal of Laws of 2014 item 94 with amendments, hereinafter u.o.i.f.
28 According to u.o.i.f., the authorized entities may keep in their securities deposit or securities registration system maintained by the National Bank of Poland the accounts in which dematerialized securities may be registered that belong to persons for whom they are kept but they belong to other person or persons (collective accounts). Dematerialized securities recorded in the collective account are not recorded in the securities accounts.

rights resulting from securities, and also on the obligation to pay income tax for this revenue. The entity that keeps a collective account, on request of the persons entitled to the base of securities recorded in the collective account, makes a statement in order to allow application by the persons in case of overpaid income tax, and the statement includes: the amount of income (revenue) given to the collective account holder; the amount of taken tax; a date of revenue inflow and transfer, and a date when the tax was debited. The above persons who claim return of overpaid income tax must provide a proof of the place of their residence or seat in the form of a residence certificate. On the basis of delegation formulated in Art. 8c par. 4 u.o.i.f., the minister appropriate for public finances has defined, in the course of ordinance, a specimen for such certification in order to ensure correct settlement of income tax[29].

Particularly complex problem with respect to possible consolidation processes related to fiscal law regulations included in the financial market law acts are questions of some referrals to the provisions of the Act dated 29 August 1997 Fiscal Ordinance[30], including those that concern accruing delay interests taken similar to tax delays. It applies to such obligatory burdens (charges) related with financial market law institutions that are directly mentioned in the Fiscal Ordinance. Their legal status is not explicit, despite the fact that they have a mandatory character and the rules of their measurement and levy are defined in statutory regulations (in particular, this problem applies to obligatory annual charges and conservatory charges paid by banks and cooperative saving-credit funds to the BFG account)[31]. The BGF Act regulated in a comprehensive manner the rules of the charges measurement, including a base for calculation, rates and payment dates. Interests charging and payment when a due date is not met are, therefore, essential structural elements of the above charges that create coherent entirety with other elements of the charges legal structure that constitute financial resources

29 The Ordinance of the Minister of Finances dated 9 February 2011 on specimen of the income (revenue) statement provided by the entity that keeps a collective account and of the tax amount taken (Journal of Laws 2012, item 185).

30 Uniform text Journal of Laws of 2015 item 613 with amendments.

31 Z Ofiarski, Istota, zakres i przeznaczenie opłaty ostrożnościowej, „Monitor Prawa Bankowego" 2015, no. 6, p. 63-75.

of BFG used to perform tasks connected with guarantees, supports or restructurization.

For the same reasons, it is not recommendable to move to the Fiscal Ordinance the contents of Art. 55 of the Act dated 19 August 2011 on payment services[32] that regulate the payment services provider's obligation to pay to the Treasury or relevant local self-government unit interests in the amount anticipated for delay interest on overdue taxes in case the date of payment transaction for public law receivables is not met[33], and stating that the Fiscal Ordinance regulations on the collector's tax responsibility apply to the payer's provider who makes such payment order (for failure to fulfil his duty consisting in punctual crediting the account of the receiver's provider with the transaction amount that includes public law receivables and is initiated by the payer). The Fiscal Law regulations are in this case an inseparable structural element of the financial market law institution, i.e. payment service[34].

Legal acts pertinent to the financial market law also include legal law regulations with a relatively general character that may not be moved to any specific fiscal act in detailed fiscal law, and it would not be reasonable to put them in the Fiscal Ordinance, which is the most important act of the general fiscal law. They must be left in respective financial market law acts with regard to the necessity to maintain some consistence of the institutions regulated in them. In this context we may mention, for instance, provisions in Art. 16 of the Act dated 23 October 2014 on reversed mortgage loan[35] that specify borrower's obligations during the term of the reversed mortgage loan agreement including, among others, the obligation to punctually pay taxes and obligatory charges related with the use of real property or premises that secure the loan. The above borrower's obligation is correlated with the bank's rights. When this obligation is not fulfilled, the bank will summon the borrower to do it, specifying a period not shorter than 60

32 Uniform text Journal of Laws of 2014 item 873 with amendments.

33 Receivables that are subject to regulations of the Fiscal Ordinance or the regulation of the EU Parliament and Council no. 952/2013 of 9 October 2013 that implement the EU Customs Code (EU Official Journal. L. 2013, No. 269, p. 1).

34 K. Korus, Pojęcie usługi płatniczej w ustawie o usługach płatniczych, „Monitor Prawa Bankowego" 2012, no. 7-8, p. 29-42.

35 Journal of Laws of 2014 item 1585 with amendments.

days or longer, considering the borrower's abilities to perform. If the borrower fails to meet this obligation in indicated time, the bank will request authorization to perform it on behalf of the borrower. The bank may terminate the reversed mortgage loan agreement if the borrower refuses to give the bank such authorization[36]. Termination period for the reversed mortgage loan agreement terminated by the bank is 30 days.

It is also not recommendable to move to particular fiscal acts provisions of Art. 57 of the Act dated 29 August 1997 on National Bank of Poland[37], according to which NBP, the same as any budget units, takes benefits from exemption from taxes and stamp duty. In case of an attempt to move this provision and maintain the existing legal law status of NBB, the achieved effect would be contrary to consolidation, i.e. deconcentration and necessity to repeat many times a similarly worded provision in several fiscal acts.

5. Final Remarks

Current state of the fiscal law matter regulation contained in legal acts pertaining to the financial market law requires implementation but, to a limited extent, of some ordering actions, including consolidating actions in the framework of detailed fiscal law in particular. It was demonstrated, in the course of the performed analysis of the financial market law acts, that it is possible to move to respective fiscal acts those regulations which are not inextricably related to particular financial market institutions. These are mainly regulations concerning legal structure elements of particular tax (e.g., exemptions or exclusions from taxation) and also fragmentary regulations concerning deductible expenditures of some financial institutions. Relocation of these regulations to respective fiscal acts should have a positive effect on the clarity of fiscal law regulations, and it may eliminate various appearing doubts about a colliding character in the process of specific legal law structures implementation. Some analyzed financial market law acts

36 H. Ciepła, Odwrócony kredyt hipoteczny jako nowy rodzaj umowy w systemie prawnym od 15.12.2014, "Rejent" 2015, no. 8, p. 54.

37 Uniform text Journal of Laws of 2013 item 908 with amendments.

include fiscal law regulations that are tightly connected with the financial market law institutions. Possible attempts of their relocation to fiscal acts would lead to hazardous decomposition of the legal status in this area.

Abstract

Fiscal law regulations are often included in legal acts that are not explicitly contained in the fiscal law sources, e.g. financial market law acts. They have a different nature, i.e. they are essential and inseparable structural elements of important legal institutions that are characteristic to the financial market law or they constitute fragmentary and not related with the financial market law standards which were included in the legal act that regulates functioning of a particular sector in the financial market. Only the second group of the above mentioned regulations may be subject to consolidation processes aimed for their gathering in one place (e.g. in relevant fiscal act). Such actions may, to some extent, contribute to the improvement of the status quo of the detailed fiscal law, especially increasing its clarity and consistency.

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THE RULE OF TIME-BARRED EFFECT OF PASSAGE OF TIME IN TAX ADMINISTRATION IN THE SLOVAK REPUBLIC[1]

Adrián Popovič[2]

1. Introduction

The performance of tax administration in the Slovak Republic is characterized and limited by principles and rules which are established in the Tax Procedure Code[3]. These principles and rules interact with principles and rules of the *so called good governance* and with principles and rules which result only indirectly from the Tax Procedure Code and special legislations applicable within the realization of tax administration.

The principles and rules of tax administration[4] are often the subject of legal research which is realized by the representatives of tax jurisprudence[5]. In pursuance of this, it can be concluded that the principles and rules of tax administration are one of the most important areas of tax jurisprudence. These principles and rules represent "constraints" of the performance of tax administration, in which all

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3 The basic legislation which regulates tax administration in the Slovak Republic is the Act no. 563/2009 Coll. on Tax Administration (Tax Procedure Code) and on amendments and supplements to certain laws in the wording of later regulations. Hereinafter "Tax Procedure Code".

4 V. Babčák introduces in his research works the idea of division of principles and rules in tax administration. For more details, see: V. Babčák, Daňové právo na Slovensku, Bratislava 2015, p. 422-447.

5 For example: V. Babčák, K problematike princípov a zásad daňového konania, in: Acta oeconomica Cassoviensia N° 5, Košice 2001, p. 13-25.; M. Bujňáková, Princípy a zásady v daňovom práve, in: Aktuálne otázky práva: zborník vydaný pri príležitosti životného jubilea prof. Jozefa Suchožu, Košice 2006, p. 159-168.; A. Románová, Vybrané zásady daňového konania tak, ako ich nepoznali klasické rozprávky, in: Acta Iuridica Olomucensia. 2012, vol. 7, no. 1, p. 25-32.; M. Štrkolec, Zákonnosť ako princíp (zásada) daňového konania. In Humanum 2010, vol. 1, no. 4, p. 277-287.

actions of the persons involved in tax administration must be realized in order to achieve procedural perfection of tax administration. This eventually leads to the fulfilment of the purpose of tax administration, which means appropriate identification of tax and the assurance of its payment.

Therefore, it is important to draw attention to the hitherto unnamed rule of time-barred effect of passage of time in tax administration. The paper will specify the content of that rule and its classification into the systematic of the principles and rules of tax administration.

2. Definition of Terms

2.1. Principles versus Rules of Tax Administration

The doctrine of the theory of law and the modern conception of the theory of tax law make a distinction between the terms a principle and a rule. It is primarily important to define the distinction between principles and rules in order to comprehensively understand that rule and to incorporate it into the structure of applied principles and rules of tax administration.

The concept of a principle comes from a Latin word "*principium*", which literally expresses a basis, beginning, origin, source or base. The principle can, therefore, be characterized generally as the fundamental and leading idea, which is valid without residue, which does not allow any exception and, for this reason, has absolute determination[6]. In tax administration, for example, these principles are applied: *the principle of legality, the principle of legal protection* and *the principle of uniformity of process decision making of a competent authority in tax administration*. Although the modern literature of the theory of law deemed for the meaning of a principle also the term *rule*, it should be noted that in this sense a principle is understood as an original rule which constitutes a basis for other rules[7].

6 M. Gašpar et al., Československé správne právo, Bratislava 1973, p. 104.
7 J. Pinz, Právní principy, zásady a legis ratio in Právní principy – kolokvium. Pelhřimov 1999, p. 110.

Tax administration is carried out on the basis of certain ideas which a legislator promoted among the rules of tax administration by their enactment into tax legislations. **The rules of tax administration** can be characterized as *standards* by which a tax administrator and the persons involved in tax administration are obliged to proceed which have significant influence on the correct identification of the tax and ensure its payment[8]. It is important to observe that the rule develops, elaborates and specifies the principle in a certain way. By the realization of the rule in real situations, the content of an individual principle is fulfilled. The rule is defined by normative, more specific and more concrete content, however, it is still a considerably high level of abstraction[9].

In the legislation of tax administration, the basic rules of tax administration[10] are directly embedded and *expressis verbis* stated but besides these rules it is possible to infer the existence of further rules of tax administration[11] by interpretation from the text of the Tax Procedure Code and special tax legislations. Such a division of the rules of tax administration will serve us to classify the rule of time-barred effect of passage of time in tax administration into the systematic of principles and rules of tax administration.

2.2. Time and Passage of Time

Time and its passage has an irreplaceable role in the law. It provides the law with the "fourth" dimension, in which the legal relations regulated by legal norms and mutual rights and duties of subjects which represent parties in these legal relations are implemented. Based on this, it is necessary to define and limit the influence of the law by the passage of time. In this respect, it is important to point out the differences between the term *time* and the term *passage of time* in the theory of law.

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8 V. Babčák, Daňové právo na Slovensku, Bratislava 2015, p. 423.

9 J. Dostálová, J. Harvánek, Právní principy a procesní zásady, in Právní principy – kolokvium, Pelhřimov 1999, p. 106-107.

10 These rules are established in § 3 of the Tax Procedure Code. This includes, for example, the rule of close cooperation of a tax administrator, taxpayers and other persons, the rule of free evaluation of evidence, the rule of non-public process, the rule of official process and non-mandatory process, etc.

11 These include, e.g.: the rule of two-stage procedure in tax administration, the rule of process in a written form, the rule of preservation of tax secrecy, the rule of the use of a state language in tax administration, etc.

Time can be seen as a legal fact which the law admits legal relevance to and in the legal order that fact is expressed, on the one hand, by legal norms through temporal competence but, on the other hand, by the legal relation and its individual elements. Passage of time can be characterized as an objective legal fact that is independent of the will of a person and which links legal consequences with objective law in relation to the subjective rights and duties of subjects of legal relations[12].

Passage of time is then closely tied and limited by a **time limit**. In general, the time limit can be characterized as a time period which has the beginning and the end. In this time period the tax subject, the tax administrator or other participants of proceeding are obliged to perform a required act to which the time limit relates[13]. In this regard then, the legislation links the legal consequences with compliance, respectively with failure, to comply with time limits.

Accordingly, it is well-founded to infer that passage of time, as the objective legal fact, institutes borders within time limits which are established by legislation in which subjective rights and duties of the subjects of legal relations are realized, arise and cease to exist. *Legal effects of* time, *therefore, may arise, change and cease to exist by* a passage of time.

3. Statute of Limitation and Statute of Repose

With time and its passage in the law these institutes are strongly interlinked, namely the statute of limitation and the statute of repose. A conduct of the subjects of legal relations is affected by these institutes in various branches of law (e.g. civil law and commercial law[14], labour law[15], financial law, tax law[16] and so on). Firstly, it is important to define

12 J. Lazar a kol., Občianske právo hmotné, Bratislava 2010, p. 203.

13 B. Jurčíková – Jurčík, K. Peter – Husárová, Daňový poriadok po novelách s komentárom, Poradca 2015, vol. 20, no. 8, p. 139.

14 B. Hodasová, Plynutie času v práve alebo praktický sprievodca lehotami, Daňový špeciál: daňový časopip 2014, vol. 4, no. 4.

15 J. Toman, Niekoľko úvah o práve a nároku, premlčaní a preklúzií (s významom nielen pre pracovné právo), Justičná revue 2009, vol. 61, no. 12, p. 1355-1364.

16 T. Bardelčík, Premlčanie a preklúzia vybraných práv v daňovom konaní, Bulletin slovenskej advokácie 2011, vol. 17, no. 3, p. 6-13; A. Gašparovičová, Odvolanie proti rozhodnutiu správcu dane – daňového úradu, colného úrade alebo obce, in Daňový a účtovný poradca podnikateľa, 2013, vol. 18, no. 10.

these institutes and point out elementary differences between them in order to describe and specify the rule of time-barred effect of passage of time in tax administration.

The statute of limitation represents in the doctrine of the theory of law one of the legal consequences of vain expiration of time, which is established in the legislation when the qualified person does not perform their right (respectively does not demand their enforcement by a public authority). If there occurs the limitation of the right, the obliged person may face enforcement of the right in front of a public authority by a *limitation plea*, which results in the *expiry of its enforceability in front of a public authority*, which is one of the elements of the subjective right[17]. The obliged subject, however, is liable for raising the limitation plea on its own initiative and the public authority is not authorized to instruct the obliged subject about this possibility. And what is more, the lapsed right continues to exist as the so called *natural right* which can be satisfied by the fulfilment of the so called *natural obligation*. The statute of limitation is, therefore, the weakening of the right, which means that after the expiry of limitation, time limit in which the right was not exercised, the public authority cannot admit the lapsed right to a creditor if a debtor raises the limitation plea. In conclusion, the right does not cease to exist with the statute of limitation, and the obliged person may satisfy their obligation even after its limitation and such performance will not be unjustified enrichment of the entitled person[18].

The statute of repose is the institute which is characterized by the extinction of a subjective right as the whole within vain expiration of time. The statute of repose is different from the *statute of limitation*. The difference rests in that with the non-compliance of time-barred time limit, which is established in the legislation, the extinction of a claim and the extinction of the right itself are connected. To sum up, the difference between these two institutes lies in the legal consequences of vain expiration of time. The legal consequences of the statute of repose are more severe than the legal consequences of the statute of limitation[19]. The public authority takes

17 J. Cirák a kol., Občianske právo, Všeobecná časť. Šamorín: Heuréka 2008, p. 323.
18 P. Vojčík, Občianske právo hmotné I. Košice, Košice 2012, p. 180.
19 I. Fekete, Občiansky zákonník 1, Veľký komentár, Bratislava 2011, p. 487.

into account the extinction of a right *ex officio* even if the debtor (obliged subject) does not dispute that[20]. All in all, if the obliged subject satisfies their obligation after the expiration of time-barred time limit, such performance will be the performance without a legal cause, thus there will be unjustified enrichment of the entitled person.

It should be noted that the statute of limitation and the statute of repose are used mainly in civil law and commercial law, thus in the area of private law. This means that by the application of the statute of limitation and the statute of repose in tax law different types of rights within the realization of tax administration are influenced. On the other hand, these institutes have the same meaning and application in the areas of public law, and thus also in tax law. These institutes particularly highlight the importance of ensuring legal certainty of subjects in legal relationships governed by Slovak law and influence the speed and efficiency of the implementation of tax administration. For the purposes of this paper, I will further focus on the application of the institute of statute of repose in tax administration and its transfer to the rule of time-barred effect of passage of time in tax administration.

4. Principle or Rule?

First of all, it is necessary to answer the question whether time-barred effect of passage of time in tax administration is expressed through the rule or the principle. In my opinion, time-barred effect of passage of time in tax administration cannot be regarded as the principle because it does not apply all the time and under all circumstances during the realisation of tax administration.

To confirm this notion, it is necessary to mention the fact that the point of the realisation of a principle and rule occurs at different stages of not only the tax procedure but within the entire tax administration. For example, in accordance with the principle of legality, the tax administrator is obliged to act upon this principle and is obliged to keep

20 § 583 of the Act no. 40/1964 Coll. Civil Code in the wording of later regulations. This provision deals with non-exercising the right, thus: "Extinction of a right due to the fact that it was not exercised in the stipulated time limit can occur only in cases laid down by law. The court shall take account of the extinction even if the debtor does not rise such objection."

it at any instant within the realisation of tax administration. What is more, unless the tax administrator acts in accordance with this principle, it establishes the illegality of tax administration and the possibility of the tax subject to demand the elimination of an unlawful situation in a prescribed manner, e.g. by the submission of a legal remedy[21]. On the contrary, the rule of time-barred effect of passage of time in tax administration is applied only in cases strictly defined by law. Its application comes into force after the expiration of defined time-barred time limit and until that time limit does not elapse, that rule is not taken into consideration. Consequently, it can be inferred that time-barred effect of passage of time in tax administration is applied only in strictly determined events and after the fulfilment of specified conditions (there must be admitted the right to the person involved in tax administration, the expiration of defined time-barred time limit and establishment of these conditions in the legislation).

It is also important to point out further differentiating features of the principle and the rule. The principle is valid without residue, while the rule allows exception from its application. Here it may be pointed out that some rights are not subject to the statute of repose but to the statute of limitation. E.g., § 85 of the Tax Procedure Code sets out the conditions of the limitation of the right to recover tax arrears. It means that upon the expiration of defined time and after applying the limitation plea by the obliged person, it comes to the *expiry of enforceability* of tax arrears by the entitled person although the right itself does not terminate (as it is within the realisation of the statute of repose, where there is the extinction of a subjective right as the whole)[22].

5. The Rule of Time-Barred Effect of Passage of Time in Tax Administration

When the basic terminology is defined, subsequently, it is possible to identify and specify the content of the rule of time-barred effect of

21 V. Babčák, Daňové právo na Slovensku, Bratislava 2015, p. 426.

22 This provision regulates also the conditions when the extinction of the right (statute of repose) to recover tax arrears occurs, which I analyse below.

passage of time in tax administration. That rule can be seen in **a narrow sense** and in **a broader sense.**

In the narrow sense, the rule of time-barred effect of passage of time in tax administration is characterized by the **extinction of rights** of the tax administrator, which is related to the *own tax liability* of a tax subject and by the **extinction of rights** of the tax administrator, which is related to *the consequences of non-performance of own tax liability* of a tax subject. These rights and conditions are specified in the **Tax Procedure Code** or in **other tax legislations.** It is important to note that such extinction of the right (statute of repose) is explicitly expressed in the legislation. Based on the conceptual definition of the statute of repose, it can be inferred that if the right of the tax administrator to assess tax will cease to exist, then the consequence of that termination will be the extinction of own tax liability of the tax subject. And what is more, if the tax subject paid the tax even after the extinction of the right to assess tax of the tax administrator, it would be unjustified enrichment of the tax administrator. In this case, the subjective right of the tax administrator ceases to exist as the whole, thus it is the genuine statute of repose.

The content of the rule of time-barred effect of passage of time in tax administration in its narrow sense is constituted by the extinction of the right of the tax administrator to assess the own tax liability of a tax subject, which is related to the consequences of non-performance of the own tax liability of a tax subject, which are explicitly established in the Tax Procedure Code or in other tax legislations.

The basic act which establishes the area of tax administration is the Tax Procedure Code and this act came into force on 01 January, 2012. This act explicitly regulates the statute of repose in these provisions:

a) § 69, which provides assumptions of the extinction of the right to assess tax or tax difference;
b) § 85, which governs the extinction of the right (statute of repose) to recover tax arrears;
c) § 155 (12), which specifies premises of the extinction of the right to impose a fine for an administrative offence;

d) § 156 (8), which lays down conditions for the extinction of the right to assess interest on late payment.

The wording of § 69 of the Tax Procedure Code, which is about **the extinction of the right to assess tax,** specifies the variable time limits of the extinction of this right, i.e. providing the time-barred time limit of **5 years, 7 years** and **10 years.**

Unless otherwise provided for by the Tax Procedure Code or special regulation, *tax* or *tax difference* may not be assessed or a *claim to an amount* according to special regulations[23] may not be made after **5 years** have elapsed since the end of the year in which the obligation to file a tax return arose, or in which the tax subject was obliged to pay tax without the obligation to file a tax return, or in which the right to claim an amount according to special regulations arose for the tax subject.

In the case of the tax subject which *claims the deduction of tax loss*, tax or tax difference may not be assessed after **7 years** have elapsed since the end of the year in which the obligation to file a tax return in which the tax loss was reported arose.

It also results from this article that if an action leading to the assessment of tax or tax difference or the claim for an amount according to special tax regulations was made before the expiry of the time-barred time limit, 5 year and 7 year time-barred time limits shall pass again since the end of the year in which the tax subject was notified of that action[24].

It is important to specify what is meant by *the action leading* to the assessment of tax or tax difference or making a claim for an amount according to special tax regulations. It is:

– the delivery of a protocol of tax audit (§ 46 of the Tax Procedure Code);

23 For instance, this concerns an excessive deduction of VAT (Value-added tax) according to Act no. 222/2004 Coll. on Value Added Tax in the wording of later regulations, or a tax bonus and an employment premium of income tax according to Act no. 595/2003 Coll. on Income Tax in the wording of later regulations.

24 P. Kubincová, Daňový poriadok – Komentár, Bratislava 2015, p. 409.

– the delivery of a protocol on the determination of tax by using tools (§ 49 of the Tax Procedure Code);
– drawing up minutes of the commencement of tax audit or the delivery of a notification of tax audit (§ 46 of the Tax Procedure Code) if tax audit is performed at the request of prosecuting authorities.

The Tax Procedure Code also determines the **maximum time-barred time limit** for the extinction of the right to assess tax or tax difference or making a claim for the amount according to special tax regulations. Tax or tax difference may be assessed or the claim to the amount according to special tax regulations may be made not later than within **10 years** after the end of the year in which the obligation to file a tax return arose, or in which the tax subject was obliged to pay tax without the obligation to file a tax return, or in which the right to claim an amount according to special regulations arose for the tax subject. This means that it is the *objective time-barred time limit*, which delimits the passing of the *subjective time-barred time limits* listed above (5 years and 7 years), which begin to pass again based on the performed action.

On the whole, when international agreements in the area of taxes which are binding for the Slovak Republic are applied, tax or tax difference may be assessed or the claim to the amount according to special regulations may be made not later than within **10 years** after the end of the year in which the obligation to file a tax return arose, or in which the tax subject was obliged to pay tax without the obligation to file a tax return, or in which the right to claim the amount according to special regulations arose for the tax subject. Therefore, here the Tax Procedure Code does not allow the time-barred time limit to begin to pass again.

§ 85 of the Tax Procedure Code establishes 20 years of time-barred time limit. It sets that **the right to recover tax arrears** shall cease to exist 20 years after the end of the calendar year in which the tax arrears arose. Therefore, the tax administrator takes into account the extinction of this right *ex officio*.

Within the meaning of § 155 (12), **the right to impose a fine ceases to exist** if **five years** have elapsed since the end of the year in which:

a) the tax subject committed an administrative offence referred to some cases settled by the Tax Procedure Code,

b) the decision of the tax administrator became final if the tax subject committed an administrative offence referred to some cases defined by the Tax Procedure Code.

§ 156 (8) of the Tax Procedure Code designated that **the right to assess interest on late payment ceases to exist** if 5 years have elapsed after the end of the year in which the tax subject was obliged to:

a) to pay tax, tax difference, tax advance, instalment of tax, or the amount to secure tax,

b) to pay the collected tax advance, the collected tax, or the withheld tax.

In special tax regulations the time-barred time limit is established, e.g.:

1. In Act no. 582/2004 Coll. on Local Taxes and Local Fee for Municipal Waste and Minor Construction Waste in the wording of later regulation – § 99f prescribes that the right to asses real estate tax, dog tax, tax on vending machines and tax on non-winning gaming machines ceases to exist after **5 years** have elapsed since the end of the year in which the tax administrator had the possibility to asses them. Thus there passes 5 year time-barred time limit;
2. In Act no. 595/2003 Coll. on Income Tax in the wording of later regulation – in § 30a – **10 year** time-barred time limit for the investment aid to beneficiaries in the context of the extinction of a tax relief for these beneficiaries is provided. Neither the tax nor its difference can be levied after ten years from the end of the year in which the obligation to file a tax return for the tax period for which this tax relief is applied.

In the broader sense, the rule of time-barred effect of passage of time in tax administration is formed by the **extinction of procedural time-barred time limits** delimiting the duration of the individual procedural rights of the persons involved in tax administration and these rights are established by the Tax Procedure Code and special tax regulations. Vain expiration of time of these procedural time-barred time limits reminds the statute of repose by its nature and consequences. The existence of their interconnection with the statute of repose and with their time-barred effect is *possible to infer on the basis of their nature*. For example, the expiry of time limit for a tax subject appealing against a decision of the first instance authority to secure an object[25] can be considered as the time-barred time limit because by its vain expiration the tax subject loses the right to the effective appealing against such a decision and this fact is taken into account *ex officio*[26]. On the other hand, the Tax Procedure Code also stipulates general conditions under which it is possible to ask for remitting of a delayed time limit[27].

Such an approach to the rule of time-barred effect of passage of time in tax administration is applied to all time-barred time limits by the expiration of which particular procedural rights granted to the persons involved in tax administration by relevant tax legislations within the implementation of tax administration cease to exist, and which are different from the time-barred time limits bounding the exercise of the rights of the tax administrator defined by this rule in its narrow sense. Their time-barred nature results from the Tax Procedure Code and special tax legislations only indirectly. In these cases only the procedural right whose extinction does not influence the existence of the own tax liability of a tax subject becomes extinguished, thus it is the ungenuine statue of repose.

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25 In addition to this right of a tax subject, further time limits are specified, e.g., time limit for submitting a proposal to reopen proceeding, time limit for requesting of the extension of time limit for filing a tax return, time limit for appealing against the decision of assessing own tax liability at VAT, time limit for submitting an objection against a call to pay tax arrears, etc.

26 § 41 (2) of the Tax Procedure Code in connection with § 72 (1) and (3) of the Tax Procedure Code.

27 § 29 of the Tax Procedure Code.

6. Conclusions

Based on this, it can be concluded that the rule of time-barred effect of passage of time in tax administration defines the borders within which time is passing in tax administration and beyond which the entitled person *ex officio* loses the right to require the fulfilment from the obliged person in tax administration. By its realization legal certainty of the obliged person within the application of tax administration is strengthened. The rule is forcing the entitled person to act within allowed time and if this person fails to do so, the right against the obliged person given by the legislation will cease to exist.

But we cannot overlook the fact that if the tax subject fulfils his own tax liability, respectively if they fulfil every obligation to which the extinction of the right of the tax administrator by the expiration of specified time is bound, or if the persons involved in tax administration apply their procedural rights within defined time limits, then applying of the rule of time-barred effect of passage of time in tax administration appears unfounded. In these cases, these rights cease to exist but by the completion of obligations stipulated in legislation and not as the legal consequence of the passage of time.

From the view of the systematic of principles and rules of tax administration, it is possible to include this rule among the further rules of tax administration because the rule of time-barred effect of passage of time in tax administration is not expressly provided in § 3 of the Tax Procedure Code and its content and nature can be inferred from the wording of selected provisions of the Tax Procedure Code and special tax legislations. This rule cannot be regarded as the principle because it does not apply in the implementation of tax administration without residue and applies only in cases exactly stipulated by law, respectively if its time-barred effect results in the extinction of a procedural right.

The rule of time-barred effect of passage of time in tax administration expressed in the narrow sense can, therefore, be characterized as the interpretive rule, according to which the tax administrator and the persons involved in tax administration in cases when **the subjective rights of the tax administrator** extinguished by vain expiration of

explicitly stated time limit are required to proceed. In the broader sense, the time-barred effect of this rule is reflected by vain expiration of time limits demarcating the period for the application of the procedural rights of the persons involved in tax administration, which are established in the Tax Procedure Code and special tax legislations.

The mere existence and implementation of the rule is important in the aspect of abidance of the requirements of speed and efficiency of the implementation of tax administration and ensuring legal certainty of tax subjects and other persons involved in tax administration. The rule is "the guardian" of continual development of tax administration forasmuch as for the tax administrator represents final temporal delimitation within which the tax administrator is liable for the realisation of his rights against the obliged person (the tax subject), respectively the procedural rights introduce such delimitation within which the persons involved in tax administration have to carry out their procedural rights.

Abstract

The author in the article points out the existence and application of the rule in tax administration in the Slovak Republic which has been nameless till now. On the basis of that rule the persons involved in tax administration proceed in tax administration in cases in which these persons are obliged to take into account the application of that rule within the realization of tax administration. The paper focuses on clarifying basic terminology on the basis of which it is possible to comprehensively understand the nature and the effects of that rule. The author also intends to define the content of that rule, its classification into the systematic of principles and rules of tax administration and evaluation of the importance of its application within the realization of tax administration.

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PENALTIES IN TAX LAW IN LIGHT OF THE PRINCIPLE NE BIS IN IDEM

Michal Radvan[1], **Johan Schweigl**[2]

1. Introduction

In this paper, we will first outline the concept of penalties in tax law and the fundamental notions and terms, so that we could then focus on the *ne bis in idem* principle in respect to the coexistence (co-application) of the tax code and the criminal code. The goal of this paper is to support or reject the hypothesis that the *ne bis in idem* principle is breached if the state imposes both the tax penalty and criminal penalty on the offender. This is a very hot issue which is being deliberated both at the global and national level – we further refer to the relatively recent decision of the Czech Supreme Administrative Court (SAC). Throughout the research made in order to write this paper, we used mainly the following methods: analysis (of the existing laws and the respective court decisions), partially, we also employed the method of comparison (mainly, when comparing regulation of different states) and the method of synthesis (when drafting conclusions and *de lege ferenda* recommendations). As there are almost no relevant sources in the Czech literature in this respect, we had to focus on sources from abroad. This paper draws upon a former paper published by Radvan, which had been published prior to the respective SAC decision.[3]

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3 M. Radvan, Zásada ne bis in idem v případě trestného činu zkrácení daně, poplatku a podobné povinné platby. Státní zastupitelství, Wolters Kluwer ČR a.s., 2015, Vol. XIII, No 4, p. 20-27.

2. Penalties for breaching tax laws

The penalties (sanctions) for non-compliance with tax laws may be classified as follows:

a) administrative tax penalties,

b) default interest,

c) criminal penalties.[4]

2.1. Administrative tax penalties

Both administrative tax penalties and default interest are defined in the Act no. 280/2009 Sb., Tax Procedural Code, as amended.[5] There are five main categories of administrative tax penalties:

a) failure to meet non-pecuniary legal obligation penalties

– fine for breach of confidentiality;

– disciplinary fine that may be imposed on a person who seriously complicates negotiations with the tax authorities, or disturbs order, or does not obey an instruction of a tax officer, or behaves offensively to a tax officer or any other subject involved in tax administration;

– fine for failures to meet non-pecuniary obligations that may be imposed on persons who fail to comply with the registration, notification or other reporting obligations, or who fail to comply with the record-keeping obligations established by the tax law or the tax administration. This fine is imposed on any person whose filings are made in a way other than electronically and if such behavior (non-electronic filing) seriously complicates tax administration, a further, higher fine can be imposed;

b) general non-cooperation penalties

4 The following parts 1.1 – 1.3 are being published in more detail in: L. Moravec, M. Radvan, Chapter 14: Czech Republic, in Surcharges and Penalties in Tax Law, (in:) R. Seer and A.L. Wilms eds., International Bureau of Fiscal Documentation 2016, p. 406-427.

5 See P. Mrkývka, D. Šramková, J. Neckář, I. Pařízková, L. Kyncl and M. Radvan, Sanctions in Tax and Finance Law – Czech Tax and Finance Law, (in:) D. Šramková and M. Poplawski eds., Legal Sanctions: Theoretical and Practical Aspects in Poland and the Czech Republic, Brno 2008, p. 406-427.

– disciplinary fine can be imposed on a person who seriously impedes or obstructs the tax administration;

c) late tax return submission penalties

– fine for late tax return submission;

d) late payment penalties

– late payment interest. The taxpayer is entitled to ask the tax administration for remission of late payment interest if the tax has been paid. The tax administration may wholly or partially waive these interests;

e) incorrectly self-assessed tax penalties

– penalty calculated from the amount of additionally assessed tax. The taxpayer is entitled to ask for remission of penalties if the tax has been paid. The tax administration is not bound by the application and, on the basis of assessing the extent of cooperation of the taxpayer, may waive up to 75% of the penalty.

2.2. Default Interest

The provisions on default interest represent surcharges in a broader sense, but they do not represent sanctions. Their purpose is rather to absorb possible liquidity benefits and secure timely payments as well as the real value of tax claims across different time periods. Interest can be paid by both taxpayers (interest on a deferred amount) and tax administrators (interest on a refunded overpayment, interest on the unauthorized conduct of the tax administration and interest on tax deduction). The taxpayer can ask the tax administration for remission of interest on the deferred amount if the tax has been paid. These interests may be waived wholly or partially.

At the request of the taxpayer or ex officio, the tax administration may permit postponement of the tax payment or payment distribution in instalments. During the period of deferment of tax or approval of instalments, the taxpayer has an obligation to pay interest on the deferred amount.

2.3. Criminal sanctions

There are two main factors to criminal tax acts to be covered by the Act No. 40/2009 Sb. of the Criminal Code, as amended. To reach the classification of fraud as the criminal tax act, two main conditions must be met:

a) only intentional offences can be classified as tax criminal acts,

b) the damage must be higher than approximately EUR 2,000.

Nevertheless, the amount of damage identified as the result of the previous tax proceedings cannot simply be taken over as the amount of damage for determining the criminal penalties. The repressive function is weakened in practice, as active repentance can be applied in advance and, in the case of withholding taxes, even in the period before the judgment of the criminal court is declared.

3. The *ne bis in idem* principal in the authors' theoretical approach

The principle *ne bis id idem* is embodied both in international[6] law and national law.[7] It applies not only to crimes, but also to wrongdoing of administrative nature. As for taxes, a tax is administered by tax administration, i.e. the bodies of public administration. If a tax was not paid properly, they impose a penalty and if the difference exceeds a certain amount, these bodies shall report it to police or state attorneys who might take steps to open criminal proceedings. With respect to the fact that the tax crimes do not have to be committed intentionally, the tax administrators should only report such cases in which it is presumable

6 The art. 14 para 7 of the International Covenant on Civil and Political Rights: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country". Art 4 or the Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms: „No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted orconvicted in accordance with the law and penal procedure of that State" Art. 50 of the Charter of Fundamental Rights of the EU: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

7 Art. 40 para 5 of the Constitutional act No 2/1993 Sb.

that the tax was not paid properly on purpose. Nevertheless, just by looking at the relevant data, this is not so.[8] In the Czech Republic, only courts may impose criminal penalties.

There is one question we should ask at this moment. Is it even possible to impose a criminal penalty on the tax wrongdoer if he had had to pay interest (as a form of penalty)? This issue of co-application of administrative penalty and criminal penalty was also reviewed by the Court of Justice of EU (CJEU). In the case C-617/10, request for a preliminary ruling under Article 267 TFEU from the Haparanda tingsrätt (Sweden), made by decision of 23 December 2010, received at the Court on 27 December 201. CJEU ruled that "*... that the ne bis in idem principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.*"[9]. Therefore, we should now focus on whether the tax penalty imposed by an administrative body is a sanction in nature. In this respect, it should be mentioned that the European Court of Human Rights set three criteria for classification of the nature of sanction: first, it is important to identify whether the sanction is of criminal or administrative nature; secondly one has to assess the nature of the particular wrongdoing; and finally the relevance of the sanction itself.[10] Aside from that, the CJEU decided not to comment

8 E. Radvanová, Městské státní zastupitelství v Brně. interview, 14.6.2015.

9 Comp. CJEU C-617/10.

10 Comp. Item 82 of the ECHR judgement Engel and others vs Netherlands: "Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given "charge" vested by the State in question – as in the present case – with a disciplinary character nonetheless counts as "criminal" within the meaning of Article 6 (art. 6). In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government. However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness

a similar case, because some of the taxes not regulated by the EU law do not fall within its competence.[11]

Hence, first, we need to make clear what is understood under the term sanction. Lederman highlights the fact that the tax "sanctions" are usually defined in a single amount or a percentage of certain amount; they, however, have to parts having different functions. "Sanction" amounting the market interest rate is only of compensation nature, as it only compensates the lost earnings, and, from the wrongdoers point of view, he has to pay the "interest for lending the funds from the state". The part of the "sanction" which exceeds the market interest is then of the nature of real sanction for non-compliance with the statutory obligations.[12] The concept of default interest under the Czech law partially complies with this theory, as it is based on repo rate set by the Czech national bank plus additional 14 per cent.

Marino has similar approach to the *ne bis in idem* principle.[13] He researches this principle from several points of view. First, he looks at it as at the fundamental principle of international law, which also covers the principle *res iudicata*. This principle is included in numerous documents, e. g. in the Statute of the International Criminal Court (Art. 20), Harvard Draft Convention on Jurisdiction with respect to Crime of 1935 (Art. 13), International Covenant on Civil and Political Rights (Art. 14 para 7), American Convention on Human Rights (Art. 8 para 4), Schengen Accord (Art. 54), Charter of Fundamental Rights of the European Union (Art. 50) and in many constitutions and extradition treaties.

Secondly, the *ne bis in idem* principle is also included in the Art 4 of the Protocol No 7 to the European Convention of Human Rights. Although this principle had first applied only to the criminal sanctions,

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of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, mutatis mutandis, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, last sub-paragraph, and p. 42 in fine)".

11 CJEU Decision C-497/14.

12 L. Lederman, Administrative Surcharges: Instruments of Cooperative Tax Compliance Regimes. Presentation at EATLP Congress 2015, Milano, 29.5.2015.

13 G. Marino, Limitation of Administrative Penalties by The European Convention of Human Rights and The EU Charter of Fundamental Rights. [online]. Milano. 2015. [cit. 18.6.2015]. Available from: http://www.eatlp.org/uploads/public/2015/Section4_Marino.pdf

the interpretation extended its application also to administrative sanctions, provided that they meet the "Engels" criteria.[14] Hence, national legislation has to clearly determine the nature of sanction, i.e. to set whether a sanction is rather administrative or criminal. Further, it has to be clear whether it is "idem", i.e. whether the identity of one's behavior may be assessed based on historical-naturalistic behavior (according to law) or based on legal qualification (according to a crime committed). In the case Zolotukhin vs. Russia, the European Court of Human Rights ruled that the art. 4 or the Protocol No 7 shall be understood that it bans other prosecution or court hearing, if the proceeding grounds on the same circumstances. However, it is still not clear what the "same circumstances" are.

It is thus not easy to completely agree with the opinion of the European Court of Human Rights presented in the case Lucky Dev v. Sweden.[15] The tax administration ordered that an individual shall pay penalties as the individual had not first paid the tax in the correct amount and that he had failed to keep the books correctly. These wrongdoings were interconnected. The European Court of Human Rights decided that both of these breaches of law were sufficiently different, but the behavior was actually same and thus the principle *ne bis in idem* was breached, when the criminal charges had been dropped, but the tax administration continued. The court's opinion cannot be read ad accurate and one hundred per cent correct. It is always important to research the nature of the sanction that an individual may face and what is the function of such a sanction. From this point of view, a sanction imposed by a court in criminal proceedings has a function to punish and intimidate and it is caused by a perpetrator's behavior. An administrative sanction, on the other hand, is supposed to protect a tax system in the sense that the state should be able to avoid additional costs connected with wrongdoing of those who have an obligation to pay taxes[16].

14 Comp. Engel and others vs. Netherlands, op. cit.
15 Decision of ECHR, Lucky Dev vs. Sweden, complaint No 7356/10.
16 R. Seer, A.L. Wilms, Surcharges and Penalties in Tax Law: General Report. [online]. Milano. 2015. [cit. 18.6.2015]. Available from: http://www.eatlp.org/uploads/public/2015/Seer-Wilms_General%20Report2015.pdf

The Czech Supreme Court, with respect to the "Engels criteria" ruled that stating the amount of the tax to be paid in administrative proceedings cannot be understood as a criminal sanction, as it is only of reparation nature.[17] Criminal law punishes danger of a certain deliberate behavior against the law and its purpose is to protect the general interests of society. Tax law, on the other hand, only protects the fiscal interests of the public funds. Moreover, it should be emphasized that as for the tax crimes, the criminal proceedings requires that the perpetrator's intention to commit the crime needs to be proved, which is often impossible for the prosecutors. On the other hand, it is mainly the tax individual who is supposed to show proofs supporting his statements, as if he fails to prove it, the tax administration will set the amount of the tax. This approach is logical; tax proceedings is based on the principle of cooperation between the tax administrator and the individual, whereas the principles of criminal law should avoid self-criminalization of those accused.[18]

4. Current Development in the Czech Republic

As for the principle *ne bis in idem* and concurrence of the administrative and criminal punishments, there were historically no doubts that concurrence of the penalties under tax proceedings code and criminal code is possible, or even usual. The courts only determined the role of the state as the injured party.[19] As for the penalties, the court decisions in general understood them as an obligatory pecuniary sanction arising directly from the law[20] *"with respect to its (penalty) basic function (the damages for eventual damage which the state could have), it cannot be understood as an administrative tort or criminal charge in the light of the art. 6 para I of the Convention for the Protection of Human Rights and Fundamental Freedoms…"*[21] Hence, it is not a sanction in the sense of administration punishment, but rather interest on the tax.

17 5 Tdo 749/2014, op. cit.
18 Comp. V. Thuronyi, Comparative Tax Law, Wolerts Kluwer International 2003, p. 227.
19 Supreme court decision No 3 To 9/85, Supreme court decision No 11 Tdo 917/2004, supreme court decision.
20 Comp. 5 Tdo 749/2014, op. cit., Supreme administrative court decision 1 Afs 1/2011, Supreme administrative court decision 5 Afs 28/2013.
21 1 Afs 1/2011, op. cit.

The most accurate definition may be found in the ruling of the Supreme administrative court: "…the tax proceedings code covers numerous «sanction» provisions, such as § 251 on penalties, § 252 on default interest or §250 on late tax return. Although all these provision affect the individual beyond his statutory tax duty, i.e. over the amount of the tax that he would have to pay in accordance with law, and the impose additional funds, such statutory duty cannot be understood as sanction in the sense of administrative punishment, but it is a part of the tax, which fall under the same regime and the tax itself (compare § 2 para 4 and 5 of the Tax proceedings code)"[22].

In the decision of February 2015,[23] the forth senate of the Supreme administrative court ruled that penalty is a criminal charge in the sense of the art. 6 para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It stated that *the main criteria for qualification of penalty is its material nature and its actual, not only a declared, purpose.* It also referred to several decision of the European Court of Human Rights (Jussila v. Finland, Bendenoun v. France, Ferazzini v. Italy, Janosevic v. Sweden Švédsku, etc.), which rule that sanction for torts in the area of taxes shall be understood – if certain conditions are met – as criminal charges in the sense of the art. 6 para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and it further ruled that it is a long-lasting persisting opinion of the European Court of Human Rights, which the Czech administrative courts have to observe.

The fourth senate also referred to the "Engels criteria" and the practice of the CJEU, mainly the abovementioned case C-617/10 Hans Akerberg Fransson. It further found that penalty is a *lump-sum statutory fine*. In this respect, one may doubt this conclusion, as fine is of a different nature than penalty, e.g. imposing of fines is subject to administrative consideration (whether to impose it and in what amount), whereas penalty is obligatory. It is possible to compare default interest and penalty, but even this criterion does not suffice for assertion that penalty is fine, punishment or sanction in general. Each of these two concepts applies to a different type of breach of law.

22 Supreme administrative court decision 5 Afs 28/2013 – 36.
23 Supreme administrative court decision 4 Afs 210/2014 – 30.

The court continues to argue that *one cannot agree with the opinion that the function of penalty is to provide damages for eventual loss for not paying taxes properly and in time. If a tax was not paid properly and in time, the economic loss arising from it, is fully compensated by default interest. The purpose of penalty is to deter the possible attempts to lower taxes by reporting wrong data*… In this place, we should again emphasize the difference between penalty and default interest: penalty is imposed for non-compliance with obligation to present proofs and it is calculated from the amount of newly set tax exceeding the tax paid, whereas default interest is paid if the individual is late with paying taxes.

5. Conclusion

We believe[24] that the penalty imposed under the tax proceedings is not of the nature of punishment. The hypothesis presented in the introduction that the *ne bis in idem* principle is breached if the state in the case of tax evasion imposes both the administrative and criminal punishment was rejected. If an individual is made to pay penalty, it does not have influence on possible criminal prosecution. However, since the plenum of SAC[25] took a different stand (although they only assessed the nature of the penalty, not application of the *ne bis in idem* principle), such a decision could have immense consequences as for sanctioning tax wrongdoings. For instance, if tax administrators followed the Tax proceedings code and imposed penalties, criminal charges would be excluded. It would not even be possible to open criminal proceedings with respect to the principle *res iudicata*. This would surely suit the ones who evade their tax duties, as they would not have to worry about facing criminal charges and it would be easy to wound up a company without having to pay taxes. If tax administrator did not set penalty (and thus breached its statutory obligation) and passed the case on to the prosecutors, it would be possible to impose sanction under the criminal code; then the prosecutors would have to prove the amount of damage.[26] This is, however, usually not easy as the one charged with tax evasion often do not keep their books properly. If the intention to evade tax is

24 Supreme administrative court is aware of this fact, for it cites Radvan in its decision.
25 SAC No 4 Afs 210/2014 – 57.
26 Comp. For instance, Supreme court decision No 5 Tdo 1503/2014.

not proved, then the charges would have to be dropped, and the case could not get back to the tax administrator due to the principle *res iudicata*.

Then, it would be necessary to react to this situation with new regulation. Marino recommends to have, for instance, a single court process.[27] Such a solution, nevertheless, has numerous flaws; aside from the length of the proceedings and the competence of the judges, there are many more crucial issues, such as publicity of the proceedings, intention vs. negligence, cooperation leading to self-criminalization, and so on.

Abstract

The paper outlines the concept of penalties in tax law and the fundamental notions and terms, and focuses on the *ne bis in idem* principle in respect to the coexistence (co-application) of the tax code and the criminal code. The goal of this paper is to support or reject the hypothesis that the *ne bis in idem* principle is breached if the state imposes both the tax penalty and criminal penalty on the offender. Authors believe that the penalty imposed under the tax proceedings is not of the nature of punishment. However, since the plenum of SAC took a different stand (although they only assessed the nature of the penalty, not application of the *ne bis in idem* principle), such a decision could have immense consequences as for sanctioning tax wrongdoings.

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CHANGES IN THE EUROPEAN CUSTOMS PROCEEDINGS IN THE LIGHT OF THE PROVISIONS OF TAX ORDINANCE ACT

Anna Reiwer-Kaliszewska[1]

1. Introduction

Regulation of the European Parliament and the Council (EU) No. 952/2013 of 9 October 2013 laid down the Union Customs Code (OJ L 269, 10.10.2013, p. 1 and OJ L 287, 29.10.2013, p. 90). Although this code entered into force on the 30th October 2013 (with the exception of the provisions referred to in Article 288, giving the European Commission the power to adopt delegated and implementing acts), it began to be applied from 1 May 2016. The package of the EU Customs Code mainly consists of: 1) Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation of the European Parliament and of the Council (EU) No. 952/2013 with regard to the detailed rules concerning certain provisions of the EU Customs Code, 2) Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of the Regulation of the European Parliament and of the Council (EU) No. 952/2013 laying down the Union Customs Code.

Among the objectives of establishing a new customs law one should mention, among other things, the facilitation of legitimate trade and the fight against fraud by specifying simple and economically viable customs procedures as well as rapid and standard customs procedures. According to Art. 6 of the EU Customs Code, any exchange of information between customs authorities and between economic operators and customs authorities as well as the storage of this information will be carried out

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using electronic data processing techniques (the transitional period lasts until 31 December 2020).

According to Art. 5, paragraph 2 and EU Customs Code, "customs legislation" means the body of legislation made up of the Code and the provisions supplementing or implementing it adopted at Union or national level, Common Customs Tariff, the legislation setting up a Union system of reliefs from customs duty and international agreements containing customs provisions, insofar as they are applicable in the Union.

The national customs have the subsidiary nature. The European Union acts within the limits of the powers conferred upon it by the Treaty on the Functioning of the European Union and the objectives that were set out in it. Competences not conferred upon the Union in the Treaties remain with the Member States. If the Treaties confer on the Union exclusive competence in a specific area, only the European Union can legislate and adopt legally binding acts, while Member States may do so only with the authorization or to perform acts issued by it. Issues related to customs law are an area of exclusive competence of the Union[2]. According to Art. 3 paragraph 1 and paragraph a. of the Treaty on the Functioning of the European Union (TFEU), the European Union has exclusive competence in the area of customs union. This means that only the Union may legislate and adopt legally binding acts in this area, and Member States may do so only under the authority of the Union or to implement Union acts (Art. 2, paragraph 1, TFEU).

While the European Union has exclusive competence in the field of customs union and common trade policy the secondary law authorizes, in some cases, Member States to enact customs legislation. These provisions shall act, however, only on the territory of a Member State. The need for supplementary national legislation is primarily due to the legal nature of the European Union. This organization has indeed legal personality and institutions but does not have its own administration. Individual EU countries have their own structure of public administration bodies and

2 According to Art. 3 of TFEU, the European Union has exclusive competence in the area of customs union, it establishes the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and the common commercial policy.

the procedures under which they are acting. Each EU member state also retains their own judicial system and judicial procedures.

EU customs law is independent of national law and the international legal order[3]. The European Court of Justice is of the opinion "that even if Member States remain empowered to enact procedural rules for the application of the Customs Code, but they must ensure that those rules are consistent with the Code and, more generally, with the requirements and the relevant principles of the Union law"[4].

The guards of the EU legal order are the Court of First Instance and the European Court of Justice. Those authorities shall ensure that the EU law was applied and interpreted in a uniform way. These two bodies cooperate with the judicial authorities of the Member States[5].

Customs Law of the European Union therefore does not have a self-service character and must be strongly integrated with the provisions of the Member States[6]. It is obvious, however, that national rules on customs issues can not violate EU regulations, and if that would happen, such provisions should be, as a rule, skipped and in that place EU regulations should be applied[7].

2. Customs proceedings in Poland before EU customs code

During the validity of the Community Customs Code procedures in customs matters were not subject to a uniform EU regulation and standards contained in it only charted the principle of achieving substantive law[8]. The reason was a dislike of excessive interference in

3 K. Piech, Zasada autonomii proceduralnej państw członkowskich a dyrektywa jednolitego stosowania prawa celnego na całym obszarze celnym Wspólnoty (art. 2 ust 1 w.k.c.) na przykładzie zasady trwałości decyzji ostatecznych (art. 128 OP), in: Regulacje w zakresie prawa celnego i podatku akcyzowego po przystąpieniu Polski do Unii Europejskiej, Warsaw 2012.

4 ECJ judgment of 10 December 2015. C-427/14, point. 19.

5 J. Chuderski, K. Chuderski, Postępowanie celne. Prawo celne krajowe i wspólnotowe z komentarzem, Warsaw 2010, p. 48.

6 Fabio M., op. cit., par. 1, p. 6.

7 K. Lasiński-Sulecki, in: The Community Customs Code. Commentary, ed. W. Morawski, Warsaw 2007, p. 49.

8 A. Kuś, Financial law, ed. By W. Wójtowicz, p. 320.

national legal systems[9]. Thus, each Member State could precise these principles in its internal legislation.

The Community Customs Code regulated only the essential issues concerning customs matters. First of all, it defined the decision, regulated the right to cancel, the problem of suspension of the implementation of the decision and extraordinary modes of changing final decisions.

Issues relating to customs procedures were governed by national laws. In Poland, the law regulating the complementary field of customs legislation was the Act of 19 March 2004 Customs Law. According to Art. 73 of this Act, the proceedings in customs matters were used respectively, Art. 12 (deadlines) and section IV of the Tax Code (tax proceedings), including changes resulting from the customs legislation.

3. Changes in EU customs code and in the Polish customs law

On 1 May 2016, as a result of the application of EU Customs Code, the concept of customs procedures in the EU countries changed. First of all, this is due to the fact that, in accordance with Article 1, second paragraph of EU Customs Code, the Code is to be applied in a uniform manner throughout the territory of the Union. According to paragraph 15 of the preamble to EU Customs Code, the facilitation of legitimate trade and the fight against fraud require simple, rapid and standard customs procedures and processes. In addition, all customs and trade transactions are to be handled electronically and that applies not only to licenses issued upon request (a special EU computer program has been formed to support them) but also the decisions taken by the customs authorities. Issues related to the customs procedure have been governed in Articles 22-32 of the EU Customs Code.

On May 10 a draft law amending the Act – Customs Law and other laws of 27 April 2016 was sent to the Parliament (hereinafter:

9 K. Lasiński-Sulecki, op. cit., p. 292.

the project)[10]. The project, according to its justification, is to serve the application of the EU Customs Code and the rules implementing its provisions.

The concept proposed in the new wording of Article 73 paragraph 1 of the new Act – Customs Law is to restrict the use of the Tax Code to customs procedures. This is primarily due to the establishment of the EU Customs Code and its implementing acts, which are applied directly and with priority over conflicting national law. That is also the opinion of the Court of Justice of the European Union, which prefers uniform application of customs law on the territory of the Union, and whose rulings sometimes show a tendency to restrict the principle of autonomy of the Member States[11].

The bill proposes the following wording of Art. 73: *Art. 73. 1. The procedure in the customs shall apply according to the provisions of Article 12, Art. 141-143, Art. 168, Art. 170 and section IV, Chapters 2, 5, 6, 9, 10, 11 with the exception of Art. 200, and Chapters 21-23 of the Act of August 29, 1997 – Tax Ordinance, and to the appeals shall also apply the provisions of this Act regarding specified in Chapter 6. 2. Steps taken in customs matters pursuant to the provisions of the Act of August 29, 1997 – Tax Ordinance, with the exception of the decisions referred to in Art. 163 § 2, Art. 179 § 2, Art. 215, Art. 228 § 1, Art. 262 § 5, Art. 263 § 1, Art. 268 § 3 and Art. 270a: 1) are not considered to be decisions within the meaning of the customs legislation; 2) can be challenged only in an appeal against the decision. 3. The issuing of certificates shall apply according to the provisions of section VIIIa Act of 29 August 1997 – Tax Ordinance, except that the refusal to issue a certificate or a certificate of the content requested by the applicant shall be taken in the way of a decision within the meaning of customs legislation.*

The bill proposed to apply properly the following provisions of the Tax Ordinance Act to the customs provisions: Art. 12 (deadlines), Art. 141-143 (not dealing with the matter within the time limit), Art. 168 (applications), Art. 170 (referral of the case to the competent authority), and the following chapters of Part IV of Tax Ordinance Act:

10 This article has been written in May 2016. The project of the law amending the Act – Customs Law and other laws has been approved by the Parliament on 22nd of June. The Senate has not introduced any changes. The law amending the Act – Customs Law and other laws has been put into force.

11 J. Chuderski, K. Chuderski, op. cit., p. 60.

second (exclusion of an employee or body), fifth (delivery)[12], sixth (call), ninth (minutes, annotations), eleventh (sharing files) with the exception of Art. 200, twenty-first (liability for damages), twenty-second (fines) and twenty-third (costs of the proceedings). For further appeals the provisions of Section 6a of the customs code are to be used, as there is no specific regulation in this area in the EU Customs Code.

In Art. 5, paragraph 39 of the EU Customs Code the concept of a decision has been defined. According to it, the decision means any act by the customs authorities pertaining to customs legislation giving a ruling on a particular case, and having legal effects on the person or persons concerned. It is important to note that the term "decision" in the EU customs code has been used in a broader sense than in the Ordinance Tax Act. On the basis of the Tax Ordinance Act the decision settles the matter as to its essence, or otherwise terminates the proceedings in a given instance, and in the course of proceedings the authorities issue provisions. These relate to the specific issues arising in the course of tax proceedings, but do not rule on the substance of the case, unless the provisions of the Tax Ordinance Act provide otherwise. Meanwhile, on the ground of EU Customs Code the decisions have a much broader meaning and the decisions should be understood not only as decisions within the meaning of the Tax Ordinance Act but also resolves.

Systematic of the decisions in the EU Customs Code is different from the systematic of the decisions placed in the Tax Ordinance. Although similar to the Tax Ordinance Act, the decisions may be issued on request or ex officio, however, there is an additional distinction which does not occur on the basis of the Tax Ordinance Act. Due to EU Customs the decisions may be favorable or unfavorable.

In addition, in accordance with Article 73, paragraph 2 of the draft, the activities undertaken in customs matters under the provisions of the Tax Ordinance Act are not considered to be decisions within the meaning of customs law and they are challenged only in an appeal against the decision. A closed list of decisions referred to in the indicated

12 It should be noted that the range of possible ways of delivery of writings, governed by Art. 144 of the Tax Code, has been broadened – and there is also the opportunity to serve the writings by the Platform for Electronic Services of the Customs Service.

Articles of the Tax Ordinance Act, which according to the EU Code of Customs should be considered as decisions, are the exception to this rule. Thus, it can be assumed that the concept of a decision encompasses both decisions and the resolves that can be challenged, and other actions taken during customs proceedings on the basis of the Tax Ordinance Act are on the basis of the customs law only material-technical activities[13].

So far the applicable provisions of Art. 120-129 OP on the general principles of conduct were used during the customs proceedings. However, due to the fact that the legal framework for customs proceedings is placed in the preamble to the EU Customs Code, which has a form of regulation, they are applied in the Member States directly. In the preamble to the EU Customs Code a reference is made, inter alia, to the principle of legality, the rule of ensuring the active participation of the parties in the proceedings (the possibility of establishing a representative) and the principle of trust to the customs authorities (customs controls in a manner least burdensome for entrepreneurs). It should also be noted that the previously used ordinance definition will be replaced by the statutory definitions contained by the EU Customs Code[14].

EU Customs Code regulates the customs representation in details. This institution is regulated in a different manner than the institution of the power of attorney in the Tax Ordinance Act. Customs representation may be direct, the customs representative shall than act in the name and on behalf of another person, or indirect, when the customs representative acts in his own name but on behalf of another person. A customs representative must, in principle, be established in the customs territory of the Union. Any person, even a legal entity established by another person to carry out the acts and formalities required under the customs legislation of the customs authorities, can be a representative.

Dealing with the matters so far regulated in Art. 139 of the Tax Ordinance Act as well as the cases when the matter is not dealt with

13 Justification for the project, p. 59.

14 EU Customs Code does not provide for the concept of the party, there are definitions of a person, an entrepreneur, a debtor and, therefore, it is the Code's concepts which will be applied.

within the time limit, Article 22 of the European Union Customs Code will find application. It is essential to mention again that according to the EU Customs Code, the decisions can be favorable and unfavorable. They can also be issued at the request and ex officio. The mode and deadline for the settlement of a case depend on which decision one will have to deal with. It should be emphasized that the time limits provided in EU Customs Code are much longer than the time limits under Art. 139 of Tax Ordinance Act. For example, in the case of decisions issued at the request the customs authorities, unless otherwise provided, issue the decision and notify the applicant immediately, not later than 120 days from the date of receipt of the decision (Art. 22 paragraph 3 of the EU Customs Code). If the customs authorities may not meet the deadline for a decision, this period may be extended, but generally not more than 30 days.

Particularly noteworthy are the issues related to the initiation of the customs proceedings, so far regulated in Art. 165-171 OP. The EU Customs Code abandoned the institution of initiating a procedure, among others, because of the presence of the institution of the right to be heard. It is not a simple equivalent of Art. 200 of the Tax Ordinance Act (the right to comment on the collected evidence)[15]. Article 200 of the Tax Ordinance Act, regulating the right to comment on the evidence collected, will no longer be used on the basis of customs procedures due to the presence on the ground of EU customs law of another institution – regulated in Art. 22 paragraph 6, the right to be heard. According to Art. 22 paragraph 6 of the EU Customs Code, before taking a decision which would adversely affect the applicant, the customs authorities shall inform the applicant of the grounds on which they intend to base their decision. At the same time they give the applicant the opportunity to present its position within a specified period. This term generally is 30 days from the date of delivery of the notification or the date of classification as delivered, but in some cases may be much shorter.

According to Art. 44 of the EU Customs Code, each person has the right to appeal against the decision issued by the customs authorities on the application of customs legislation which concerns him directly and

15 Justification for the draft of the Act (Customs Law), p. 59.

individually. The right to appeal shall also be awarded to a person who has applied to the customs authorities for a decision and the application has not been acted upon within a reasonable time[16]. European Union Customs Code empowers the Member States to regulate the appellate procedures in their national orders. In the project a separate chapter has been devoted to this area.

The EU Customs Code introduces three modes of replacing the existing extraordinary modes of changing final decisions (regulated in Tax Ordinance Act). The use of one of three modes depends on the fact whether the decision is favorable or unfavorable: annulment of a favorable decision, revocation or amendment of a favorable decision, annulment, revocation and amendment of the decision (favorable and unfavorable).

Noteworthy is the introduction of the provisions relating to the revocation of favorable decisions as well as the revocation or amendment of favorable decisions to the EU Customs Union. These modes can be taken ex officio or upon request. Under Article 27 of the EU Customs Code the customs authorities shall annul a decision favorable to the holder in the case of joint fulfillment of the following reasons: a decision based on incorrect or incomplete information the holder of the decision knew or should have known about and the fact that the decision would have been different if the information had been correct and complete. A favorable decision may also be revoked or amended if one or more of the conditions laid down for its issue were not met, or no longer fulfilled, or at the request of the holder of the decision.

The mode governed by Article 23 paragraph 3 of the EU Customs Code deals with the annulment, revocation and amendment of a favorable and unfavorable decision. Without prejudice to provisions laid down in other fields which specify the cases in which decisions are invalid or become null and void the customs authority which took a decision may at any time annul, amend or revoke it where it does not conform to the customs legislation.

16 On the basis of the Tax Ordinance Act this institution is synonymous with the institution of a reminder regulated in Art. 141 of Tax Ordinance Act.

The issue of extraordinary modes of changing the final decisions has been regulated comprehensively and completely. When determining the conditions for the application of these modes, both general terms and terms of specific narrower range have been used. The regulation laid down in EU Customs Code is therefore different than in Tax Ordinance Act, which specifically mentions the conditions for the application of the mode of changing the final decisions. Moreover, the Polish national legislature does not distinguish between favorable and unfavorable decisions. The effect of the application of the provisions laid down in the EU Customs Code and the Tax Ordinance Act is, however, ultimately similar leading to elimination of unlawful decisions[17].

4. Conclusion

The beginning of the application of the EU Customs Code results in the need to amend the Customs Act. These changes are particularly significant in regulating customs procedures. This, however, does not mean abandoning the proper application of the provisions of Chapter IV of the Tax Ordinance Act but a significant reduction in its use.

The changes are intended to standardize customs procedures at the EU customs territory and, above all, to speed up and simplify customs procedures.

The changes look impressive on paper but only the future will show whether they will be great in practice. Thus the full impact of the changes in legislation remains to be seen.

Abstract

In the European Union common customs provisions are used in all member countries. Customs law is an example of the most harmonized field of law in the international context[18]. Implementation of the EU Customs Code has caused even greater unification of this matter. This

17 Justification for the draft of the Act (Customs Law), p. 70.
18 M. Fabio, Customs Law of the European Union, Forth Edition, The Netherlands, 2012 par. 1, p. 7.

is particularly evident in the case of customs procedures, which until now was governed by the provisions of the Member States. Currently, this area is covered by the EU Customs Code. One of the objectives of implementing the new Code was precisely the introduction of rapid and uniform customs procedures.

In Poland, this means a significant reduction in the use of the Tax Ordinance Act to customs procedures. The article aims to identify the most important changes in customs proceedings in the light of the provisions of the Tax Law.

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THE PRINCIPLE OF PROPORTIONALITY IN THE PROCESS OF TAX LAW CONDIFICATION

Paweł Selera[1]

1. The principle of proportionality in the Constitution of the Republic of Poland: genesis and scope of application

Philosophically, "proportionality" or "the principle of proportionality" is derived from the Aristotelian theory of golden mean. In this most generalized perspective, this principle is both historically and geographically simply ubiquitous. It is, in fact, a variously instrumentalized directive which recommends that extreme solutions be avoided[2].

This principle then became widespread in the concept of constitutionalism of states belonging to the German culture area. In the judicature and doctrine of these countries, three components thereof were separated to which Polish Constitutional Tribunal[3] [hereinafter referred to as the **Tribunal**, the **CT** or the **Court**] refers in its jurisprudence.

Until the enactment of the Constitution of the Republic of Poland of 2 April 1997[4] [hereinafter referred to as the **Constitution**], the principle of proportionality was not *explicitly* formulated in any provision of constitutional significance. Nonetheless, the Court attempted to reconstruct this principle on the basis of other provisions (constitutional principles, in particular the rule of law) as well as jurisprudence and

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2 E. Łętowska, Wprowadzenie do problematyki proporcjonalności in: E. Szymaniec (ed.), Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy, Wałbrzych 2015, p. 15-16.

3 D. Gruszecka, Zasada proporcjonalności jako konstytucyjna bariera karnoprawnej ochrony, in: E. Szymaniec (ed.), Zasada proporcjonalności…, op. cit., p. 149-50.

4 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No 78, item 483).

Western legal doctrines which the Court sometimes referred to in justifications of its decisions[5].

According to Article 31(3) of the Constitution, "any limitations upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

Until recently, it was alleged that this provision is the only source of the principle of proportionality on the basis of the Constitution; therefore, it was believed that referring to the rule of law mentioned in Article 2 of the Constitution in the context of the principle of proportionality is unnecessary[6]. In more recent jurisprudence, the Court emphasizes that the principle of proportionality is still "anchored" in Article 2 of the Constitution; citing this article as direct grounds for the application of the principle of proportionality is permissible whenever the test of proportionality under Article 31(3) of the Constitution cannot be done. The Court understands the principle of proportionality expressed under Article 2 of the Constitution as a prohibition against excessive interference of the legislator separately from violation of a specific constitutional right or freedom[7].

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5 J. Zakolska, Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego, Warsaw 2008, p. 37.

6 Initially, it was assumed in the Constitutional Tribunal jurisprudence that "(...) the principle of proportionality is established fully independently and comprehensively by another provision of the Constitution, namely Article 31(3). As this article is universally applicable, there is no need to resort in each case to the undoubtedly capacious principle of a state ruled by law, covering thereby many separate constitutional norms. Obviously, this does not mean totally breaking the axiological and functional bonds between the proportionality principle and the principles derived from the idea of a state ruled by law" (judgement of the CT of 12 January 1999 (P 2/98), OTK 1999/1/2).

7 In its judgement of 11 February 2014, the CT broadly pointed to a more recent judicial trend which emphasizes a different scope of application of the principle of proportionality resulting from Article 2 and Article 31(3) of the Constitution. The Court argued that the principle of proportionality under Article 2 of the Constitution "(...) refers to the assessment of the legislator exercising regulatory freedom separately from violation of a specific constitutional right or freedom. For it usually concerns limitation on (i) the rights or freedoms guaranteed only at the statutory level, or (ii) constitutional rights of differently understood public entities, or finally (iii) the assessment of limitation on property rights resulting from the imposition or increase of tax obligation to which – according to jurisprudence of the Tribunal – Article 31(3) of the Constitution does not apply" (judgement of the CT of 11 February 2014 (P 24/12), OTK-A 2014/2/9).

In addition, the Constitution contains provisions relating to the requirement of proportionality in the context of protection of certain rights and freedoms, such as in particular Article 51(2) thereof, according to which "public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law." Article 51(2) of the Constitution expresses a separate requirement of proportionality in the field of informational autonomy. Furthermore, a special clause of proportionality is included in Article 64(3) of the Constitution, according to which "the right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right." The Court jurisprudence, including jurisprudence in tax area, may lead to a conclusion that mutual relationships between these specific principles of proportionality and the general clause under Article 31(3) of the Constitution do not correspond to the *lex specialis derogat legi generali* principle which should apply to norms of the same legal significance. The Court does not interpret the provisions of the Constitution in a manner typical of a formal-dogmatic method. Such an interpretation, although it may raise concerns from the point of view of legal doctrine, is very convincing and certainly not isolated[8]. The Court, when citing specific principles of proportionality, usually applies them jointly with the general clause under Article 31(3) of the Constitution.

2. The principle of proportionality: an attempt to reconstruct its substance

In the first ruling of the Constitutional Court of 1995[9], in which the principle of proportionality provided the basic pattern of control, the

8 A. Stępkowski, Zasada proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie, Warsaw 2010, p. 363. In its subsequent rulings, the Constitutional Tribunal indicated that "the norm expressed in Article 51(2) of the Constitution is not entirely independent; therefore, the application of the principle of proportionality in terms of public authorities acquiring information on citizens may and should be assessed on the basis of Article 51(2) and Article 31(3) of the Constitution, jointly applicable" (judgement of the CT of 17 June 2008 (K 8/04), OTK-A 2008/5/81).

9 The Court's statements on the principle of proportionality can also be found in its earlier rulings. In the CT judgement of 26 January 1993 (U 10/92), OTK 1993/1/2, the Tribunal stated that limitations on the freedom of activities of political parties are not absolute as they must take into account the necessity to each time balance between the prestige of law and freedoms to be limited or the prestige of law and the principle that justifies such a limitation. In the opinion of the CT, "failure to keep the proportionality, necessary in this case, or claiming that the accepted

Court derived the prohibition against excessive interference from the rule of law, and then specified the sense of this principle, asking questions typical of the proportionality test, namely: is the new regulation going to produce the desired results? Is the regulation necessary to protect public interest with which it is connected? Are the results of the regulation adequately proportional to burdens imposed on citizens[10]? In subsequent rulings, the Court kept referring to those components of the principle of proportionality, pointing especially to the achievements of the German doctrine in this area.

The principle of suitability (adequacy) expresses the requirement of praxeological rationality. The criterion of suitability is precise and objective, but its use involves a number of difficulties, which is a reason why making clear assessment of effectiveness of measures taken by public authorities is not always possible[11].

The principles of necessity and proportionality in the strict sense express the requirement of axiological rationality. According to the principle of necessity, an administrative authority must choose such measures – from among equally effective ones – that would be the least inconvenient to an individual (taxpayer). The principle of proportionality *in the strict sense* requires that the right balance be kept between a positive effect of a given regulation (e.g. the need to combat tax fraud) and burdens imposed on an individual[12]. A conflict of interests is solved by sacrificing – to some extent – some interests for others. Therefore, in order for this criterion to apply, the conflicting interests must be "balanced"[13].

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limitation is unnecessarily excessive, may result in unconstitutionality of the regulation. Thirdly, such limitations cannot be arbitrary, i.e. they cannot be based on classifications lacking justification in rational and constitutionally legitimized criteria, that is classifications contrary to the principle of equality."

10 Judgement of the CT of 26 April 1995 (K 11/94), OTK 1995/1/12.

11 All three aspects of the principle of proportionality along with the difficulty in defining them are extensively discussed, in: K. Wojtyczek, Zasada proporcjonalności, in: B. Banaszak, A. Preisner (eds.), Prawa i wolności obywatelskie w Konstytucji RP, Warsaw 2002, p. 682 and futher.

12 K. Wojtyczek, Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP, Kraków 1999, p. 150 and futher.

13 K. Wojtyczek, Zasada proporcjonalności. In: B. Banaszak, A. Preisner (eds.), Prawa…, op. cit., p. 686.

3. The principle of proportionality in tax law: methodology of application[14]

The difference between taxes (and other public imposts) and other public levies and charges is that taxes are an inherent element of any political system; therefore, they are the opposite of civil rights and freedoms, not an exception to them[15]. As fiscal sovereignty (understood as the supreme power of a state to impose and collect taxes and levy contributions) is being executed, it must lead to a conflict between constitutionally protected values (such as freedom, the right to ownership, the right of succession and the freedom of economic activity) and the power of a public body to impose and enforce levies in order to meet the needs of the whole community. The question now is whether the use of the proportionality clause in solving the conflict of interests (competing goods) is legitimate[16].

Based on considerations developed by the Court, tax imposition is clearly established in the Constitution (Article 84 thereof), hence it cannot be looked upon in terms of limitations on the rights and freedoms referred to in Article 31(3) thereof[17]. This is because the CT does not connect taxes with the issue of limitations on rights and freedoms[18]. According to previous jurisprudence of the Court, affecting the sphere of property rights is to the substance of tax[19].

Choosing a tax source and defining taxation scope is an attribute of fiscal sovereignty of the state, and therefore the suitability and proportionality (in the narrow sense) of the adopted solutions can only be subject to political assessment. Fulfilment of tax liabilities, understood as a total amount of tax that an entity is legally obligated to pay to an

14 Due to the limits of this article, an impact of both the EU principle of proportionality and the principle of proportionality as defined in the acts of international law on domestic law has been omitted.

15 T. Dębowska-Romanowska, Prawo finansowe. Część konstytucyjna wraz z częścią ogólną, Warsaw 2010, p. 124.

16 M.A. Duda, Wpływ zasady proporcjonalności na proces kształtowania powszechnego obowiązku podatkowego. in: P.J. Lewkowicz (ed.), J. Stankiewicz (ed), Konstytucyjne uwarunkowania tworzenia i stosowania prawa finansowego i podatkowego, Białystok 2010, p. 442.

17 For example, the judgement of the CT of 5 June 2013, SK 25/12, OTK ZU No. 5/A/2013, item 68.

18 Zakolska, J. Zasada proporcjonalności…, op. cit., p. 242.

19 Judgement of the CT of 5 November 2008, ref. no. SK 79/06, OTK ZU No. 9/A/2008, item 153.

authority as the result of the occurrence of a taxable event specified in tax law, undoubtedly means an intervention in taxpayer's property rights, but for the reasons indicated above it should not be viewed in terms of limiting property rights, including ownership rights[20]. In this aspect, the constitutional principle of proportionality as an exclusive pattern of control is not applicable, which does not mean that it has no significance for tax law.

Referring to Article 84 of the Constitution, the CT stresses that tax obligation itself should not be considered as limitation on constitutional rights and freedoms. However, the Court further reserves: "Measures taken to fulfil this obligation, interfering in the sphere of civil rights and freedoms, can be assessed from the point of view of requirements listed in Article 31(3) of the Constitution"[21].

The constitutional principle of proportionality within the meaning of Article 31(3) of the Constitution does, however, apply in the process of balancing public and private interests. In the past, public interest (in tax law, it is defined as the need to ensure effective fulfilment of an obligation to pay taxes/combating tax fraud) would collide with private interest (constitutional rights and freedoms, especially informational autonomy/right to privacy). It is primarily about the possibility of applying the principle of proportionality in the fulfilment of the so-called instrumental tax obligations. The essence of this obligation is to have the taxpayer himself/herself disclose, in the manner prescribed by law, his/her tax liabilities in order to pay tax amount due[22]. Other benefits and charges constitute some form of assistance to authorities and state bodies, which is the reason why they are assessed from the point of view of the principle of proportionality in limiting civil rights and freedoms in accordance with Article 31(3) of the Constitution[23].

In its jurisprudence, the Constitutional Tribunal many times applied the principle of proportionality in the area of tax law. For the purposes of this study, the application of the principle of proportionality in

20 M.A. Duda, Wpływ zasady proporcjonalności…, op. cit., p. 445-446.
21 Judgement of the CT of 25 October 2005, SK 33/03, OTK-A 2004/9/94.
22 T. Dębowska-Romanowska, Prawo finansowe…, op. cit., p. 126.
23 T. Dębowska-Romanowska, Prawo finansowe…, op. cit., p. 128.

the area of tax law will be presented against probably the best-known judgement of the CT, namely a judgement on tax abolition and propriety declarations of 2002[24]. This judgement is noteworthy primarily because the Tribunal, as part of its analysis, considered the use of all three aspects of the principle of proportionality, which is not always the case. The Court interpreted the principle of proportionality in the context of a new obligation planned to be imposed by the Ministry of Finance, namely to have taxpayers submit declarations concerning their property[25]. In the opinion of the Ministry of Finance, this new obligation was to ensure proper collection of income tax and "seal the tax system."

When analysing the scope and nature of a new formal legal obligation, the Court pointed out at the beginning that disclosing all the assets accumulated over a lifetime (along with meticulous enumeration of their components and their value) invades the sphere of personal privacy. On the other hand, the CT argued that constitutional protection of privacy and informational autonomy are not absolute, which is due to the rights and freedoms of other individuals or the needs of community. Given the intrusive nature of an obligation planned to be imposed on taxpayers, the Court found that infringement of informational autonomy[26] as a result of unauthorized acquisition of information on citizens should be compatible with the requirements specified in Article 31(3) of the Constitution.

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24 Judgement of the CT of 20 November 2002 (K 41/02), OTK-A 2002/6/83.

25 This obligation was to be imposed on the basis of Article 18 of the Act of 26 September 2002 on one-off taxation of undisclosed income and amendment to Tax Ordinance Act and Fiscal Criminal Code (the Constitutional Tribunal ruled that the Act was inconsistent with the Constitution before it was signed by the President). Article 18 of the contested Act (which was challenged by the CT based on the principle of proportionality) changed the provisions of Tax Ordinance [The Act of 29 August 1997 Tax Ordinance (Journal of Laws consolidated text of 2015, item 613), hereinafter referred to as the Ordinance]. In the light of the draft, Article 119a (1) of the Ordinance was to read as follows: "Individuals residing or staying in the Republic of Poland shall submit a one-off declaration concerning the property they own, own jointly with other individuals or which is in possession of a person submitting a propriety declaration – as of 31 December 2002 – subject to Article 119b (3) and (5), even if is concerns the period covered by the propriety declaration when they were temporarily staying abroad." Further details were defined in Articles 119a and 119b – 119g thereof.

26 According to Article 51(1) of the Constitution, "no one may be obliged, except on the basis of statute, to disclose information concerning his person." As the CT stated: "An analysis of the relationship between Article 31(3) and Article 51(2) of the Constitution leads to the conclusion that infringement of informational autonomy as a result of unauthorized acquisition of information on citizens should be compatible with the requirements specified in Article 31(3)."

When analysing the proportionality of a new legal measure (the obligation of taxpayers to submit declarations concerning their property), the Court reminded that "the principle of proportionality – in line with the established jurisprudence of the Constitutional Tribunal (*acquis constitutionnel*) – requires that certain conditions be met in order to consider invasion of privacy (infringement of informational autonomy) constitutional (...)". A further detailed analysis performed by the CT was to demonstrate whether or not the elements of the proportionality test were satisfied.

The Court reminded that a given measure must be **indispensable (necessary)**, therefore "it is not enough for propriety declarations (Article 18 of Tax Abolition Act) <to favour these goals>, <to facilitate their achievement> or <to be comfortable for state authority> which is to use them to achieve these goals." The Tribunal emphasized that there must be a relationship of necessity between the imposition of an obligation on taxpayers to submit common propriety declarations and the possibility of implementing the existing provisions on income tax from individuals. "It is, in fact, the first criterion for applying the principle of proportionality as regards invasion of privacy of persons obliged to submit such a declaration." When analysing the necessity to introduce property declarations, the Court pointed out that Polish law already provides for the possibility of imposing taxes on individuals whose assets are not reported in income tax returns (namely taxation on the basis of the so-called external characteristics). Therefore, despite the lack of propriety declarations, there are solutions that can be adopted in the event of discrepancies between declared income and externally visible assets. At the same time, the Court pointed to the provisions of law applicable at the time when the case was being considered, which allow tax authorities to obtain information on assets (income) of taxpayers. Therefore, tax authorities are, in fact, able to obtain data to which propriety declarations apply without declarations themselves. To sum up this part of the judgement on tax abolition and propriety declarations, the CT stressed that the first aspect of the proportionality test, the necessity, does not occur. In other words, the planned measure (an obligation of taxpayers to submit declarations concerning their property) is not compulsory to achieve the goal indicated in the

statement of reasons of the challenged Act (a possibility of imposing tax of hitherto undisclosed income).

The Court also analysed the next aspect of the proportionality test, i.e. **suitability** (which the Court called "soundness"), arguing that "a hallmark of the principle of proportionality (Article 31(3) and Article 51(2) of the Constitution) is (besides the aspect of necessity) that the measures must be suitable for effective (not potential or hypothetical) achievement of the goal pursued".

The third component of the principle of proportionality considered by the CT is **proportionality** in the strict sense. As pointed out by the Court, "(...) invasion (if it is positively verified in terms of necessity and suitability, as indicated above) must be the least inconvenient to an individual whose right or freedom suffers limitation. Propriety declarations (such as controlled ones) do not meet this condition. The balance between the sacrificed good and the pursued value muse be kept."

Article 31(3) of the Constitution was also one of the constitutional norms on the basis of which the provisions of the Act on establishing Provincial Tax Courts (Wojewódzkie Kolegia Skarbowe) were challenged[27] (judgement of the CT of 20 June 2005 K 4/04[28]). Once again, the Tribunal referred to Article 31(3) and Article 51(2) of the Constitution jointly in its judgement of 17 June 2008[29] (K 8/04) to analyse the scope of use of data (materials) collected in the course of tax intelligence activities. Further rulings regarding the scope of application of the principle of proportionality in the area of tax law underline the importance of this principle for specific control of state authorities in imposing instrumental tax obligations.

27 The Act of 27 June 2003 on establishing Provincial Tax Courts and on amending certain acts regulating duties and competences of authorities and the organization of organizational units under the minister competent for public finances (Journal of Laws No 137, item 1302).

28 Judgement of the CT of 20 June 2005 (K 4/04), OTK-A 2005/6/64.

29 Judgement of the CT of 17 June 2008, (K 8/04), OTK-A 2008/5/81.

4. The principle of proportionality among general principles of tax law in the work of the General Tax Law Codification Committee

The General Tax Law Codification Committee [hereinafter referred to as the **Committee**], in a document entitled *Directional Assumptions of New Tax Ordinance*30 indicates that mature codification of general part of tax law requires that general principles of tax law be taken into account[31]. The Committee states: "„Over the last few decades they have crystallized clearly enough in the jurisprudence and the doctrine that inserting them into the act is now possible and necessary. The impact of general principles of tax law will not be limited to tax ordinance itself but will also affect the entire area of tax law."

The proposed catalogue of general principles of tax law is intended to refer only to the aspects of tax law application, thereby creating supreme standards to determine the relationship between tax authority and taxpayer. The Committee notes: "If the tax ordinance does not regulate the law-making process, there is no basis for inserting therein the cardinal principles behind law-making (...)".

In the definition of the catalogue of general principles of tax law, the Committee refers to, although not in the first place, the principle of proportionality. The reference made to this principle clearly shows that it is "anchored" in the Constitution and the laws of the European Union. According to the Committee's opinion, inserting this principle in the provisions of general tax law is substantiated by the need to protect taxpayer's rights. By putting considerable emphasis on the application

30 Directional Assumptions of New Tax Ordinance of 24 September 2015, available on the website of the Ministry of Finance: http://www.mf.gov.pl/ministerstwo-finansow/dzialalnosc/ciala-kolegialne/komisja-kodyfikacyjna-ogolnego-prawa-podatkowego/prace-komisji (access on 3 March 2016).

31 According to the Committee: "The Committee's goal is to organize general part of tax law and give it a form of a new act entitled – bearing historically developed nomenclature in mind – Tax Ordinance. It is a form of the so-called partial codification of tax law, sometimes referred to as the tax law constitution. Complex codification is not currently possible due to the ongoing process of Polish tax system redevelopment. There is no point in drawing up a tax code when the existing model of income and assets taxation has not taken its final form. Completion of tax reforms is a prerequisite to taking up any further work on codification of the entire tax law (general and specific part)", Directional Assumptions of New Tax Ordinance of 24 September 2015, p. 10.

of this principle in tax law, the Committee argues that tax authorities will be obliged to take only such actions infringing taxpayer's rights that meet certain criteria of proportionality. Invading the sphere of taxpayer's rights will satisfy such criteria if it is (i) essential to achieve the intended goal as regards public interest protection (the requirement of adequacy); (ii) necessary to achieve this goal (the requirement of necessity) and (iii) produces effects in proportion to burdens imposed on a taxpayer (the requirement of proportionality *in the strict sense*)[32]. As it is emphasized: "This principle will therefore require that effective, yet the least inconvenient measures, be chosen from among all acceptable measures (no more inconvenient than it is necessary to achieve legitimate goals at which these measures are aimed)[33].

5. Summary and conclusions

The principle of proportionality is one of the tax law principles which guarantees the protection of taxpayer's rights. So far, its use in the area of tax law focused primarily on the assessment of legislative solutions supporting (designed to support) the fulfilment of obligation to pay taxes. The Constitutional Tribunal takes into account the fiscal sovereignty of the state, defined primarily in Articles 84 and 217 of the Constitution, and emphasizes that affecting the sphere of property rights is the substance of tax. This does not mean, however, that the right to impose tax obligations excludes the application of the principle of proportionality in the area of tax law.

The principle of proportionality expressed in Article 31(3) of the Constitution is applicable when assessing the shape and scope of use of the so-called instrumental tax obligations, extremely important for the fulfilment of the "main obligation". The imposition of such obligations by the state in the name of "sealing the tax system" as well as their scope were challenged in the past and considered inconsistent with various principles, including the constitutional principle of proportionality. The

32 Directional Assumptions of New Tax Ordinance of 24 September 2015, p. 22.
33 Ibidem, p. 22-23.

Constitutional Tribunal assesses in its jurisprudence the proportionality of certain legislative solutions.

In this regard, a gap in this area would be filled by the principle of proportionality defined among other general principles of tax law in the new Tax Ordinance (Tax Code) as part of general tax law codification. This principle would apply to the assessment of the proportionality of actions taken by law enforcement bodies (in other words, it would focus on the relationship between tax authority and taxpayer). Admittedly, tax authorities, while performing their duties, are currently obliged to choose such legal measures that are adequate, necessary and the least inconvenient to a taxpayer, having regard to the constitutional principle of proportionality; however, inserting this principle into Tax Ordinance would undoubtedly strengthen the protection of taxpayer's rights.

Abstract

The General Tax Law Codification Committee, in *Directional Assumptions of New Tax Ordinance* adopted by the Council of Ministers on 13 October 2015, calls for the introduction of a catalogue of tax law principles. Such a catalogue is to include the principle of proportionality among other general principles of tax law.

The principle of proportionality, even though it is not regulated by Tax Ordinance, profoundly shapes directly or indirectly many aspects of Polish tax law.

The purpose of this study is an attempt to identify the scope and methodology of application of the principle of proportionality in the field of taxation, as a new general principle of tax law defined in the future Tax Ordinance (Tax Code).

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PROPOSALS OF LEGISLATION CHANGES IN THE REGULATORY ENVIRONMENT OF THE BANK GOSPODARSTWA KRAJOWEGO AS TO RELIEFS AND EXEMPTIONS IN TAX LEVIES FROM CERTAIN FINANCIAL INSTITUTIONS

Sebastian Skuza[1]

1. Introduction

Law & Economics as a science is located between economy and law sciences; it uses the tools of economic sciences to indicate the directions of the state's activity as to law–making. The above science is divided into two subfields: positive and normative. The positive one focuses on predicting the effects of regulations for the economy, i.e. through analyses and economic efficiency of current regulations. The achievements of the economic analysis of law are used to study, with economic methods, the results of legal solutions before introducing given regulations (*ex ante*) and afterwards (*ex post*). On the other hand, the normative economic analysis of law, on the basis on economic principles, delivers recommendations for actions in law–making by making proposals of changes, affecting state authorities, and creating legal regulations more beneficial for the entities of the economic and/or social life. Quoting Professor Jerzy Stelmach, the economic efficiency of the law may be presented as[2]:

1) maximization of social welfare (Posner); the law, efficiency-wise, should allow to choose such a solution which maximizes social welfare (social usefulness);

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2 Lecture: Efektywność wartością procedury dochodzenia odszkodowania za wydanie niezgodnej z prawem decyzji podatkowej?, International Conference on Challenges of Finance Law, Karlskrona. Sweden, April 2015.

2) improving (advancing) the economic situation of at least one entity, while the status of the others remains unchanged (Pareto);
3) achieving "bigger benefit" (Kaldor-Hicks); economically efficient is such a legal solution which means that benefits achieved by certain entities thanks to that solution are higher than the losses of entities which are worse off after such a change;
4) equalizing or decreasing marginal costs; in a marginal analysis, a legal solution is economically efficient if it achieves a desirable goal only to such an extent in which the marginal social costs and marginal social benefits of such a goal are equalized.

In the said paper, the author focuses on the issue of the economic analysis of law in the regulatory environment of Bank Gospodarstwa Krajowego (the "Bank") as to the solution related to tax levies from certain financial institutions. Moreover, the purpose of the paper is to add application values to the studies conducted, i.e. preparing a draft of legal solutions. The author attempts to prepare his own proposals of changes in the regulations in the area of charging the Bank with the asset tax, under the so called Pareto optimum principle. Quoting V. Pareto, *We can say about members of society that they enjoy maximum satisfaction in certain circumstances if it is not possible to slightly move from their position in such a manner that the satisfaction experienced by members of society will either increase or decrease. This means that even the slightest move from such a position must bring the effect of the increase in satisfaction in some individuals and corresponding decrease – for others; pleasure for some, distress for others*[3]. The author wants to present his proposals of changes in the normative subfield of law and economics on the basis of the principle of improving (advancing) the economic situation of at least one entity, while the status of the others remains unchanged.

3 S. Chrupczalski, Ekonomiczna analiza prawa własności w ujęciu szkoły austriackiej, Kraków 2008, http://mises.pl/wp-content/uploads/2009/09/ekonomiczna-analiza-prawa.pdf., V. Pareto, Manual of Political Economy, New York, 1971 translation of 1927 edition Augustus M. Kelley, http://cepa.newschool.edu/het/essays/paretian/paretoptimal.htm

2. Reliefs and exemptions in the Polish law

The main role of taxation is the fiscal role, i.e. acquiring funds necessary to cover public needs. Another (secondary) role is the redistribution role, which means the distribution of budget income from taxes among citizens and public law institutions. The main difference between taxes and civil obligations is that the former are mandatory under the general norms of the tax law as presented in tax acts[4].

Currently, in the Polish law there are fourteen types of taxes: eleven of them are direct taxes, three are indirect taxes. All those types of taxes constitute a whole in both legal and economic sense, and they are interconnected.

The basis for imposing tax obligations in Poland are set forth in Article 217 of the Constitution of the Republic of Poland of 2 April 1997. According to it, 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 by means of statute.

Reliefs and exemptions constitute a key element of tax structure; they are general in nature and set forth in the law which regulates a given tax. As tax privileges, they are stimuli to commit capital, regulate supply and demand, develop regions with worse economy, promote employment and ease the disproportion of income.

Tax exemption and tax relief are solutions in the area of tax law used by lawmakers in order to decrease taxes levied on the taxpayer. However, they are two different solutions. Tax exemption means that the lawmakers exempt certain categories of passive entities of tax or subjects of tax from the tax obligation. Tax relief may be used in the broad definition, as per the Act of 29 August 1997 – the Tax Law, or in the narrow one. In the former, tax relief is identical to the notion of tax preference and includes exemption, while in the latter – it is a solution in the area of tax law which decreases the taxation base, rate or

4 H. Dzwonkowski, Prawo podatkowe, Warszawa 2012.

amount of the tax calculated. Tax exemptions may concern only an entity (taxpayer) or subject of taxation (trade, income, property) and consist in excluding certain categories of entities in the subject area of a given tax or result in excluding certain categories of actual or legal statuses from the subject of a given tax. Tax reliefs may consist in the decrease of the taxation base, tax rate or tax amount; they do not concern any entity or subject of taxation directly but rather – other elements of tax structure[5].

3. The most important regulations on tax from certain financial institutions

On 1 February 2016, the Act of 15 January 2016 on Tax from Certain Financial Institutions (Journal of Laws Item 68) became effective. This Act imposes on certain financial institutions an obligation to pay monthly levy (the "bank tax") in the amount of 0.0366% of the value of such institution's assets, after taking into account certain exemptions, thresholds and deductions. According to the justification for the Act, the purpose of introducing this tax is to acquire an additional source of financing budget expenditures and the increase of the participation of the financial sector in financing budget expenditures.

According to the Act on Tax from Certain Financial Institutions, the bank tax is imposed on:

1) domestic banks;
2) branches of foreign banks;
3) branches of credit institutions;
4) cooperative savings and loan funds;
5) domestic insurance companies;
6) domestic reinsurance companies;
7) branches of foreign insurance and reinsurance companies;
8) main branches of foreign insurance and reinsurance companies;

5 http://www.finanse.mf.gov.pl/wynik/-/asset_publisher/JLw0/content/informacje-podstawowe-1/pop_up;jsessionid=E27D3226885CD507B4E3E9EFD575FC43?_101_INSTANCE_JLw0_viewMode=print

9) loan institutions.

The basis of taxation is the surplus of the sum of the value of assets at the end of each month above the amount:

1) PLN 4,000 million for banks and cooperative savings and loan funds;
2) PLN 2,000 million for insurance and reinsurance companies;
3) PLN 200 million for loan institutions.

The Act sets forth the decrease of the basis of taxation:

1) for domestic banks and branches – by the amount of:
   a) own funds within the meaning of Article 126 of the Act of 29 August 1997 – the Banking Law, and
   b) assets purchased by the taxpayer from the National Bank of Poland, which constitute a collateral for a refinance loan granted to the bank by the National Bank of Poland;
2) for cooperative savings and loan funds – by the value of own funds referred to in Article 24 of the Act on Cooperative Savings and Loan Funds;
3) for domestic banks and branches and cooperative savings and loan funds – by the amount of:
   a) the increase of own funds due to performance of a given supervisory decision, and
   b) assets in the form of treasury securities;
4) for domestic banks which are associated banks within the meaning of Article 2(2) of the Act on Operations of Cooperative Banks, Their Associations and Associated Banks – by the amount of funds held on all accounts of associated cooperative banks.

The bank tax is not tax deductible. Moreover, the introduction of the bank tax may not constitute a basis for changing the terms and conditions of providing financial and insurance services performed under the agreements concluded before the effective date of the Act.

4. Subject-based exemption of a state-owned bank from the tax from certain financial institutions

Pursuant to Article 10 of the Act of 15 January 2016 on Tax from Certain Financial Institutions, state-owned banks within the meaning of the Act of 29 August 1997 – the Banking Law, are exempted from the bank tax. Currently, in the Polish banking sector, Bank Gospodarstwa Krajowego is the only bank which conducts business as a state-owned bank. Pursuant to Article 4 of the Act of 14 March 2003 on Bank Gospodarstwa Krajowego, the main purpose of the Bank's business is to support the economic policies of the Council of Ministers, government social and economic programmes as well as local government and regional development programmes, which include in particular:

1) realized with the use of the European Union funds and funds from international financial institutions;
2) infrastructure projects;
3) related to the growth of the sector of small and medium enterprises,
   – which indicates operations as a state-owned development bank.

The above statutory definition of basic goals of the Bank's business, in particular supporting the economic policies of the Council of Ministers, may not contradict the applicable law, including the solutions on ensuring fair competition or counteracting monopoly practices.

Although the Bank may conduct business other than that related to the above statutory issues, it should be noted that the main purposes of the Bank's businesses were clearly defined in the Act of 14 March 2003 on Bank Gospodarstwa Krajowego. The lawmakers decided that those purposes are "basic" in nature, which *a contrario* means that other purposes realized by the Bank are not. This is confirmed in the Bank's mission defined in the Act: "The mission of Bank Gospodarstwa Krajowego is a cost-wise effective and efficient realization of activities commissioned by the state, supplemented by the development of attractive services of own business for certain market segments in which the bank may use

its natural advantages." The mutual relation between the Bank's public mission and market business is mentioned also in the justification to the draft act on Bank Gospodarstwa Krajowego, according to which "BGK brings together conducting full commercial domestic and foreign business with the mission of financial support for social and economic enterprise carried out by the state." However, the commercial business serves to increase the efficiency of performing commissioned tasks and expanding and enhancing the Banks' infrastructure and resources, used to perform tasks commissioned by public administration authorities."[6].

During the works on the Accession Treaty, it was accepted that the Bank will be put on the list of loan institutions not covered by the EU banking regulations[7]. Therefore, considering the nature of its business, currently the Bank is excluded from the European Union law on banks, i.e. the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012. Moreover, there is no obligation to cover the Bank with the solutions under the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

In the context of the Bank's supporting the economic policies of the Council of Ministers, we can identify strategic areas of the Bank's actions which aim to promote economic growth, such as:

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6 Justification to the draft act on Bank Gospodarstwa Krajowego, 2002.

7 T. Olszówka, S. Skuza, Ustawa o Banku Gospodarstwa Krajowego, "Prawo Bankowe" 2003, No 9.

1) The *Polish Investments* programme;

2) The *de Minimis Guarantees* programme.

Under the *Polish Investments*, the biggest investments in Poland that are strategic for the entire country and its regions are funded. The purpose of the *Polish Investments* is to provide funding for long-term infrastructure projects in the territory of Poland, and subsequently to increase the growth of the Gross Domestic Product and creating new jobs.

The reason to apply towards the Bank a subject-based exemption from the bank assets is the Bank's role in managing funds of the Minister of Finance, too. The funds deposited by the Minister of Finance in the Bank due to high volatility (the level of deposits of the Minister of Finance in the Bank is between PLN 10-15 billion) and due to the need to adjust the Bank's investment policy to the budget policy conducted by the Minister of Finance are invested in liquid and safe assets. Such assets do not give high yields from investments, hence the value of transactions has a limited effect on the Bank's performance.

In the bank's regulatory environment, currently there are certain subject-based exemptions from applying certain solutions, e.g. in the Act of 14 December 1994 on the Bank Guarantee Fund, the Act of 5 August 2015 on the Macro-Prudential Supervision, the Act of 15 February 1992 on Corporate Income Tax (exemption from the withholding tax) and the new Act on the Bank Guarantee Fund, System of Deposit Guarantees and Forced Reorganization. The above exemptions were subjected to analyses as to their compliance with the European Union's law and raised no objections.

In relation to the Bank, the Minister of Finance may follow the fiscal purpose and financial engineering as to the budget policy with other methods, including:

1) transferring funds to the Bank in order to maintain own funds at the level which ensures the performance of the Bank's tasks along with the proper level of liquidity in the form of cash or treasury securities, which is identical to guarantees/reguarantees of the State Treasury to the Bank's obligations;

2) decreasing the statute fund of the Bank by paying funds to the state budget, free of charge transferring of state securities owned by the Bank to the State Treasury as well as free of charge transferring to the State Treasury or any other state-owned legal entity of shares transferred previously to the Bank in order to increase its statute fund;
3) paying the Bank's net profit to the state budget (after the annual settlement or in advance).

Considering the legal form of the Bank's business (a state-owned bank), the only statutory beneficiary of the surplus of own funds or profit can in practice only be the state budget.

Moreover, it should be noted that the exemption from the bank tax is used by other European public institutions responsible for financing development. One of the examples is German Kredit für Wiederaufbau, exempted not only from the bank tax, but using also many other tax exemptions not unlike the German central bank; other examples include French Caisse des Depots et Consignations, Irish Strategic Banking Corporation of Ireland or Swedish Almi Företagspartner AB[8].

During the works on the draft act on Tax from Certain Financial Institutions, the Speaker of the Sejm (Polish Parliament), by letter of 11 December 2015, ref. GMS-WP-17-53/15, requested an opinion by the President of the Competition and Consumer Protection Office. In return, the President of the Competition and Consumer Protection Office on 21 December 2015 sent to the Speaker of the Polish Parliament the opinion ref. MK-020–19/5/15, which indicates that the draft act should be submitted for notification to the European Commission under Article 108(3) of the Treaty on Functioning of the European Union, as Article 10 of the draft act would, in the opinion of the President of the Competition and Consumer Protection Office, constitute public assistance within the meaning of Article 107(1) of the Treaty on Functioning of the European Union.

8 The letter of Bank Gospodarstwa Krajowego of 15 December 2015, ref. DP.064.6.SS.2015.

In order to limit the potential objection referred to above, in the Author's opinion, a change of Article 10 of the Act on Tax from Certain Financial Institutions should be considered, by giving the following wording:

Article 10. State-owned banks within the meaning of the Act of 29 August 1997 – the Banking Law, whose main purpose is to carry out tasks related to the support of the economic policies of the Council of Ministers, performance of the government social and economic programmes as well as local government and regional development programmes shall be exempted from the tax.

5. The proposal of reliefs in the basis of taxation with tax from certain financial institutions

During the parliamentary works on the draft act, an amendment was accepted in order to allow (Article 5(9) of the Act of 15 January 2016 on Tax from Certain Financial Institutions) to decrease the basis of taxation by the value of assets in the form of treasury securities. It seems reasonable to include in such exemption also any debt securities issued not only by the State, but also by entities, towards obligations or business of which the liabilities of the State Treasury meet the requirements of credit protection in the form of guarantees or reguarantees. Under the current law, the only such entity is the Bank, whose liabilities have the risk weight used to calculated capital adequacy at the level of the liabilities of the State Treasury. Accepting such a solution would result in taking into account, in the deduction limits, the Bank's bonds related to funding of its main statutory purpose, i.e. supporting economic policies of the Council of Ministers, or bonds issued by the Bank for the National Road Fund.

Moreover, it should be noted that the Minister of Finance, considering the need to cover the risk of banking activity, is obliged, under Article 3(3) of the Act of 14 March 2003 on Bank Gospodarstwa Krajowego, to transfer funds to the Bank in order to maintain own funds at the level which ensures the performance of the Bank's tasks along with the proper level of liquidity, which is equal to guarantees/ reguarantees of the State Treasury for the Bank's liabilities within the

meaning of Articles 213-215 of the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012. Considering the above, it should be noted that the liabilities of the Minister of Finance are considered equal to the guarantees or reguarantees of the State Treasury given to any exposures of the Bank (including those related to bonds issued by the Bank). Therefore, any exposures towards the Bank are given the risk weight under the Article 14(4) of the Regulation of 26 June 2013 No 575/2013. According to the above norm of this Regulation, exposures towards central governments and central banks of Member-States, denominated and financed in the domestic currency of such central government and central bank have the risk weight of 0%. Therefore, considering the above domestic and EU regulations, any exposures of the Bank denominated and financed in PLN should have the same risk weight as above. The risk weight of 0%, due to the State Treasury's credit protection for the Bank's exposures, results also, under Article 400 of the Regulation of 26 June 2013 No 575/2013, in no need to apply concentration limits for the exposures of Bank Gospodarstwa Krajowego by other banks. Moreover, the Polish law sets forth exemption for two groups of issuers of securities, i.e. the State Treasury and entities whose business is guaranteed or reguaranteed by the State Treasury within the meaning of Articles 213-215 of the Regulation of 26 June 2013 No 575/2013 (i.e. the Bank) – in relation to the lack of obligations to maintain concentration limits of insurance companies for debt securities of such entities (Article 276(6) of the Act of 11 September 2015 on Insurance and Reinsurance Business) and open pension funds (Article 142(1) of the Act of 28 August 1997 on Organizing and Functioning of Pension Funds). Notwithstanding the above regulations, it should be also stressed that the Bank is a frequent issuer[9].

9 The letter of the President of Bank Gospodarstwa Krajowego of 28 December 2015, ref. DP.064.7.SS.2015.

Table 1. Estimate loss in budget income in the variant of the decrease of the basis of taxation by the value of bonds by Bank Gospodarstwa Krajowego

Value of the Bank's bonds issued	Estimate of the Bank's bonds in assets of other banks	Estimate loss in budget income
Own bonds:	in PLN	
5,762,000,000	2,592,900,000	11,408,760
Bonds for the National Road Fund:	in PLN	
19,384,500,000	3,751,750,000	16,507,700
Total	6,344,650,000	27,916,460

Source: The letter of the President of Bank Gospodarstwa Krajowego of 21 January 2016, ref. P.061.1.2016. SS, figures for 2015.

Below is the proposal of amendment to Article 5(9) of the Act of 15 January 2016 on Tax from Certain Financial Institutions:

Article 5. 9. In the case of taxpayers referred to in Article 4(1)-(4), the basis of taxation shall be decreased by the value of assets in the form of:

1) *treasury securities within the meaning of Article 95(1) of the Act of 27 August 2009 on Public Finance (Journal of Laws of 2013, Item 885, as amended);*
2) *securities issued by the entities towards whose liabilities or business, the liabilities of the State Treasury granted under the separate law meet the requirements of credit protection within the meaning of Articles 213-215 of the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (EU Journal of Laws L 176 of 27 June 2013, page 1, as amended).*

The Author believes it should be considered to expand Article 5d(3) of the Act of 14 March 2003 on Bank Gospodarstwa Krajowego with the regulation that the Bank's net profit may be allocated to purposes other than those set forth by the Supervisory Board – with the Minister of Finance's consent.

Below is the proposal of regulation to the Act of 14 March 2003 on Bank Gospodarstwa Krajowego:

In the Act of 14 March 2003 on Bank Gospodarstwa Krajowego (Journal of Laws of 2014, Item 510, as amended), Article 5d(3) receives the wording:

3) other purposes set forth by the Supervisory Board, with the consent of the minister competent for financial institutions.

6. Conclusions

Bank Gospodarstwa Krajowego is an exceptional bank in the Polish banking system. The main purpose of the Bank's business and considering the Bank in practice as a public law entity within the meaning of other acts (e.g. the Salary Cap Act, the Act – the Public Procurement Law, the Anti-Corruption Act) should be compensated for in a special manner in other law-making solutions. Even despite certain doubts arising in the course of analyses of the EU law, the author believes that certain tax exemptions remain justified.

Further, it is justified, considering the purpose of the Bank's business and financing needs, as well as the zero risk weight of the Bank's liabilities, to decrease the basis of taxation of other banks by the value of the Bank's securities held by them. Such a solution would result in minimum losses in budget income due to the tax from certain financial institutions (ca. PLN 27.9 million), however, considering the improvement of the Bank's financial performance and its distribution options as well as the solutions set forth in the Act of 14 March 2003 on Bank Gospodarstwa Krajowego and other mechanisms of budget engineering which combines the state budget with the Bank's funds, such a loss should be easily compensated for.

Abstract

This paper deals with newly imposed in Poland tax from certain financial institutions. It presents the most important regulations on this tax. The article also analyses reliefs and exemptions in the Polish law. Moreover, the paper depicts subject-based exemption of a state-owned bank from this tax and a proposal of reliefs in the basis of taxation in this tax.

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SELECTED ASPECTS OF LOCAL ENQUIRY IN THE SLOVAK REPUBLIC[1]

Ivana Straková[2], **František Bonk**[3]

1. Introduction

Revealing tax evasions is becoming one of the most important tasks of procedural tax law at all. The task of tax law authorities in the Slovak Republic (hereinafter "SR") is not represented only by specific determination, levy and collection of tax, but it is of high importance to monitor potentially illegal actions of tax subjects which may consequently lead to tax evasions. These authorities are, therefore, trying to anticipate and prevent tax evasions by effective use of legal institutes regulated by law within the scope of their competences.

Among activities by which tax administration authorities (mainly tax administrators) anticipate and prevent tax evasions, the following activities have a place: investigation, local enquiry and the institute of tax audit, which are mutually connected and belong to the most effective instruments in tax frauds combat, as well as other activities and institutes regulated by Tax Procedure Code or special tax regulations.

Even despite the fact that the most important institute is represented by tax audit[4], the institute of investigation and local enquiry should attract more attention.

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4 More about tax audit as an effective institute in tax evasion and tax frauds combat: K. Červená, M. Karabinoš, Daňová kontrola ako nástroj odhaľovania daňových únikov, in: Zborník vedeckých štúdií z vedeckej konferencie "Odhaľovanie daňových únikov a daňovej trestnej činnosti", Bratislava 2012, p. 148-155.

The institute of local enquiry will, therefore, be described in this article in relation to its applicability and application problems in the tax practice. The aim of the article is to verify if the legal regulation of this institute is necessary in the legal order of the Slovak Republic.

2. Local enquiry de lege lata

Local enquiry presents in itself a procedural institute which is regulated by the second part of Tax Procedure Code titled Tax administrator's activities, particularly within § 37 and following.

The second part of Tax Procedure Code includes only one section titled Tax proceedings preparation, which means that the second part regulates activities which precede tax proceeding. We can, therefore, claim that these activities attempt to help to fulfill the purpose of tax proceeding and create conditions for uninterrupted and continuous course of tax proceeding[5]. Tax Procedure Code specifies these activities as following: investigation, local enquiry, ensuring and forfeiture of property, tax audit proceeding, procedure for tax determination by using tools and other activities of a tax administrator.

Local enquiry represents an important control instrument of a tax administrator and one of the most important evidence which enables a tax administrator, in result of his own observing and comparing his findings on the place with his knowledge, to create a reasonable conclusion for next procedural operations[6]. This institute is defined as an activity of a tax administrator by which a tax administrator seeks evidence, examines and finds facts that are needed for the purposes of tax administration.

It may be observed that local enquiry represents a very operative instrument that enables a tax administrator to reach inevitable information for tax administration. This institute, as it is regulated by Tax Procedure Code, basically defines acting of a tax administrator "out of his own

5 Compare: V. Babčák, Daňové právo na Slovensku, Bratislava 2015, p. 498; as well as S. Kubincová, Daňový poriadok (komentár), Bratislava 2015, p. 205.

6 V. Babčák, Slovenské daňové právo, Bratislava 2012, p. 442-443.

place". It could, therefore, be characterized as a visual inspection directly on the place or as an inspection performed at the place of tax subjects or the third person conducting business. It basically represents investigation or verification of partial issues by tax administration. The local enquiry is, however, not determined to any complex findings or verification of tax duties of tax subjects. This is namely devoted to tax audit[7]. We are, therefore, able to conclude that the aim of the local enquiry is to achieve current information on tax subject matters (resp. third persons) which should be usable next in the tax proceeding by the correct determination of a tax duty.

Every tax administrator is entitled to perform local enquiry within his territorial competence. Tax Procedure Code, however, entitles a tax administrator to perform local enquiry even outside the scope of his territorial competence, even without any authorization. There are more principles applicable to tax administration[8], including the principle of economy and effectiveness of proceeding which should be followed strictly by a tax administrator. It is, therefore, necessary to carefully consider performance of local enquiry outside the territorial scope of competence of a tax administrator, if any other institutes, such as the institute of requesting of the other, territorially competent tax administrator[9], would not be more suitable.

A tax administrator conducts local enquiry for the purposes of tax administration as well as to provide information to other public authorities under the special legal acts, e.g. to authorities responsible for criminal proceeding. This especially informative function of tax administrators ensures a preventive function as well, mostly by revealing illegal tax evasions[10].

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7 Compare with: J. Kobík, Daňový řád s komentářem, Olomouc 2010, p. 301.

8 See more on the principles of tax administration: V. Babčák, K problematike princípov a zásad daňového konania, Acta Oeconomica Cassoviensia No 5. Košice: Podnikovohospodárska fakulta v Košiciach, 2001, p. 13-25; tiež M. Bujňáková, Princípy a zásady v daňovom práve. In: Aktuálne otázky práva: zborník vydaný pri príležitosti životného jubilea prof. Jozefa Suchožu. Košice 2006, p. 159-168; tiež A. Románová, Vybrané zásady daňového konania tak, ako ich nepoznali klasické rozprávky, Acta Iuridica Olomucensia 2012, vol. 7, no. 1, p. 25-32.

9 Request (among tax administrators) is regulated by § 21 of Tax Procedure Code.

10 V. Babčák, Slovenské daňové právo, Bratislava 2012, p. 443.

By legal regulation of local enquiry in Tax Procedure Code a tax administrator is provided with large entitlements[11], whose nature is to ensure a proper performance of tax administration as well as limitation of tax evasions as much as possible. Tax Procedure Code, within legal regulation of the local enquiry, apart from the regulation of the rights and duties of a tax administrator and tax subjects, regulates procedural operations of a tax administrator by local enquiry. It has to be stressed that despite the wording of Tax Procedure Code in the provision ("Tax Administrator's Local Enquiry Procedure"), a comprehensive procedure of a tax administrator by performing local enquiry is not obvious from the abovementioned provision. Within this provision, Tax Procedure Code only regulates the duty of a tax administrator to prove identification by local enquiry and to draw up minutes or an official record.

The duty of a tax administrator to prove identity by performance of the local enquiry is of high importance since without fulfilling this condition the whole procedure of tax administrator would be considered as unlawful. A tax subject could then claim this fact and request not to take into account the performed local enquiry[12].

As regards the duty of a tax administrator to draw up minutes or an official record from the local enquiry, the principle of a written form applicable by tax administration could be observed. This should not be understood as arbitrariness of a tax administrator as a tax administrator is not free to decide either to draw up minutes or an official record. Tax Procedure Code provides that an employee of a tax administrator draws up an official record only in the situation that a tax subject (his employee or the other person, or the employee of the other person) is not present. The minutes are drawn up in other cases.

11 On the rights and duties of tax administrators and tax subjects within local enquiry see further § 38 a § 39 Tax Procedure Code.

12 Compare with: S. Kubincová, Daňový poriadok (komentár), Bratislava 2015, p. 212.

3. Performance of local enquiry in the Slovak Republic and application problems connected therewith

Within this part, we would like firstly to provide the number of local enquiries that were performed in the Slovak Republic within the period of the last ten years. We then present sanctions ensuing from the local enquiries and the trend of performing local enquiries with such a focus in our country. The overview of the number of local enquiries is illustrated in the scheme no. 1.

Scheme 1: The overview of the number of local enquiries within 2005-2014

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Number of local enquiries (LE)	34969	24997	35974	35365	38959	44262	38272	33031	30711	32280
including LE on Electronic Cash Register (ECR)	18938	8154	16282	16089	16117	20805	17601	15137	6383	7852
including LE on voluntary registration for VAT	x	x	x	x	x	3032	3742	4973	5116	4508
Total penalties of local enquiries (in thousands of Euros)	1712	947	822	714	515	457	674	438	273	386
Including sanctions on ECR (in thousands of Euros)	1524	859	738	663	478	432	644	429	240	289

Note: x- this value has not been separately showed

Source: own processing according to data published by the Ministry of Finance SR.

The focus of local enquiry in itself is determined by the requested object of verification and Tax Procedure Code enables the use of this institute within various fields of tax administration such as, e.g., verification of business partners, commercial activities with their accounting as well as verification of particular taxable trades or places where taxable trades should have been realized, etc.[13]

Since Tax Procedure Code does not regulate particularly the procedure of a tax administrator in the performance of local enquiry, the following application problems may arise: There is a question in some cases of performance of local enquiry if local enquiry could be performed arbitrarily, at any time and if the "personal sphere" of a tax subject

13 L. Fecková, D. Hrušková, Inštitúty daňového práva procesného v SR na odhaľovanie daňových únikov- kvantitatívna a kvalitatívna analýza, in: Zborník vedeckých štúdií z vedeckej konferencie „Odhaľovanie daňových únikov a daňovej trestnej činnosti", Bratislava 2012, p. 105.

(individual) is not interfered inappropriately, Is the tax administrator obliged to inform a tax subject about the reason for performing local enquiry? Partial answers to these issues may be found in the case law.

Constitutional Court of the Czech Republic (hereinafter "CR") stipulated in its ruling[14] on the question if a tax administrator is entitled to perform particular activities and operations arbitrarily within tax administration that: *Every interference into the personal sphere of an individual, regardless of the procedure of the state towards an individual, has to be justified by particular facts, resp. by the reason for such a restriction, and has to be performed not only because of the fact that the public authority is entitled to realize such a competence. This general entitlement is only a precondition of the realization of such limitation competence, not only a criterion of its intensity*. The abovementioned refers to tax administration as well in relation to local enquiry because of the fact that local enquiry cannot be performed arbitrarily and it rather needs the existence of the reasons for its performance formulated by a tax administrator. It would be realization of arbitrariness to a greater extent if a tax administrator could perform local enquiry at any time and without any reason on any tax subjects, resp. in cases when he arbitrarily decides relying "only on his own examination".

As regards the issue of notification of a tax subject about the beginning of local enquiry, or notification on the reasons and object for performing particular local enquiry, the Highest Court of the SR (hereinafter "HC SR") in its ruling[15] already stipulated that: *A tax administrator* ***is not obliged to notify a tax subject about the local enquiry in advance****, it could, however, be done so if former preparation of a tax subject or ensuring conditions for the realization of entitlements of an employee of a tax administrator is necessary under § 14 Art. 2,3 of the Act on Tax Administration. A tax administrator does not issue a notification on the beginning of local enquiry if such information could cause frustration and the purpose of local enquiry could negatively influence its continuance*. The abovementioned judgment stresses out that ***there is no such an obligation of a tax administrator to notify a tax subject about the object of local enquiry*** *regarding the provision of § 23 of the Act, under which a tax administrator is bounded by tax confidentiality*. The judgment of the court says, therefore, that such local enquiry does not

14 Ruling of Constitutional Court of the CR of 18.11.2008 under titl. I. ÚS 1835/07.
15 Judgment of HC SR of 15.04.2008 under titl. 5 Sžf 12/2007.

represent unlawful interference because of the legitimate reason of the tax administrator to refuse notification of the tax subject on a particular reason for its performance.

The Highest Administrative Court of the CR in its ruling[16] similarly presents that from the particular provision of the law which regulates local enquiry it **does not accrue** the obligation of the tax administrator to notify a tax subject about the performance of local enquiry. Such a procedure would not have sense since the purpose of the local enquiry is represented by immediate finding of facts relevant to determination of a tax duty. By suspension or subsequent performance of local enquiry after notification of a tax subject, the meaning of particular detection would be disclaimed. Moreover, non-repetition of the operation conducted by a tax administrator is essential from the provision under which a tax administrator is entitled to ensure property non-ensuring of which could lead to lack of evidence by tax administration.

County Court of Banská Bystrica in its ruling[17] dealt with the issue of the maximum period in which local enquiry may be conducted. A tax subject as a plaintiff claimed that the local enquiry does not follow a legitimate purpose if it is conducted in itself for tax periods for which tax could not be levied anymore. The court in relation to the abovementioned stressed: *The court does not agree with the opinion of the plaintiff that local enquiry does not follow the legitimate purpose if a tax administrator cannot levy tax for the period of conduction of local enquiry. Contrary, the court does agree with the opinion of the defendant according to which the reason and the object of local enquiry for taxation periods of years 2005, 2006, 2007 and 2008, and the results of finding may be directly connected with the calculation of the tax base for years 2009 and 2010, therefore, conducting these local enquiries is fully legitimate.* That means, contrary to the tax audit[18], that when it comes to the local enquiry, even the taxation periods for which the tax cannot be levied could be verified if the results of findings of these taxation periods could be directly connected with

16 Judgment of the Highest Administrative Court of the CR of 25.01.2007 under titl. 7 Afs 205/2005.

17 Judgment of County Court Banská Bystrica of 15.10.2014 under titl. 23S/35/2014.

18 See more: M. Štrkolec, Prerušenie daňovej kontroly – prípustnosť, dôsledky a možnosti procesnej obrany, Justičná revue 2014, vol. 66, no. 11, p. 1354-1355; as well as M. Vernarský, Limity daňovej kontroly, Justičná revue 2012, vol. 64, no. 1, p. 48-60.

the calculation of tax base for the periods for which the tax could be levied.

4. Minutes of local enquiry as evidence of tax administration

Local enquiry, as it was already stressed above, represents one of the most important evidence of tax administration. A tax administrator is entitled to conduct local enquiry as to its scope and content without a special permission, on his own initiative (or the initiative of a third person), but the particular performance of local enquiry is left fully to his own discretion [19].

The legal regulation of local enquiry indicates that local enquiry is an institute whose aim is to seek and to find new evidence. By the local enquiry, a tax administrator generally verifies statements of a tax subject concerning his suppliers/purchasers, or conducts other purpose-aimed operations necessary for finding evidence inevitable for reaching the purpose of tax administration[20]. All the statements and facts that a tax administrator learns about are subsequently noticed by minutes or official record.

The minutes or the official record which is a result of the local enquiry presents then an important evidence obtained based on the tax administrator's own activity. A comparison of the information obtained by a tax administrator during the local enquiry with the information presented by a tax subject enables the tax administrator to evaluate the relevance of this information from the point of material truth[21].

The question which arises now is: What is the nature of the written minutes (or the official record) as a result of the local enquiry from the view of its legal force? What is the importance of it and the position amongst evidence? It may be observed that the legal order does not

19 L. Fecková, D. Hrušková, Inštitúty daňového práva procesného v SR na odhaľovanie daňových únikov-kvantitatívna a kvalitatívna analýza, in: Zborník vedeckých štúdií z vedeckej konferencie „Odhaľovanie daňových únikov a daňovej trestnej činnosti", Bratislava 2012, p. 104.

20 Compare with: O. Lichnovský, R. Ondrýsek, a kol., Daňový řád, komentář, Praha 2010, p. 138.

21 J. Kobík, Daňový řád s komentářem, Olomouc 2010, p. 304.

prescribe the nature and the importance of particular evidence at all. Bearing in mind the principles of tax administration, a tax administrator evaluates evidence discretionary, every each evidence particularly and all evidence within its mutual context and takes into account everything what came up within the tax administration.

The Highest Court of the Slovak Republic in its ruling[22] presented opinions on minutes from local enquiry as evidence: *Minutes from local enquiry are together with witness testimony* ***one of the possible forms of evidence admissible in the tax proceeding***. *Tax law regulations do expressly prefer the performance of witness testimonies over only the local enquiry. The defendant (tax office) does not, however, make a mistake if local enquiry on finding, resp. verification of information on potential residence of the witness was preferred over a witness testimony with the participation of a plaintiff. Such a procedure is compliant with the conditions settled by tax law norms.* There were mainly cases in the tax practice that employees of the tax administrator within the local enquiry interrogated persons participating in the local enquiry, e.g. employees of the tax subject – a business company in which the local enquiry was held or company representatives. The questions concerned facts of other tax subjects such as buying and selling goods or delivering the work, whereas by such an examination[23], the tax subjects concerned were not present. If, therefore, a tax subject was not present, his rights were not preserved[24] because of the fact that he could not give his opinion about the examination and could not subsequently give his opinion on performed evidence which were latter used in the next proceeding[25].

5. Local enquiry vs. investigation activity and tax audit

Local enquiry, investigation activity and tax audit represent three procedural tax law institutes which are mutually connected. Therefore,

22 For example: Judgment of the Highest Court of the SR of 19.01.2010 under titl. 5 Sžf 27/2009; as well as Judgment of the Highest Court of the SR of 04.05.2010 under titl. 5 Sžf 61/2009.

23 As it is represented by witness examination.

24 Particularly the right which accrues from Art. 48 p. 2 of the Constitution of the Slovak Republic no. 460/1992 Coll., as follows: "Everyone has the right to have his or her case tried publicly without undue delay, to be present at the proceedings and to comment on any evidence given therein."

25 See more, for example: Judgment of the Highest Court of the SR of 20.06.2012 under titl. 6 Sžf 28/2011, 6 Sžf 32/2012, 6 Sžf 33/2012, 6 Sžf 34/2012.

they are regulated within the same, second part of Tax Procedure Code. We may come to a conclusion that these three institutes have a common purpose and focus and are held basically out of the tax administrator's (or other relevant authority) office[26].

As concerns **the relation of the local enquiry and the investigation activity,** we may come to a conclusion that even when they are regulated by separate provisions of Tax Procedure Code, it is, however, not excluded that investigation activity could be performed even within the other (even ongoing) procedural institutes. The relation with ongoing local enquiry means that the investigation activity may be conducted even within local enquiry and with respect to their similar features, it is not possible to make some kind of a "dividing line" between the operations which fall under both of these legal institutes (local enquiry and investigation activity).

There is even an opinion presented within tax law books[27] under which the local enquiry (considering its purpose) may be regarded as a part of investigation activity of a tax administrator (with its meaning in the broader sense). Supporting this claim, we may point to the Czech Tax Procedure Code which specifically stipulates[28] that local enquiry in itself is a part of investigation activity.

Within the regulation of local enquiry, **a very narrow relation to the tax audit** may be sought. The institute of local enquiry may actually remind the institute of tax audit from the material point of view. This, however, does not mean that local enquiry represents some kind of tax audit in itself. Local enquiry can be particularly realized independently of tax audit. If a tax administrator finds any doubts in the performance of local enquiry, he is automatically entitled to start tax audit. Thus local enquiry may become an impulse for a tax administrator to conduct tax audit. The similar opinion was brought by the ruling of the Highest Court of the SR[29]: ***Local enquiry shall not be considered an easier form of tax audit***

26 See more on the topic: V. Babčák, Daňové právo na Slovensku, Bratislava 2015, p. 498-500.
27 See for example: V. Babčák, Daňové právo na Slovensku, Bratislava 2015, p. 500; as well as S. Kubincová, Daňový poriadok (komentár), Bratislava 2015, p. 210.
28 Act no. 280/2009 Coll., Tax Procedure Code as amended, namely in § 78 sec. 3 point e).
29 Judgment of the Highest Court of the SR of 15.04 2008 under titl. 5 Sžf 12/2007.

in any kind thereof. *It is rather one of those operations by which information is collected and upon which subsequent institutes of tax administration may be established.*

The relation between tax audit and local enquiry was presented by the Highest Administrative Court of the CR. In its ruling[30], the court stressed that the institute of local enquiry serves acquisition of preliminary information on tax subjects which may be subsequently used in the next proceeding for the proper determination of tax in the appropriate amount. Contrary to this, the institute of tax audit is devoted to finding and then verifying the tax base by a tax administrator. The Highest Administrative Court of the CR presented an opinion according to which the tax administrator is not entitled to freely (arbitrarily) choose between legal actions (operations) and that he needs to prefer actual content because of the protection of the rights of a tax subject against whom the tax proceeding is conducted. Concluding its ruling, it is not sufficient to levy a tax duty only based on the results acquired by tax proceeding, without initializing and performing tax audit by preserving all rights which are guaranteed to a tax subject by virtue of law. By such a procedure, a tax subject's right guaranteed by law could be reduced (especially the right of qualified defense) which may be realized under the results of findings which are presented taking into the account the content of the protocol of tax audit.

6. Conclusion

All abovementioned facts imply that local enquiry represents a very important procedural institute which has its place in the legal order of the SR and should be paid a satisfactory attention to (together with the other institutes). Local enquiry may be understood as the institute of a tax administrator of rather general nature which serves acquiring of prior information necessary for reaching the purpose of tax administration without interferences into the rights of tax subjects up to the inevitable limit as it happens in tax audit. Local enquiry should be one of the primary sources of information on tax subjects and should, therefore,

30 Judgment of the Highest Administrative Court of the CR of 27.07.2005 under titl. 1 Afs 70/2004.

in itself precede tax audit, which is known for deeper verification of all relevant facts.

Currently, a trend of consistent reduction of the number of performed local enquiries may be sought (as it is observed in the scheme 1 of our article). This is connected with reducing of imposed fines within local enquiry as well. The reasons for this trend may be caused, in our view, by the fact of continuous electronization and imposing new effective institutes which lead to revealing breach of tax regulations in advance, such as is a VAT Control Statement, etc. We are of the opinion that the institute of local enquiry as presented will always have place in the legal regulation because of the inevitable need of immediate verification and comparison of particular facts and knowledge of a tax administrator directly "outside his office".

Abstract

Tax law as a separate branch of law is regulated by many legal acts in conditions of the Slovak Republic. The basic legal act regulating procedural tax law – a legal area of tax administration – is represented by the Act no. 563/2009 Coll. on Tax Administration (Tax Procedure Code) and amendments and supplements to certain laws in the wording of later regulations (hereinafter "Tax Procedure Code"). This act regulates more procedural institutes, the aim of which is to prevent tax evasions. One of these institutes is represented by the institute of local enquiry. Even if local enquiry in itself is not the most important institute in tax evasions prevention, it definitely has an important place in legal order of the Slovak Republic and should, therefore, be paid more attention to. The aim of this article is, therefore, focused on the presentation of its legal regulation and applicability in tax practice with application problems connected therewith.

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FIGHTING TAX EVASION AND ITS REFLECTION IN THE PROCEDURAL TAX LAW[1]

Miroslav Štrkolec[2]

1. Introduction

Tax evasion is not only the phenomenon but also the problem of our times. It occurs in relation to all taxes, it is committed by both natural persons and legal entities, it may be based on negligence as well as intention, and sometimes it is even committed by the employees of tax administrators whose task is, naturally, truly opposite.

The most general way to define tax evasion is to consider it a failure to pay taxes that is contrary to law[3]. Understandably, it is not a legal definition since such a definition is simply lacking in our legal rules[4]. In general, tax evasion must be distinguished from tax avoidance. Whereas tax avoidance consists in, for example, making use of loopholes in the tax system, or decreasing of tax liability that is directly allowed by the law, tax evasion means such acts or omissions that can establish open or latent violation of tax rules[5].

Basically, non-payment of taxes contrary to the law amounts to tax evasion. Tax evasion may have different forms. The simplest are based on a failure to use electronic cash register (cash payments without their accounting), failure to report some income within a taxpayer´s taxable

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3 Z. Ryllová, Mezinárodní dvojí zdanění, 2. aktualizované vydání, Olomouc 2007, p. 13.

4 M. Karfíková, Z. Karfík, Předcházení daňovým únikům v ČR, in: Daňové právo vs. Daňové podvody a daňové úniky, Košice 2015, p. 255.

5 For more details see V. Babčák, Slovenské daňové právo, Bratislava 2012, p. 103 a nasl., J. Široký, Daňové teorie s praktickou aplikací, Praha 2003, p. 226, A. Harumová, K. Kubátová, Dane podnikateľských subjektov, Poradca podnikateľa, Bratislava 2006, p. 90.

income, accounting of fictitious taxable transactions, increasing the actually incurred expenditure or including personal spending within the tax-deducible expenditure. Complicated cases of tax evasion are based, for instance, on the use of sophisticated forms of carousel transactions or intentionally incorrect classification of objects of excise taxes (e.g. mineral oils). As a rule, such acts or omissions have a nature of tax fraud. Tax fraud in the context of criminal law amounts to such conduct whereby a person has enriched himself or another by misleading another person, making use of another´s mistake or not disclosing crucial facts, as a result of which the public budget will not be filled with the expected income[6].

2. Prevention, sanctioning or motivation – or all at once?

Procedural tax law may be considered as a codified system of tax law that is mainly represented by the Act No. 563/2009 Z.z. /Coll./ on tax administration (Code of Tax Procedure), and to amend the relevant Acts, effective as from January 1, 2012 (hereinafter referred to as the Code of Tax Procedure). The Code of Tax Procedure regulates activities of tax administrators and other bodies as well as procedural action occurring in the course of the whole process of tax administration.

It may be generally stated that there are overlaps in the context of combating tax evasion across numerous provisions of the Code of Tax Procedure. The nature of these procedural rules is rather versatile, and in the light of the goals pursued by them, they will be distinguished for the purposes of this paper.

- There are procedural rules that are primarily aimed at the prevention of tax evasion, i.e. they are of a **preventive nature.** These may be exemplified as follows:

(i) the tax administrator´s authority to disregard legal acts or other facts that have no economic justification and the result of which is purpose-bound evasion of

6 R. Boháč, Teoretické a praktické otázky českého daňového práva z hlediska daňových úniků a podvodů, in: Daňové právo vs. Daňové podvody a daňové úniky, Košice 2015, p. 38.

tax liability or acquisition of tax advantage to which a taxpayer would not be entitled otherwise, or which result in intentional reduction of tax liability (Section 3, subsection 6 of the Code of Tax Procedure); the preventive nature of this measure will be manifested especially during the tax control aimed to determine the eligibility of the right to excessive VAT deduction claimed;

(ii) the authority to perform a tax control to detect the eligibility of the right to claim an excessive tax deduction refund (Section 46 subsection 2 of the Code of Tax Procedure) where the excessive deduction will be paid out only after the completion of the tax control, and only in the amount determined by the tax administrator[7], or

(iii) the authority to impose, via a preliminary measure, an obligation upon a taxpayer to perform some act, to refrain from doing some act, or to sustain some act, especially to pay some amount into the account of tax administrator, or to refrain from disposing of some items or rights specified in the decision during the period when the tax liability is still not mature (Section 50 subsection 1 of the Code of Tax Procedure)[8].

- Procedural rules that are aimed at sanctioning tax evasion, i.e. they are **punitive in nature.** For example:

(i) sanction of seizure and forfeiture of a thing, e.g. in respect of the sale of goods without electronic cash register or failure to prove the payment of tax or duty during the import of goods (Section 40 and the following sections of the Code of Tax Procedure);

7 6 For more details see, e.g., M. Štrkolec, Prerušenie daňovej kontroly – prípustnosť, dôsledky a možnosti procesnej obrany, in: Justičná revue: časopis pre právnu prax, Roč. 66, č. 11 (2014), p. 1303 and next.

8 7 For more details see, e.g., M. Štrkolec, Predbežné opatrenia v správe daní, Justičná revue: časopis pre právnu prax. Roč. 64, č. 10 (2012), p. 1165.

(ii) imposition of fines for administrative offences – e.g. reporting a lower tax than the one supposed to be reported in a tax return, enforcing a higher VAT deduction, etc. (Sections 154 and 155 of the Code of Civil Procedure).

- Finally, it may be noted that lately there have been implemented motivation provisions in the procedural rules of tax law intended to motivate taxpayers to contribute to removal of negative consequences of tax evasion. Among the legal provisions of a **motivation nature** there may be ranked, for example, amended provisions on the submission of supplementary tax returns after the commencement of tax control (Section 16 subsection 9 in conjunction with Section 155 of the Code of Tax Procedure, in the wording effective as from January 1, 2016).

The limited scope of this paper does not allow to deal with all of the above mentioned procedural provisions of the Code of Tax Procedure that have a certain potential in tax evasion fighting. Below we will be, therefore, concerned with only two of the above provisions, namely the anti-abuse rule and the amended provisions on the submission of supplementary tax returns after the commencement of a tax control.

2.1. Anti-abuse rule as the basic principle of tax administration

The anti-abuse rule was included into the Code of Tax Procedure through the amendment implemented by the Act No. 435/2013 Z.z. /Coll./, within the meaning of which: *Tax administration shall not take into consideration any legal act or any fact relevant for identification, imposition or collection of tax for which there is no economic substantiation and which results in an intentional evasion of tax liability or obtaining of such tax advantage to which a taxpayer would otherwise not be entitled, or which results in an intentional reduction of tax liability*.

The valid tax-law providing for the anti-abuse rule has several defining features. First of all, its application requires an actual existence of a legal act (multi-lateral, unilateral), or other facts that have no economic substantiation. This may be exemplified by a sale of already existing, but non-tradable, goods (bark beetles in tonnes as feedstuff for fish, or air in the bottle), sale of goods for unrealistic price (web

page having a value of EUR 5,000.00 sold for EUR 5,000,000.00) and the like. A common feature of all of these acts is the absence of their economic substantiation, i.e. economic significance which is simply dispensed with such acts or facts. In other words, such an act is economic non-sense, having no substantiation in market economy.

Another precondition for the application of the anti-abuse rule is concurrently the fact that such an act or another fact is intended at an undesired result which is (i) intentional tax evasion, or (ii) unlawful obtaining of tax advantage, or (iii) intentional reduction of tax liability. In particular, it is necessary to highlight that both conditions must be met at the same time since the fulfilment of only one of them (absence of economic substantiation or undesired result) may not lead to a conclusion that an abuse of the law occurred.

Finally, when it comes to consequences of such an act of a taxpayer, it is necessary to point out that the Code of Tax Procedure connects it "only" to the fact that such an act or another fact shall not be taken into consideration in tax administration. In other words, procedural tax law does not provide for private-law impact of such conduct as, for example, validity or invalidity of a legal act[9], which, however, we do not consider as the major problem as such conclusions are not relevant for tax purposes; as it was also stated by the Constitutional Court of the Slovak Republic[10].

Legal provisions on the anti-abuse rule, however, raise several intriguing questions in tax practice. Initial doubt[11] is connected with a necessity of its being embodied into the law as it has been commonly applied even prior 2014, based on the case law of the EU Court of Justice from which the case law of the Supreme Court of the Slovak Republic derived. As it follows from the judgments of the EU Court of

9 K. Prievozníková, Implementácia zákazu zneužitia práva do daňového poriadku, Daňové právo vs. Daňové podvody a daňové úniky, II. diel, Košice 2015, p. 165.

10 For example, in its Ruling I.ÚS 241/07 the Constitutional Court of the Slovak Republic stated that the validity or invalidity of a contract (legal act) from the point of view of private law has no influence upon that fact if costs incurred on its ground were or were not considered as tax deductible cost.

11 A. Románová, The new anti-abuse rule in Slovak tax law: strengthening of legal certainty?, in: Radvan, M.: System of financial law: System of tax law: conference proceedings, Brno 2015, p. 212.

Justice (formerly the European Court of Justice), for example C-255/02 Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise[12], it was held that: *The Sixth Directive shall be interpreted as meaning to prevent the right of the taxpayer to deduce VAT paid on the input in the case where the exercise of this right establishes an abuse. On the one hand, the proving of the abuse requires that the said performance, despite formal observance of conditions laid down in the relevant provisions of the Sixth Directive and in the domestic laws implementing this Directive, should result in obtaining of tax advantage whose granting was contrary to the aim intended by these provisions. On the other hand, it must follow from the set of objective elements that the main goal of the said performance is to obtain tax advantage.*

The Supreme Court of the Slovak Republic took a similar position in respect of the said issued in its decision 5Sžf/66/2011, where it stated: *Transfer of the right to a solution aimed to obtain a tax advantage which constitutes an abuse of law. Transfer of the right to a solution (patent license) did not pursue economic activities but its main aim was to obtain a tax advantage – it constitutes an abuse of law, and therefore such activities may not be protected under domestic law (nor under the Council´s Directive 2006/112/EC).*

Deriving from the explanatory report for the amendment to the Code of Tax Procedure, the law-maker was inspired mainly by the Commission´s Recommendation C (2012) 8806 final of December 6, 2012, in relation to aggressive tax planning, final wording, however, corresponds only partially with the Commission´s recommendations[13]. The main problem in this context is, to us, the vague nature of the provisions and the possibility of their easy abuse, even by tax administrators at the expense of taxpayers[14].

Naturally, we may agree that the conduct without any economic substantiation aimed at a purpose-bound result or taking unjustified advantage cannot be accepted for the purposes of tax administration. The

12 For the doctrine, see, e.g., F. Tesauro, The EU prohibition of abuse of law and the limits of the principle of "External" Res Judicata in conflict with European law, in: P. Pistone, Legal remedies in European tax law, IBFD, Amsterdam, 2009, p. 507 and the following.

13 A. Románová, The new anti-abuse rule in Slovak tax law: strengthening of legal certainty?, in: Radvan, M.: System of financial law: System of tax law: conference proceedings, Brno 2015, p. 225

14 J. Čollák, Zákaz zneužitia práva ako účelová súčasť správy daní, in: J. Suchoža, J. Husár, R. Hučková, Právo, obchod, ekonomika V., p. 88 and following.

reason for this is the primary fiscal function of taxes and their importance from the point of view of a revenue side of the state budget. However, it must be added that answering the question what is or is not an abuse of law may be, under extreme circumstances, extraordinarily demanding, and tax administrators may be tempted to adopt a simple solution by concluding that the case constitutes an abuse of law. It is, therefore, particularly important to ensure that conclusions of tax administrators should not be arbitrary in this respect, but they should rather be reviewable, reasoned and deriving from concrete circumstances in each taxation case.

From a procedural point of view, the question of the abuse of law within the framework of tax control is usually examined (Section 44, and the following, of the Code of Tax Procedure), specifically for the control of the eligibility of a claim of excessive deduction refund. Then the task of the tax administrator within the tax control, after the execution and evaluation of evidence (witnesses, documents, expert reports and other) is to settle whether a particular legal act or another important fact falls under the anti-abuse rule, and whether this will not be, therefore, taken into account during the tax administration. Consequently, it is the major task of the tax administrator to justify this conclusion properly in his decision issued in imposition proceedings so that it may be subject to a review by the Court in appellate tax proceedings as well as within the framework of the judicial review proceedings (Section 63 subsection5 of the Code of Tax Procedure).

2.2. Motivational element – supplementary tax return after commencement of tax control

As already mentioned, countries use various tools to combat tax evasion that may not always have the nature of tax fraud and that may even result from negligent conduct. Various motivation schemes have appeared lately that under the promise of various benefits motivate taxpayers to report taxes which have not been disclosed yet, or taxes that have been disclosed in a lower amount. In this respect, for example, the tax amnesty in Italy in 2015 (officially called Voluntary Tax Disclosure Program) has attracted attention lately since it has brought EUR 3.8

billion to the state budget, according to unofficial information. In principle, it was about a voluntary self-disclosure of untaxed property values abroad (mainly in Switzerland), whereby taxpayers avoided possible later more extensive taxation of income by tax authorities.

In this context in the Slovak Republic, attention was raised mainly by the measure whereby the lawmaker, effective as from January 1, 2013, provided for the extinction of criminal liability for an offence of tax and insurance evasion pursuant to Section 276 of the Criminal Code, failure to report taxes and insurance pursuant to Section 277 of the Criminal Code, or failure to pay tax and insurance pursuant to Section 278 of the Criminal Code, if payable tax and its accessions (penalty, late-payment interest), or insurance premium were paid additionally, no later than on the day following the day on which the offender could have got familiarised with the outcome of the investigation upon its completion. Even though this measure is adopted in criminal law, it is not possible not to notice its motivational character where the state prefers implementation of the fiscal function of taxes and gain revenue for the state budget rather than establish liability and punish the offender.

Motivation schemes, however, may be found also in the tax law, both the procedural tax law, but currently also in the latest direct amendment implemented by the Act No. 269/2015 Z.z. /Coll./, which became effective on 1 January 2016 in the relevant provisions. Basically, the point is that the lawmaker aims to motivate taxpayers to submit, on a voluntary basis, a supplementary tax return, even after having been served a notice on the commencement of tax control, or a notice to extend it by another tax or another tax period, simultaneously undertaking to impose a lower sanction. The legislator hence motivates taxpayers to disclose by themselves, already after the commencement of tax control, taxes that were not disclosed before (undisclosed tax liability), or to reduce by themselves an excessive VAT deduction or a tax refund unlawfully claimed before. Taxpayers can do so within 15 days after the receipt of a notification of the commencement of the tax control, or after the minutes of the commencement of the tax control were drawn up.

"A reward for such self-disclosure" will be a lower penalty which, however, will depend on the amount of a difference between the sum reported in the supplementary tax return and the sum reported in the original tax return. In the event that the said difference will be identified by the tax administrator themselves during the tax control, the penalty will currently amount to 10% per year of the difference identified. However, in the case where a supplementary tax return has been submitted after a notification of the commencement of the tax control, such penalty will be lower, i.e. it will be 7% per year of the difference identified.

The legislator has imposed an even lower penalty – as to the penalty rate – in the case where a taxpayer submits a supplementary tax return before being notified of the commencement of tax control, where such a penalty currently amounts to 3% per year of the difference identified.

From the point of view of the state and fulfilment of the meaning and purpose of such a motivation scheme, not only such a scheme is pursing the fiscal goal of voluntary payment of an adequate amount of taxes, it is also aimed to accomplish the goal of avoiding costs of tax control. Although the submission of a supplementary tax return will not lead to a termination of tax control, it is quite obvious that it will limit its extent and necessity to execute evidence since the tax administrator will not be actually bound to prove the facts declared by the taxpayer himself.

3. Summary conclusions

The significant importance of tax revenues for the state budget requires that the state and the legislator, in particular, should seek for and adopt such solutions that will potentially lead to increasing tax revenues without a necessity to increase tax rates, or introduce new taxes. In this context, anti-tax-evasion measures seem to be a natural solution which, if successful, will increase tax revenues without a necessity to increase tax burden. However, this fight is a long-distance run. The most fundamental point is to ensure that numerous measures in various

areas mutually interact, especially in the area of tax law criminal law and commercial law, but also in the area where these overlap[15].

This brief paper was aimed to identify the selected schemes of the procedural tax law that have a certain potential to fight tax evasion.

We dealt in more detail with two newly introduced provisions of the procedural tax law that may be effective in tax evasion combat. As for the anti-abuse rule, it may be stated (based on our experience) that tax administrators employ this measure frequently, mainly when taking a decision not to grant an entitlement to an excessive VAT deduction refund. Undoubtedly, we may agree with its application in the case where it is supposed to serve as an imaginary whip for tax evaders who create conditions by various fictitious constructions, without any economic substantiation, for unlawfully claiming excessive VAT deduction refund, or intentional decreasing of their tax liability. However, as has been suggested, its application should be careful, taking into account concrete circumstances of each case under examination in order to prevent the abuse thereof at the expense of those taxpayers that did not commit any abuse of law. Since the boundary between lawful tax optimisation and law abuse may be very thin, when in doubt, tax administrators should proceed in dubio mitius[16].

The other motivation measure that has been defined as the extension of a possibility to submit a supplementary tax return also after the commencement or extension of tax control in conjunction with a lower tax sanction may, at the moment, be assessed only as a potential instrument to remove harmful consequences of tax evasion. Its effectiveness, however, depends, to a considerable extent, on the willingness of taxpayers themselves to use it. At the moment, we do not have enough relevant information about this willingness as since the introduction of this motivation measure only a few months have

15 See Action plan to combat tax fraud for the years 2012-2016 adopted by the Government of the Slovak Republic in May 2012, or the European Commission´s document entitled Action plan to strengthen the combat against tax fraud and tax evasion COM(2012) 722 final.

16 According to the decision of the Constitutional Court of the Czech Republic IV. ÚS 666/02 "…. in imposing and enforcing taxes pursuant to the law, i.e. in de facto depriving persons/entities of their property, public bodies are under a duty to examine the substance and meaning of the fundamental rights and freedoms. In other words, when in doubt they (public bodies) shall act in a mitigating manner – in dubio mitius".

passed, it will, therefore, take some time until it becomes manifest on the revenue side of the budget.

Abstract

Tax evasion in its versatile forms troubles law-makers not only in Slovakia but in all countries where its extent has significant impact on the public finance. It is a natural aim of every good economic manager – and we assume that developed countries have such an ambition – to adopt any necessary legislative measures that have the potential to prevent tax evasion and help its subsequent detection. These measures are implemented not only through tax laws but also through criminal laws and commercial laws, while their success is often limited by the symbiosis of their mutual interactions. The paper is aimed to define partial possibilities of the procedural tax law that were implemented in the previous years with the intention to prevent tax evasion, or to detect it and ensure redress.

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CAN WE ACHIEVE TAX LAW CERTAINTY THROUGH CODIFICATION OF TAX LEGISLATION?

Małgorzata Stwoł[1], **Edward Juchniewicz**[2]

1. Introduction

The phenomenon of tax law codification is not new. However, there is no substantial comprehensive research in terms of justification of the codification of law. In principle, this remark applies to all branches of law. In different countries, various areas of regulations were codified to some extent. It is due to a number of factors, including historical circumstances and legal culture. Well known are codes of civil and criminal law. From a historical perspective, it seems that codification is one of the directions of development. This can easily be proven by many examples of other legal codes, when several statutes became a code, they later did not return to the form of statutes[3]. The phenomenon of codification can even be called a modern trend, where representatives of every branch of law present their own arguments for the need to develop legal codes for certain areas of legislation.

In legal theory, the codification of legislation should be understood as the process of collecting and restarting the law of jurisdiction in certain areas by forming a legal code. In the context of more functional definition, codification can be understood as a way to organize, which is based on modification, update and systematize legal norms in specific sectors or subsectors of law that finally lead to establishing a legal code. In fact, a key concept in the definition of the codification of law is the systematization of law. In the light of systematization, codification should

1 Gdynia Maritime University, Faculty of Entrepreneurship and Quality Science (Poland).
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3 See more R.P. Dhokalia, The Codification of Public International Law, Manchester University Press 1970.

be described as one of many ways to improve the law[4]. Moreover, many authors of various publications treat codification, on the one hand, as a direction and, on the other hand, as a result of the development of a certain sphere of regulations[5].

From the Polish perspective, it should be mentioned that some postulates for codification have already been mentioned in the Regulation of the Prime Minister of June 20th 2002 on the "Principles of Legislative Technique"[6]. In the text of the regulation, we will not find any exact justification for the codification of law because the regulation mostly determines the general scope of statutes in Poland. For example, in Art. 1 of the regulation it is specified that statutes should comprehensively regulate a given sphere of law and should not omit any other relevant issues within a range of its scope. It looks like a general principle for every legal code or idea of codification. It could also be called as one of the principles of law codification.

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4 See more legal theory of systematization of law in general in В.П. Реутов, А.В. Ваньков, К вопросу о консолидации как форме систематизации законодательства, Право и современные государства. 2013. №3. URL: http://cyberleninka.ru/article/n/k-voprosu-o-konsolidatsii-kak-forme-sistematizatsii-zakonodatelstva (дата обращения: 09.05.2016); see also Е.А. Петрова, Особенности систематизации американского законодательства, Вестник ЮУрГУ. Серия: Право. 2012. №7 (266). URL: http://cyberleninka.ru/article/n/osobennosti-sistematizatsii-amerikanskogo-zakonodatelstva (дата обращения: 09.05.2016).; see also С. А. Налимов, Свод законов Российской империи как акт систематизации законодательства, Вестник ЮУрГУ. Серия: Право. 2006. №13 (68). URL: http://cyberleninka.ru/article/n/svod-zakonov-rossiyskoy-imperii-kak-akt-sistematizatsii-zakonodatelstva (дата обращения: 09.05.2016); Н.А. Фадеева, Актуальные вопросы систематизации законодательства Российской Федерации, Правовая информатика. 2013. №3. URL: http://cyberleninka.ru/article/n/aktualnye-voprosy-sistematizatsii-zakonodatelstva-rossiyskoy-federatsii (дата обращения: 09.05.2016); see more Т.В. Гавашели, Систематизация законодательства в Германии, Право и современные государства. 2015. №1. URL: http://cyberleninka.ru/article/n/sistematizatsiya-zakonodatelstva-v-germanii (дата обращения: 09.05.2016); С. Кодан, М.М. Владимирович, Сперанский и формирование теоретических основ юридической техники систематизации законодательства в России (1820-1830-е гг.), Юридическая техника. 2012. №6. URL: http://cyberleninka.ru/article/n/m-m-speranskiy-i-formirovanie-teoreticheskih-osnov-yuridicheskoy-tehniki-sistematizatsii-zakonodatelstva-v-rossii-1820-1830-e-gg (дата обращения: 09.05.2016).

5 See под ред. В.А. Сивицкий, Систематизация законодательства, Москва 2010, p. 11-18; see also a different meaning of systematization of the law in the light of Polish legal doctrine in A. Dyrda, N. Ghazal, R. Nowak, O. Pogorzelski, A. Samonek, Teoria i filozofia prawa, Warszawa 2011, p. 55-59; see also D. Canale, The many faces of the codification of law in modern continental Europe [in:] A Treatise of Legal Philosophy and General Jurisprudence Vol. 9: A History of the Philosophy of Law in the Civil Law World, 1600-1900; Vol. 10: The Philosophers' Philosophy of Law from the Seventeenth Century to Our Days, Springer 2009, p. 135 and next.

6 Journal of Law 2002.100.908.

2. The codification of Tax Law in the Light of Certainty of Taxation

There is no doubt that in modern tax law there should be some systemic changes. Every year Poland produces the largest number of legal acts related to tax law in the EU. This means that Polish Parliament changes tax statutes very often. The theory of the law indicates that it is a basic reason to consider the need for the (systematization) codification of the law[7].

Due to the nature of tax law and taxation, it can be formulated the same as other additional conditions of tax regulations. In principle, the answer to the need for systemic changes in tax law, including its codification, is the fulfillment of the principles of tax law and taxation that are well-known in the literature. In result, it would further entail that besides basic principles, the tax law should be effective in order to ensure adequate budget revenues and counter tax avoidance and tax evasion. However, in practice it means that the State creates so many legal acts just due to a few reasons mentioned above[8].

If we intend to undertake legal research on the codification of tax law in Poland, we must specify main features of a "future" tax code at least in a formal sense. Certainly, the tax code will take the same position as other statutes in the hierarchy of sources of law; the tax code will incorporate uniform principles of taxation and tax law that will apply to the entire Polish tax law; the tax code will ensure complete regulation and its main feature is consistency of regulation. In theory, it should

7 See И.И. Мозженко, Принципы систематизации современного российского законодательства, Пробелы в российском законодательстве. 2010. №1. URL: http://cyberleninka.ru/article/n/1-3-printsipy-sistematizatsii-sovremennogo-rossiyskogo-zakonodatelstva (дата обращения: 09.05.2016); see also Г.В. Россихина, Об усовершенствовании норм налогового права, Проблеми законності. 2012. №119. URL: http://cyberleninka.ru/article/n/ob-usovershenstvovanii-norm-nalogovogo-prava (дата обращения: 09.05.2016); see Э.Б. Алиева, Проблемы становления и реализации принципа системности в налоговом законодательстве, Евразийский Союз Ученых. 2015. №9-2 (18). URL: http://cyberleninka.ru/article/n/problemy-stanovleniya-i-realizatsii-printsipa-sistemnosti-v-nalogovom-zakonodatelstve (дата обращения: 09.05.2016).

8 О.А. Борзунова, Принципы кодификации налогового законодательства России: теоретические и практические аспекты, Вестник Финансового университета 2010, №3. URL: http://cyberleninka.ru/article/n/printsipy-kodifikatsii-nalogovogo-zakonodatelstva-rossii-teoreticheskie-i-prakticheskie-aspekty (дата обращения: 09.05.2016).

help a legislator to systematize and consolidate tax law. All mentioned features are applicable to all legal codes from various branches of law. Beyond any doubts, such a condition of legislation is desirable in every branch of law. The doctrine of tax law presents many arguments to support codification, including the opinion that consolidating common provisions into a code facilitates their rationalization since it forces one to think about what the general rule should be. Putting all tax laws into one code also facilitates compliance because taxpayers know that they have all tax laws in front of them when dealing with a particular problem. In the absence of a code, people can waste time searching for tax laws in an effort to ensure that they have a complete set. This function of a code — gathering all tax laws into one document — is an important benefit and argument in favor of using a code if at all possible[9].

It is not as simple as it looks like. Technically, it is important to know if it is the right time to pass a tax code in Poland. We should take into account whether the tax system and tax law of Poland is mature enough to place all tax legislation into the tax code. All recent dynamic changes in the EU allow us to conclude that common problems of all Member States (including Poland) should be solved with a joint effort of all Member States. Certainly, uniform fiscal instruments will be among joint activities. For example, Panama scandal[10] confirms the belief that we cannot prevent international tax avoidance and tax evasion alone, as one state.

After studies on tax law and studying problems in the countries that do not have tax codes, we have reached the conclusions that we have

9 See more arguments for tax law codification in V. Thuronyj, Drafting Tax Legislation [in:] editor V. Thuronyj, Tax Law Design and Drafting, IMF 1996, source: http://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch3.pdf [last visited: 10.05.2016].

10 See more on Panama paper scandal in O'Donovan, James and Wagner, Hannes F. and Zeume, Stefan, The Value of Offshore Secrets – Evidence from the Panama Papers (April 27, 2016). Available at SSRN: http://ssrn.com/abstract=2771095 [last visited: 12.05.2016]; see also Chohan, Usman W., The Panama Papers and Tax Morality (April 6, 2016). Available at SSRN: http://ssrn.com/abstract=2759418 or http://dx.doi.org/10.2139/ssrn.2759418 [last visited: 12.05.2016]; A. Jallow, Assan, Panama Papers: A Celebral Global Madness and What Options to Mitigate this Scourge in the Realm for Prudent Financial Accountability Through Taxation (April 12, 2016). Available at SSRN: http://ssrn.com/abstract=2766712 [last visited: 12.05.2016]; see also Fenwick, Mark and Vermeulen, Erik P.M., Disclosure of Beneficial Ownership after the Panama Papers (May 8, 2016). Lex Research Topics in Corporate Law & Economics Working Paper No. 2016-3. Available at SSRN: http://ssrn.com/abstract= [last visited: 12.05.2016].

the same problems in Poland. It is difficult to provide a comprehensive analysis on the effectiveness of tax system and find answers to the related questions. Primarily because there are many causes thereof and many of them are outside of the tax legislation. However, with anxiety we should look at the problem of legal certainty of tax law (see more in A. Smith – canons of good tax system: 1. Principle or Canon of Equality 2. Canon of Certainty 3. Canon of Convenience 4. Canon of Economy), which occurs in countries with tax codes and countries where there is no any tax code.

The principle of certainty of taxation (in terms of principles of tax law – the principle of legal certainty of tax law) means that the tax which must be paid by a taxpayer should be specified in an accurate manner. Precisely, all rights and obligations of taxpayers that are associated with the payment of tax should be defined. The implementation of this principle should avoid any arbitrary actions of tax authorities and ensure taxpayers to pay the amount of tax resulting from the provisions of tax regulation.

Questions regarding uncertainty of taxation and uncertainty of tax law are expressed in a number of scientific studies and are a main subject of research in the science of financial law. The vast majority of research related to tax law concludes that studied provisions of regulation are uncertain and, in principle, confirm the lack of implementation of the principle of legal certainty in the context of taxation. A special nature of this principle can be derived from such taxation attributes as significant legal limits of every taxpayer's rights and limits of interests of other participants of tax law relations. This, in turn, requires from a tax legislator special care in determining the rights and responsibilities of all participants of tax law relations. It should be added that tax law, by its nature, (probably not only in Poland) is considered the most complicated branch of law. The presence of economic content in the provisions of tax regulations is one of the reasons for frequent changes and reforms of tax legislation. An additional argument is noticeable in every parliamentary election, when each party offers some changes in the tax law. This allows us to claim that uncertainty of tax law is present in modern times because of its polarization. As a general result, it is

reflected in the process of designing, drafting and application of tax law[11].

Generally, any criticism of the tax legislature can be presented in the context of the lack of certainty of tax law and uncertainty of taxation. The current state of any sphere of taxation in legal doctrine is always presented in the content of lack of accuracy, clarity and predictability of legal norms. The existence of tax regulations by itself does not guarantee any legal certainty of taxation. From this perspective, it can also be difficult to answer the question whether the law is imperfect in the situation of existence of not accurate regulation or lack of any regulation. In both cases, this may mean no tax obligation (non-taxation) or additional tax risk for taxpayers. It can be added that we can evaluate the uncertainty of regulation of tax law only through the prism of time and place at which the evaluation is done. Perfection in the practice and theory of tax law requires us to establish certain tax regulations. It is worth remembering that in the context of taxation legal relations, due to their nature, generate objectively contradictory interests: on the one hand, the State (fiscal interests of the State) and the other – interests of individual taxpayers. Uncertainty, efficiency and tax justice are core values which for a long time will remain the subject of a legal debate and research. Regardless of the methods used in legal research, all above

11 It should be noted that tax law uncertainty can be measured and insured, see. K.D. Logue, The Problem of Tax Law Uncertainty and the Role of Tax Insurance. Virginia Tax Review, Vol. 25, No. 2, Fall 2005. Available at SSRN: http://ssrn.com/abstract=780345 [last visited: 26.05.2016]; see also general thoughts on law uncertainty in L. Osofsky, The Case Against Strategic Tax Law Uncertainty (August 10, 2011). Tax Law Review, Vol. 64, No. 4, 2011. Available at SSRN: http://ssrn.com/abstract=1907927 [last visited: 26.05.2016]; see also Y. Givati, Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings (June 30, 2009), Harvard John M. Olin Fellow's Discussion Paper Series No. 30; Harvard Law School Program on Risk Regulation Research Paper No. 09-3. Available at SSRN: http://ssrn.com/abstract=1433473 [last visited: 26.05.2016]; see also P.J. Beck, P. Lisowsky, Tax Uncertainty and Voluntary Real-Time Tax Audits (November 13, 2013), Accounting Review, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1761343 or http://dx.doi.org/10.2139/ssrn.1761343 [last visited: 26.05.2016]; see also S. Dyreng, M. Hanlon, E. L. Maydew, Rolling the Dice: When Does Tax Avoidance Result in Tax Uncertainty? (January 5, 2014). Available at SSRN: http://ssrn.com/abstract=2374945 or http://dx.doi.org/10.2139/ssrn.2374945 [last visited: 26.05.2016]; see also Н.А. Власенко, Т.Н. Назаренко, Неопределенность в праве: понятие и формы, Государство и право. 2007, № 6. С. 5, М.Н. Дмитриев, О принципе правовой определенности в российском гражданском процессе, Цивилист 2010, № 4, С. 98; see also M. Wojciechowski, Pewność prawa, Warszawa 2014; H. Filipczuk, Postulat pewności prawa w wykładni operatywnej prawa podatkowego, Warszawa 2013; see also T.Z. Pouga, Tax Complexity: A Sine Qua None for Tax Fairness (May 2013). Available at SSRN: http://ssrn.com/abstract=2588661 or http://dx.doi.org/10.2139/ssrn.2588661 [last visited: 26.05.2016].

mentioned values should be taken into account when pursuing any tax reforms, including codification of tax law[12].

3. Conclusion

Most research in the field of tax law have similar hypotheses and goals. We are all trying to present conclusions of our research in the context of how the current tax law and tax system can approach perfection. In fact, the perfection of tax law and tax system has been generally outlined in the principles of taxation and tax law. It means that we always return to the values which are well known in the tax law.

The discussion about tax law codification reminds various scientific disputes on the question if Great Britain needs to have a constitution. Probably we are not going to get reasonable answers. For the need of tax law codification, it is more necessary to present the official State concept of tax law development. Moreover, it is obvious that one of the elements of this concept could be the codification of tax law. However, we should keep in mind that the direction of the development of taxation and tax law should focus on the implementation of principles of taxation and principles of tax law, including the certainty of tax law. That means that the codification by itself should not be the main idea of a tax reform.

It is worth noting that this paper (as a part of the whole publication devoted to the tax law codification) corresponds to the need for

12 The certainty of law is an important value that should be taken into account in interpreting the practice of tax law generated by the tax administration and administrative courts. The presence of legal certainty is unsatisfactory – in terms of its scale and adopted form, see more H. Filipczyk, Postulat pewności prawa w wykładni operatywnej prawa podatkowego, LEX 2013, source: LEX OMEGA 2016; Uncertainty of taxation, in turn, in a sense, may be a reason for fiscal uncertainty of the whole state. The term "fiscal uncertainty" gains its popularity and is generally used in the context of wider uncertainty in the process of tax in connection with high deficit and state debt, see more, for example, in G. Curatola, M. Donadelli, A. Gioffré, P.A. Grüning, Fiscal Uncertainty, and Economic Growth (August 8, 2014). SAFE Working Paper No. 56. Available at SSRN: http://ssrn.com/abstract=2458855 or http://dx.doi.org/10.2139/ssrn.2458855 [last visited: 26.03.2016]; see also J. Robbins, B. Torgunrud, Ch. Matier, Fiscal Planning Under Uncertainty – The Implications of Economic and Fiscal Uncertainty for Budget Forecasts (March 29, 2007). Available at SSRN: http://ssrn.com/abstract=2004273, or http://dx.doi.org/10.2139/ssrn.2004273 [last visited: 26.03.2016]; see also A.W. Richter, N.A. Throckmorton, The Consequences of an Unknown Debt Target (June 8, 2014). Available at SSRN: http://ssrn.com/abstract=2220247 or http://dx.doi.org/10.2139/ssrn.2220247 [last visited: 26.03.2016].

comprehensive research on the codification of tax law. The effectiveness of tax law codification (in a broad meaning – tax law systematization) affects the ability to adapt to the dynamic changes in the world economy and let us develop so-called "smart taxes" or present so-called "taxation 2.0" in a future.

Abstract

The phenomenon of tax law codification is not new. However, there is no substantial comprehensive research in terms of justification for the codification of tax legislation. In principle, all research and theses in the context of law codification pursued so far apply to all branches of law. It means we can borrow some achievements from other branches of law. In different countries, various areas of regulations (including tax law) were codified to some extent. It is due to a number of factors, including historical circumstances and legal culture.

The authors of the paper attempt to answer the question if tax law codification should be a goal of any tax reform, or is it possible to achieve certainty of taxation (in the light of A. Smith's principle of certainty) through the codification of tax legislation.

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LAW ON TAX OBLIGATIONS AS PART OF THE GENERAL TAX LAW CODIFICATION

Maciej Ślifirczyk[1]

1. Introduction

Earlier traditions affect new legislative solutions to a smaller or greater extent in terms of the legal regulation of certain issues or the development of legislative acts pertaining thereto. This not only pertains to the terminology but also to a certain theoretical approach and the structure of a legislative act. Undeniably, the cultivation of certain legal traditions may and does have a positive influence on how easily addressees of new provisions become familiar with them, on solving problems arising against their background and on the use of the hitherto developed views of the legal doctrine and the jurisprudence. From a purely practical and praxeological perspective, radical changes in the scope being discussed herein should be made with consideration and where they are sufficiently justified by the benefits resulting therefrom.

To realize the conditions accompanying the Polish codification of the general tax law, one has to refer to the circumstances under which a legislative act in the form of the Tax Ordinance was introduced into the Polish legal system. A legislative act of this type was enacted for the first time on March 15, 1934[2]. Undeniably, the inspiration for the legislative act in question should be found in the development of the German law at the beginning of the 20th century. During the First World War new taxes were introduced, paid to the benefit of the treasury of the Reich; it also took over a large part of the taxes to which *Länder* were previously entitled. This called for uniform regulations on tax proceedings. This need was to be met by the enactment of the Tax Ordinance of the

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2 Dz.U. [Official Journal] no. 39, item 346.

German Reich (*Reichsabgabenordnung*), which took place on December 13, 1919.

An important objective in the form of the codification of the tax procedure left an imprint on the structure of both *Reichsabgabenordnung* and the Tax Ordinance of 1934. Although the discussed codifications allowed to observe that different taxes have some common structural elements of the substantive nature[3], a perspective on the general tax law through the prism of the procedure is presented also today[4]. Although on the basis of the tax law, the procedural issues and the substantive issues indeed significantly intertwine, this should not reduce the relevance of the issues from the latter of these areas. It is advisable, therefore, to examine the extent to which the codification of the general tax law should cover the substantive issues and the systematics thereof.

This study attempts to consider whether, departing from the presumptions not raising any serious controversies, it is possible to determine - on the basis of deductive inference[5] – the scope of the substantive regulations which should be covered by the general tax law codification. Setting the minimum subjective scope of those regulations should be a clue as to how to construct the general tax law codification and it should verify both the presently binding solution as well as the subordination of the construction of this codification to the model characteristic of the procedural codifications in terms of its correctness.

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3 This was, i.e., in effect of the development of the tax law science and its impact on the said codifications. Cf. M. Kalinowski, Narodziny i kształtowanie się współczesnej koncepcji stosunku podatkowego, See, e.g., "Toruński Rocznik Podatkowy" 2013, p. 6-7.

4 An example of this may be the new draft of Tax Ordinance announced in: Konferencja. Zmiany w Ordynacji podatkowej. Projekt ustawy – Ordynacja podatkowa, ed. H. Dzwonkowskiego, Warszawa 2013. As regards earlier statements, see, e.g., E. Ruśkowski, in: C. Kosikowski, E. Ruśkowski, Finanse i prawo finansowe, Warszawa 1994, p. 137-138.

5 The inference will be based on a variety of implicative relations, including cause and effect, analytical, structural, establishing relations, depending on the indicated premises (more on this: P. Łukowski, Logika praktyczna z elementami wiedzy o manipulacji, Warszawa 2012, p. 235-237). The ground for relying on the relation of structural implication will be, i.a., implied reference to a specified understanding of a rational legislator and requirements of proper legislation, especially as regards the financial law (see in this regard, e.g., C. Kosikowski, Legislacja finansowa, Warszawa 1998, passim, załącznik do rozporządzenia Prezesa Rady Ministrów z dnia 20 czerwca 2002 r. w sprawie "Zasad techniki prawodawczej", i.e. Dz.U. [Journal of Laws] of 2016, item 283), and conceptual and systematic findings relatively broadly applied in the science of law. However, the formulated observations will go beyond the conclusions which strictly and necessarily follow from certain premises. In particular, the possibility of regulating certain issues will be signalized, though it is not necessary in the adopted inference method.

2. Subjective scope of the general tax law

Determining the subjective scope of the general tax law codification on the basis of the deductive reasoning, in the first place, requires indication of basic premises on which such reasoning should be based.

The first of those premises is related to the scope of the application and the role of the general tax law codification *per se*. Referring to this issue, it can be assumed that it should be a legislative act regulating issues common to all or at least a substantial part of the existing taxes[6]. Since the codification is to address issues common to a variety of taxes, further premises for this inference should be sought in the area related to the very essence and the basic structure of the tax.

Undoubtedly, the essence of the tax is its implementation of the fiscal function[7]. This entails the most primary element of the tax construction which is an obligation to render a performance by one entity to the benefit of the other entity which has the right to demand such a performance. Constructions of individual taxes are subject to change, also the object of taxation is subject to change as is the method of calculating the amount of a tax-related performance or the circle of taxpayers, but the essence of the tax law always consists in the said duty and its corresponding right to demand that is should be performed. This observation indicates that there exists a relation specified on a case-by-case basis between the two indicated entities. This, in turn, leads to a conclusion that a useful way of describing a basic element of the tax construction is to use the concept of the tax-law relation, and specifically the relation of obligation[8].

When formulating the premises for further inference, it must be noted that further inference cannot be completely separated from

6 See the approach to the general tax law in, e.g., R. Mastalski, Prawo podatkowe I – część ogólna, Warszawa 1998, p. 29-30, J. Małecki, in: A. Gomułowicz, J. Małecki, Podatki i prawo podatkowe, Warszawa 2009, p. 352 and literature cited therein.

7 This statement does not preclude the implementation of other functions. Nor does it evaluate those functions.

8 See, e.g., H. Nawiasky, Steuerrechtliche Grundfragen, München 1926, p. 35-36. This finding should not raise any controversies at present in view of a developed and established conception of the tax-law relation. The development of these views is discussed, in M. Kalinowski, Narodziny…, p. 4-11.

modern regulations relevant for the specific tax law or from the conditions related to the operation of the entire legal system, hence also the regulations provided for in the Constitution of the Republic of Poland and other branches of the law than the tax law. Therefore, the premises for the present reasoning shall also cover - to the necessary extent - the conditions resulting from the legal constructions adopted in the indicated areas.

Moreover, one needs to note that the codification of the general tax law, creating the normative plane, may not leave aside the actual and inevitable conditions associated with the situations to which it pertains. First of all, this is about the occurrence in practice of conducts which deviate from the presumed normative model. These conducts are impossible to eliminate because of, e.g., various infirmities of humans who are the addressees of legal norms and because of the occurrence of unforeseen events. The legislator must take into account the occurrence of these conditions; therefore, one has to treat them as yet another premise for this inference.

3. The construction of the relation of obligation as the primary institution of general tax law

On the basis of the above it is apparent that general regulations of substantive tax law should focus around the construction of the relation of obligation as the primary institution. Drawing from the achievements of the science of law, particularly the law of obligations, one can indicate the basic elements of any relation of obligation, such as a creditor, a debtor, receivables, debt, a performance and the subject-matter of a performance. These elements, distinguished in this way, should not raise major controversies[9]. Since the codification of the general tax law is to regulate the relation of tax obligation, this leads to a conclusion that it

9 It is noteworthy that in literature the elements of the relation of tax obligation are sometimes viewed differently. See, e.g., P. Borszowski, Elementy stosunku prawnego zobowiązania podatkowego, Kraków 2004, passim. However, it appears that those differences are not sufficiently serious to question the correctness of the systematics adopted herein.

should regulate the said elements of this legal relation. This conclusion will be another premise for further inference.

4. The concept of taxpayer as the element of the relation of tax obligation

As it has been mentioned, the legal regulation of the relation of the tax obligation requires that the institution of the debtor in this legal relation should be regulated, that is, the taxpayer. Basically, this is a correct observation, but it should be noted that constructing the circle of taxpayers in a manner relevant for a given subject-matter of taxation[10] in many cases results from the nature of various taxes. It is also a consequence of adopted presumptions in the field of tax policy and a legislative technique. In the historical and the *de lege lata* perspective it cannot be considered a valid claim that there is one category of the taxpayer common to all taxes or that the circle of taxpayers of all taxes is common. The codification of the general tax law will not change that without a serious interference in the regulations pertaining to individual taxes, which seems neither advisable nor desirable. This leads to a conclusion that the said codification referring to a substantial part or to all taxes on the one hand, must refer to the concept of the taxpayer, on the other hand, this reference is only possible in a collective manner, covering by one term taxpayers of various taxes (i.e., through the use of a metalinguistic definition) or defining the concept of the taxpayer through its role in the relation of the tax obligation, and leaving it to be better specified in the legislative acts of the specific tax law.

In contrast to the debtor in the relation of the tax obligation, the concept of the tax creditor appears much more uniform. Despite this, creditors of different taxes, both in the historical perspective and on the basis of the currently binding law, are different. Therefore, also in this case, the codification of the general tax law may use this concept only as

10 The relation between the object and the subject of taxation is indicated by M. Kalinowski, Podmiotowość prawna podatnika, Toruń 1999, p. 51 and 76, the same author, Przedmiot podatku, Toruń 2013, p. 179-196.

a collective concept or by a definition of the concept of the tax creditor through its role in the relation of the tax obligation.

Nowadays, it is already obvious that tax-law entities may cover not only natural persons but also organizational units without legal personality and legal persons; hence, the need to regulate the way of representation of these entities on the basis of the tax law. This can occur either by implementing specific legal solutions in this respect or by reference to relevant regulations of other branches of law.

A conclusion in the form of the need for regulation of the subjective aspect in the general provisions of the tax law, and in particular the need for specification of the parties to a tax obligation, leads to another issue that needs to be resolved within the framework of the group of legal provisions discussed herein. A logical consequence of the indication of a specific entity as a party to the relation of the tax obligation is the need to consider the impact of events pertaining to the above entity on the existence and the shape of this legal relation. In particular, this pertains to the loss of a legal status by this entity or a change of its legal form.

This authorizes a conclusion that it is necessary to resolve the issue of tax succession from the legal perspective both under the general and specific title. This issue is particularly relevant with regard to the taxpayer, but it may also pertain to the tax creditor[11] and other entities of the tax law. If the tax succession in this scope was admissible, these issues should be regulated nowhere else but in the codification of the general tax law.

5. Debt elements and receivables element of the relation of tax obligation

Further elements of the relation of tax obligation which, in line with this inference, should be regulated in the codification of the general tax law are the debt element and the receivables element in this legal relation. Assuming that the element of debt means a duty of rendering a performance, the provisions of the general tax law should

11 This pertains to the situation of uniting or dividing of local government unit.

specify the requirements pertaining to this duty. In particular, in that respect this may pertain to both the maturity date, place of rendering the performance as well as general issues related to the amount thereof.

The need to regulate general issues related to the maturity date of rendering a tax performance, naturally does not entail a necessity to indicate a specific date for a particular performance to be rendered in the mere codification. This issue, in fact, largely depends on the specific nature of a certain tax, therefore, it essentially remains within the scope of the regulation of a specific tax law. The general tax law regulation covers, in turn, common principles of the calculation of the maturity date and the warranty regulations for the taxpayer related to the length of the deadline.

The need for the regulation of the place of rendering the performance mainly covers general issues related to the competence of the bodies representing the tax creditor in terms of tax collection. A widely understood issue of the place of rendering the performance also covers the fulfillment of a duty arising under the relation of tax obligation with the involvement of also other entities apart from the tax creditor and tax debtor. There is no automatic need for the regulation of this issue in the tax law, but one has to make allowance for the fact that the absence of such regulations shall be interpreted as the exclusion of this kind of a possibility. The introduction of these entities, in turn, requires a resolution as to their role in the tax obligation relation, in particular, whether these entities should operate under one legal relation, or whether they should have separate legal relations with the tax creditor or the tax debtor, and what specificity they should have.

General questions concerning the amount of tax performance that make part of the debt element in the relation of tax obligation cover issues such as the mechanism of making a rounding of due amounts or a way to express their value, including currency of the debt unless it results from separate regulations.

The regulation of the receivables element – i.e. the right to demand the rendering of a performance – is partly a correlative of the debt element. It encroaches upon the area of the regulation related to the

sphere of the security and enforcement proceedings[12]. It seems that the issue of the delimitation of the codification of the general tax law from the said procedural regulations depends on the resolution as to the role of the said codification in the levy law system. If this legislative act regulates issues common not only to individual taxes but also to all public monetary due amounts[13], then the codification of the general regulations concerning these due amounts could also cover their enforcement and protection. Otherwise, the regulations contained in the codification of the general tax law will have the nature of specific regulations in respect of the provisions governing enforcement proceedings and security proceedings in separate legislation. Therefore, the need for their implementation will be contingent on the shape of regulations which are outside the codification of the general tax law.

6. The element of a performance in the relation of tax obligation

The element of a performance in the relation of tax obligation must be understood in terms of an expected conduct of the taxpayer; the subject-matter of the performance is, in turn, what this conduct refers to. Adopting the need for the regulation of the mentioned issues in the codification of the general tax law as the premise for further inference, one should draw a conclusion that this codification should indicate how the obligation incumbent on the taxpayer should be performed. Given that the modern concept of public levies is associated with a duty to make pecuniary performance, this means that what should be regulated is the manner of rendering the pecuniary performance, i.e. payment of the tax and potential conducts equivalent thereto, such as, in particular set-off. Undoubtedly, the conduct in the form of pecuniary performance refers to a specified amount of money that is the subject-matter of the

12 Cf. Article 15 of the Act on Enforcement Proceedings in Administration dated 17 June 1966 (i.e. [Journal of Laws] Dz.U. dated 2014 item 1619 as amended).

13 The need for the broad codification of the levy law has already been indicated in the Polish science of law. Cf. e.g. C. Kosikowski, Naprawa finansów publicznych w Polsce, Białystok 2011, p. 338. Currently, it should be viewed as the broadest possible regulation of this matter. In view of the conditions deriving from the EU law it is doubtful whether it is possible to create a legislative act which fully codifies general issues of all public levies.

performance. This, in turn, leads to a conclusion that the general tax law codification should regulate issues regarding the said amount of money, such as the currency of payment or type of money used to pay. These issues are in part a result of the regulation of the debt element in the relation of the tax obligation.

7. The creation and termination of tax obligation relation

A finding that the essential construction on the basis of which the substantive regulations of the codification of the general tax law should be gathered is the institution of the tax obligation relation, which leads to a conclusion that also the issue of the creation and termination of this legal relation calls for legal regulation in the said codification.

The legal regulation of the creation of the tax obligation to a substantial extent involves the issue of the fiscal factual status. The realization of such a factual status, in the light of the views of the legal doctrine deserving consideration, is the precondition for the creation of the tax obligation[14]. Further inference in the scope being discussed requires the resolution of the problem which in the Polish science of the tax law still raises serious discrepancies, namely the impact of the assessment on the creation of the tax obligation. As it seems from the logical perspective, there are three possibilities in the discussed scope: (1) assessment is necessary only for the creation of some relations of the tax obligation[15], (2) assessment is necessary for the creation of the relation of tax obligation each time[16], (3) assessment is not relevant from

14 W. Olszowy, Decyzja podatkowa. Podejmowanie i kontrola, Warszawa 1997, p. 21, A. Nita, Stosunek prawnopodatkowy. Obowiązek i zobowiązanie podatkowe, Kraków 1999, p. 18. It should be emphasized, however, that in the tax-related literature, including foreign literature, the factual status is not understood in a fully uniform fashion.

15 This conclusion is derived from the current wording of Article 21 § 1 of the Tax Ordinance. See also: W. Olszowy, op. cit., p. 26-29, J. Małecki, op. cit., p. 384.

16 Cf. H. Dzwonkowski, Powstawanie i wymiar zobowiązań podatkowych, Warszawa 2003, passim. F. Myrbach-Rheinfeld may be considered the pioneer of this concept (Précis de droit financier, Paryż 1910). Some authors maintain that this solution was also adopted in the Polish Tax Ordinance of 1934. More on this: M. Kalinowski, Kilka uwag o pojęciu obowiązku i zobowiązania podatkowego w Ordynacji podatkowej of 1934, „Kwartalnik Prawa Podatkowego" 2012, no. 4, p. 10-15, the same author, Przedmiot…, p. 206-207, 224-225. The interesting comments of the above author as to the interpretation of the regulation of the Tax Ordinance of 1934 may be, however, questionable to a certain extent.

the point of view of recognizing that the relation of tax obligation exists[17]. Theoretically, the problem discussed can be regulated on the basis of each of the above-discussed variants. Only as a side comment it may be noted that historically the first of them has the strongest justification. Therefore, it may be disputable whether there are sufficiently strong arguments in favor of its rejection and implementation of new solutions in this respect.

Notwithstanding the above-mentioned influence of the assessment on the creation of the relation of tax obligation, it is an institution which enables to indicate the amount of the debt in a specific example, in the relation of tax obligation, and therefore useful for many substantive and procedural institutions based on this finding. The very issue of making the assessment is, however, primarily a procedural issue in its nature. This is particularly evident in the assessment made in the form of a tax decision. Recognizing that the introduction into the general tax law codification of the construct of assessment is necessary - according to the premises of this inference which have been adopted earlier – should, in turn, authorize a conclusion that the legal regulations must take into account the fact that the assessment made may prove wrong. As it follows from the above, also the legal regulation of the issue of correcting the assessment already made is also necessary. If the assessment takes the form of a decision, this necessitates the implementation of the procedural solutions enabling the modification of an issued decision or the elimination of a wrong decision from legal sphere. The same pertains to the assessment made in the form of a tax return. In both cases it is also necessary to decide about the substantive consequences of the correction of the assessment. The intertwining of the substantive and procedural issues also means that the tax debtor must be able to demonstrate during the proceedings that he has fulfilled a tax performance. This, in turn, leads to a conclusion that the subject-matter of the legal regulation should be the way of officially proving this fact (if there is such a need due to the nature of a fulfilled performance).

Based on the above, it is clear that there is a need for the implementation of appropriate procedures for the codification of the

17 Naturally, this does not mean that the assessment is entirely deprived of the legal sense.

general tax law. At the same time it becomes clear that it is not the substantive regulations that are an addition to the codification of the general tax law, which essentially has the character of the codification of tax procedures, the opposite is true – the regulation of various procedures, including in particular the procedures pertaining to the tax assessment, play a subordinate role in respect of the basic regulations of the substantive nature.

Shifting the focus towards the issue of termination of the relation of the tax obligation, it must be noted that, of course, the above-derived conclusion on the need for the regulation in the general tax law codification of the elements of the tax obligation relation in the form of debt and performance, to some extent pertains to this issue. This conclusion does not exhaust the entire problem, though. One needs to consider the admissibility of the introduction of yet another premise for the present inference in the form of an assumption that the relation of the tax obligation cannot exist without time constraint. It seems that there is no clear precondition for the use of this premise, and its use is dependent on the adopted fiscal policy[18]. The adoption of the said premise and considering that it is well-grounded to temporarily limit the existence of the relation of tax obligation may lead to various legal solutions. The mere passage of time may, in fact, result in the automatic termination of the relation of tax obligation or it may only make such an effect possible if additional conditions are fulfilled[19].

18 Cf. the argumentation contained in the judgment of the Constitutional Tribunal dated June 21, 2011, P 26/10, wherein the Tribunal found, i.a., "A decision whether the time-limitation of tax obligations should be introduced into the system of law is within the regulatory freedom of the legislator". However, it needs to be emphasized that the implementation of the time-limitation of tax obligations into the tax law system will require the satisfaction of further conditions which are necessary to ensure that the adopted solutions are compliant with the Constitution.

19 In view of the fact that in this case, the adopted premise for reasoning follows from the fiscal policy implemented by the legislator, one may not exclude the adoption thereof in a modified and less restrictive form, in accordance with which the lapse of time shall not cause the termination of the relation of tax obligation but, e.g., its modification which makes the tax creditor's position weaker.

8. Modification of the relation of tax obligation at the time of its existence

The existence of the relation of tax obligation generates another issue that requires legal settlement. This refers to the admissibility of the modification of this obligation-based relation in the period between its creation and termination. Some aspects pertaining to this issue have already been mentioned when discussing the subjective element. Inasmuch as the legislation would permit the tax succession, this would entail the possibility of modifying the relation of tax obligation at the time of its existence. As regards other elements of the relation of tax obligation, essentially there is no logical necessity of the legal regulation of the change thereof if the premises for inference are only legal in their nature. Exceptions may include constitutional regulations and the values which they protect, e.g. expressed in the principle of social justice[20]. In the period between the creation of the relation of tax obligation and its performance, a variety of fortuitous events may occur affecting the taxpayer's situation. As mentioned before, the circumstances of this type must be taken into account when constructing legal institutions. Therefore, it is necessary to decide on the influence of these circumstances on the relation of tax obligation. In the scope being discussed, this is mainly about potential modifications of the debt element, both in reference to the amount of the performance as well as its time and place.

9. Tax responsibility

The above conclusion that the codification of the general tax law should be based on the construction of the relation of tax obligation also points to the need for the legal regulation of the debt and the performance element in the obligation-based relation; it also generates the need to regulate the situation wherein the performance which is the subject-matter of the debt is not rendered or is rendered incorrectly,

20 Cf. W. Nykiel, Ulgi i zwolnienia w konstrukcji prawnej podatku, Warszawa 2002, p. 75-80, W. Morawski, Ulgi i zwolnienia w prawie podatkowym, Gdańsk 2003, p. 100.

most importantly on account of a missed deadline. In effect, this entails a need for regulating, i.a., the issue of tax responsibility[21]. In turn, the consequences of missing the deadline of rendering the tax performance may be regulated diversely, and one cannot draw a conclusion on the shape of these regulations solely on the basis of stating the necessity for regulating this matter. What follows from the fiscal function performed by the tax construction, as it appears, is only the minimum extent of the regulations which is the compensation for the detriment on the part of the tax creditor on account of a delay in obtaining a tax performance.

10. Overpayment

As it has already been mentioned, the scope of necessary regulations which make up the general tax law follows not only from model constructions resulting from the doctrine of the tax law, but also from the need of taking into account the actual and inevitable conditions in which these constructions must operate. This kind of a condition is, i.a., human fallibility or the possibility of individuals taking a decision on non-compliance with the legal norms. This discrepancy between the real sphere and the normative sphere may entail both a failure to render tax performances in the full scope as well as rendering thereof to the extent exceeding the amount resulting from the tax law provisions. The first of those cases has already been mentioned; now, it should be noted that the necessary subject-matter of the tax law regulation should also be the institution of tax overpayment, and thus also the legal regulation of the obligation arising from the overpayment of the tax as an obligation-based relation which is special and different from the relation of tax obligation[22]. Other situations of undue public performance should be treated likewise. In this aspect, one may indicate two groups of cases: the first group covering the situations where the beneficiary of undue performance is a tax creditor, and the second group – where the beneficiary is an entity obtaining undue performance from a tax creditor.

21 This issue also relates to fiscal subjectivity and it is a consequence of an adequate approach thereto in legal regulation.

22 This refers to an instance of the so-called incidental overpayment. More on this: M. Ślifirczyk, Nadpłata podatku, Kraków 2005, passim.

A separate issue is where there are no irregularities of whatever kind when rendering a tax performance, but because of the conditions resulting from the specific tax law, it is necessary to reduce or eliminate the economic burden of a tax in relation to a specific entity. In view of the fact that this burden does not have to follow from the fact that the said entity is a party to the relation of tax obligation, the elimination thereof may not be effectuated through the interference in this obligation-based relation. The intended effect may be achieved, however, by a performance to the benefit of such an entity which as to the value thereof corresponds to the amount of the tax which is a burden imposed on the said entity, and which burden must be eliminated[23]. This authorizes a conclusion that another obligation-based relation is created in this way which should be regulated in the codification of the general tax law if it pertains to all taxes or a significant part thereof.

Assuming that the above legal relations should be regulated in the said codification, it will be a logical consequence to conclude that the said codification should contain the legal regulations pertaining to all elements of those obligation-based relations as well as those pertaining to the creation, expiry and modification of those legal relations.

11. Conclusion

The conducted deliberations indicate that relying on the group of premises and implicative relations which generate no significant controversies, by way of deductive reasoning, it is possible to indicate the subjective scope of the regulation which the codification of the general tax law should contain. In the majority of cases, this finding does not determine the mere shape of specified legal institutions but it enables to indicate the need for their legal regulation. Concurrently, it indicates that the key regulations of the codification in question should be substantive solutions pertaining to the entire group of the obligation-

23 This solution is based on the so called tax rebate. See: M. Ślifirczyk, op. cit., p. 30-36. Cf. also: M. Popławski, Instytucja zwrotu podatku. Charakter prawny i funkcjonowanie, Warszawa 2009, p. 10-11.

based legal relations[24] of which the relation of tax obligation is of major importance. As it follows from the above, it does not appear correct to construct the codification of the general tax law on the basis of the procedural codification model as a group of a range of procedures. Though indeed the said reasoning also implies the need for regulation of the said procedures, these procedures are instruments for the proper operation of the substantive regulations, not contrariwise.

Acknowledging that for the codification the regulation of the already mentioned obligation-based legal relations is essential does not mean that each of these legal relations must be regulated in a completely separate way. It appears that it is possible to create certain model constructs to which the remaining ones will refer to the necessary extent. In view of the crucial importance of the relation of tax obligation, its regulation may play a role of a model for other obligation-based tax legal relations where the position of the creditor is taken by an entity which also acts as a creditor in the relation of tax obligation. In relation to other obligation-based relations, the regulations pertaining to the obligation on account of tax overpayment could play the role of the model.

Naturally, the present analysis is very general, whereas this inference does not set a full subjective scope of the general tax law codification. Other conclusions may be drawn on the basis of the findings which have already been made which should determine specific regulations of this codification, and which – in view of limitations of this study and the generality of the inference – have not been discussed[25].

In conclusion, it is a noteworthy observation that a great majority of the findings is confirmed in the text of the Tax Ordinance which is already in force. Without going into details of the assessment of its particular provisions and the correctness of the systematics of the regulated issues, it may be acknowledged that it sets a proper direction of the development of the general tax law codification, and it may be the point of departure for further legislative works in the scope discussed herein.

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24 In the title hereof these were termed collectively as "tax obligations" though, certainly, this term is not perfect as it evokes excessively strong associations with the mere relation of tax obligation.

25 By way of example, it may be indicated that this deliberation points to the need for proper interpretation of the substantive provisions, hence the regulation of also this matter.

Abstract

This paper deals with law on tax obligations as part of the general tax law codification. It presents a subjective scope of the general tax law and the construction of the relation of obligation as the primary institution of this part of law. The article also depicts different elements of the relation of tax obligation that should be regulated in this part of general tax law. Attention is also paid, among other things, to the relation of tax obligation from the perspective of a concept of taxpayer, creation and termination of tax obligation relation, modification of this institution at the time of its existence but also to tax responsibility and overpayment.

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CURRENT INSTRUMENTS FOR COMBATING TAX EVASION IN THE CZECH REPUBLIC[1]

Roman Vybíral[2]

1. Introduction

Virtually, combating tax evasion is an evergreen for governments in all democratic countries, the Czech Republic not being an exception. Avoiding taxes through artificially created structures is a common practice, which has been criticized for long decades. Public funds (including taxes that have been collected) are prone to misuse, also because the State, municipalities, regions, or, as the case may be, other public entities are still seen as something specific, which basically means that "*if I am stealing from the State, I am thereby stealing from something rather abstract*", and there in not necessarily any personal relationship to such an abstract thing. On the other hand, however, it is true that *if I am stealing from the State, I am thereby stealing from myself, too*, as the State actually is a group of people and institutions on a particular territory. The situation gets even more complicated – the most important entities usually do not operate on a local basis but rather across borders. Who actually is the victim of tax evasion then? Individual states? Or perhaps the global community? The diffusion of the moral aspect of responsibility gets even stronger in both cases.

Either way, it is indisputable that the entities are more prone, and also more tolerant, to tax evasion than they may be to any other criminal activity including property, e.g. robbery or thefts relating to specific individuals. The said moral and social premises thus serve as a basis for the unfortunate situation in most of the states in the world. The situation

1 This text was created as a part of P06 – "Public Law in the Context of Globalization and Europeanization" being realized in 2016 at the Faculty of Law of Charles University in Prague

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where tax evasion is unfortunately something that is rather common. The situation where the global community is not currently able to efficiently combat such activities[3] and the lead role is then played by individual states, which are not, however, for various reasons (financial, capacity, professional, etc.) capable of a systematic fight against these either. The situation where an adoption of a brand new instrument that aims at fighting tax evasion makes no difference as the entities are at this point already ready for such a situation and the effectiveness of these instruments is, therefore, sometimes disputable.

The topic of tax evasion combating (or "an improved collection of taxes") is to be found also in the current Government Policy Statement[4] and it has to be pointed out that activities of the Government are rather apparent regarding this area. The aim of this paper is to introduce the instruments that are currently used and that are planned to be used in the future, i.e. the instruments that the Czech Government implemented or tries to implement, to the readers. Namely, two instruments will be discussed regarding the value added tax (the VAT Control Statement and the reverse charge), then the Act on Proving the Origin of Property and the Electronic Records of Sales will be mentioned. Moreover, new procedural instruments will be mentioned as well as the recent innovations regarding criminal law.

2. Value Added Tax

A specific area of the fight against tax evasion is the area of value added tax (hereinafter also the "VAT"). It is right this domain where most important tax evasions occur, which is pretty clear from the construct of this tax. Given the high degree of harmonization, the countries have rather limited possibilities. However, even in this area

3 Many writers and organizations are trying to bring more attention to the need of global fight against tax evasion. According to their opinion, this is the only way to eliminate one of the key problems – tax paradises.

4 See Vlada.cz. [online]. 2014. [cit. 2016-04-15]. Programové prohlášení vlády České republiky. Retrieved from: http://www.vlada.cz/assets/media-centrum/dulezite-dokumenty/programove_prohlaseni_unor_2014.pdf

there are various instruments clearly available. As a first example can be mentioned especially the newly introduced VAT Control Statement.

This instrument has been introduced by an amendment to the VAT Act[5] in 2016 and its essence lies in the fact that selected entities are required to provide details of tax documents. The data are reported in the control statements based on issued and received tax documents and other documents on the supply of goods or services. This legislation was introduced as an effective means for detection of tax evasion and fraud. Its aim and purpose is to enable the tax administration to obtain information on selected transactions realized by taxpayers and in combination with other information to identify risky associations of persons (especially carousels) that are illegally withdrawing funds from the public budget[6].

Another partial aspect of the fight against the VAT evasion that might be mentioned is the continuous increase of cases of VAT guarantee. In the currently effective VAT Act there are several types of provisions where the tax administrator is entitled to address the other contracting party (the guarantor) in case the original contracting party had not properly fulfilled its tax obligations. This might be the case of cashless payments (transfers) between accounts that are not registered in the official register maintained by the tax administrator or situations where the other contracting party becomes aware (or should have and could have become aware) that the tax duty was not properly fulfilled.

In this field I shall be mention the efforts of the current Minister of Finance on the extension of the so-called reverse charge mechanism which is, however, not fully supported by the European Commission so far. In this regard, the European Commission takes a strict view that it is impossible to have a significant part of the economy built on the system of reverse charge.

5 Act No. 235/2004 Coll., on Value Added Tax, as amended.

6 See more at Financnisprava.cz. [online]. 2016. [cit. 2016-04-15]. VAT Control Statement. Retrieved from: http://www.financnisprava.cz/cs/dane-a-pojistne/dane/dan-z-pridane-hodnoty/kontrolni-hlaseni-DPH/zakladni-informace.

3. Electronic Records of Sales

Another proposed innovation is called Electronic Records of Sales[7] (hereinafter the "ERC"). The Act on ERC should come into effect at the end of 2016 and the regulation aims to reflect both direct (i.e. income taxes) and indirect taxation (especially VAT). The reason for the adoption of this concept was a situation where persons and entities receiving cash payments (i.e. payments made in cash, by a debit card or cheque, promissory note or by other similar means, e.g. meal voucher) do not always record them and thereby reduce their tax base which leads to tax evasion.

The essential principle of the ERC consists in the fact that selected persons and entities (the approved legislation shall apply within several successive time periods to individual businesses as well as legal persons) realizing cash receipts will be obliged to send electronically the selected data on all cash transactions to the tax administration which then issues a confirmation message. Consequently, the entrepreneur issues a receipt which is handed to the customer. There is even a motivational element for the customers in the form of a "receipt lottery" which is intended to make them request the receipts issued by the entrepreneurs following the example of several other countries. It should be noted that the entire legislation is from the very beginning perceived somewhat controversial both from the side of the businessmen as well as politicians.

4. Proving the Origin of Property

Rather a complementary tool in the fight against tax evasion should be the law amending some laws in connection with proving the origin of property. It is an amendment to the Income Taxes Act[8] and to the Criminal Code[9] (at the time of completion of the manuscript, the bill was in the second reading in the Chamber of Deputies[10]) which shall affect

7 See more at Eltrzby.cz. [online]. 2016. [cit. 2016-04-15]. Electronic Records of Sales. Retrieved from: http://www.etrzby.cz

8 Act No. 586/1992 Coll., on Income Taxes, as amended.

9 Act No. 40/2009 Coll., Criminal Code, as amended.

10 See more at Psp.cz. [online]. 2016. [cit. 2016-04-18]. Sněmovní tisk 504. Retrieved from: http://www.psp.cz/sqw/historie.sqw?o=7&T=504

the rights of all income tax payers. The purpose of this amendment is to enable the tax administrator to impose an additional tax on property (i.e. on income) which was not duly stated in the tax return (whereby only higher amounts, i.e. above the threshold shall be considered).

The principle should consist in the authorization of the tax administrator to ask the tax payer believed to have an increase in his assets (income) which was not properly taxed to clarify this discrepancy. But if the taxpayer does not provide such clarification concerning his income, the tax administrator is entitled to determine the tax by using the "administrative estimate" accompanied by the imposition of a penalty amounting to 50% or 100% of the tax determined by this method. As mentioned above, the envisaged legislation is perceived more as a preventive tool. Moreover, it is necessary to take into account that it is a very controversial topic from the political point of view, and the question is whether the lawmakers will find the necessary consensus for approving this legislation. In every case, this is one of the instruments based on which the state hopes to increase the efficiency of tax collection and reduce corruption as well as other similar actions of tax payers.

5. Procedural level

It is clear that the substantive-law instruments cannot efficiently work without an adequate regulation on a procedural level. Regarding this matter, it is suitable to mention in particular two novelties of the Tax Procedure Code[11] – the delegation of a territorial jurisdiction and a proposed republic-wide territorial jurisdiction that would apply when carrying out the activity of searching and/or inspecting (this instrument aims at the effectiveness of the tax inspection).

First of all, there is the already effective amendment regarding the territorial jurisdiction of the tax authority (a so-called delegation) that enables the territorial jurisdiction to be altered according to the place where genuine economic activity is being carried out, i.e. not according to the registered seat as such regulation led to numerous

11 Act No. 280/2009 Coll., Tax Procedure Code, as amended.

cases of incorporation of companies in places with many residents which resulted in the decrease of probability that the random tax inspection (and other procedures relating to tax administration) would be carried out[12]. Another element contributing to the effectiveness of a particular instrument is the impossibility to use remedial measures that may possibly challenge the decision on the delegation of territorial jurisdiction.

Another proposed instrument aiming at increasing the effectiveness of tax collection is the repeal of the territorial jurisdiction of tax authorities provided that these carry out the search and/or inspection. This measure closely relates to the aforementioned possibility of delegation and it, according to the explanatory memorandum[13], presupposes the fact that the personnel working with tax authorities is employed more effectively and that the inspection procedures are spread equally within the tax administration and that the fight against these so-called VAT carousel frauds is more effective.

6. Criminal Law Aspects

Nowadays, legislators seem to be fully aware of the fact that combating tax evasion is inevitable not only with regard to financial law but also at the level of criminal law. Two instruments are to be mentioned here, the first being the "Tax Cobra" team and the second being the proposed criminalization of preparation of the crime of *Curtailment of taxes, fees, and similar mandatory payment*[14].

The Tax Cobra team is composed of three segments – the Police of the Czech Republic, the Tax Administration, and the Customs Administration (namely the representatives of the General Financial Directorate, General Customs Directorate, and the Unit for Combating Corruption and Financial Crime). It is a group of experts of various areas

12 E.g. in some districts in Prague on average once per 200 years, while in some other parts of the Czech Republic once per 15 years.

13 See more at Psp.cz. [online]. 2016. [cit. 2016-04-18]. Sněmovní tisk 717. Retrieved from: http://www.psp.cz/sqw/historie.sqw?o=7&T=717

14 See more at Psp.cz. [online]. 2016. [cit. 2016-04-20]. Sněmovní tisk 458. Retrieved from: http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=458&CT1=0

of specialization (law, economics, IT, etc.) that deal with tax criminality, mostly in the area of indirect taxes. As the area of specialization of the individual components of the Tax Cobra is rather narrow, it enables the Cobra to detect the artificially created structures that exclusively aim at committing criminal activity[15]. It began to operate in June 2014 and to this day it has helped to prevent tax evasions to the amount of 4 billion CZK[16]. Moreover, the available data reveal that the effectiveness of its activity is still increasing.

Regarding the second measure, the proposed criminalization of preparation of the crime of *Curtailment of taxes, fees, and similar mandatory payment*, the principle that says that in case of tax crimes the criminal law measures should be applied as soon as possible applies. The preparation of the most serious tax crimes is already criminalized and the same applied to other tax crimes as well up until 2009. The legislator's effort to deter potential offenders in the very beginning, that is encouraged by the implementation of relatively strict sanctions for a preparation of such crimes, is clear. However, there are several problems relating to the chosen solution, the biggest one being perhaps the determination of the boundaries between tax optimization that is permitted by law, and the preparation, or even committing of a crime. A lack of the principle of subsidiarity of criminal repression as well as the fear of criminalization of the business environment and the distortion of the position of tax advisers and lawyers is often subject to objections.

7. Conclusion

From the brief overview of the instruments stated above it is clear that the current government takes the fight against tax evasion rather seriously. The most important changes can be perceived in the field of VAT, which is also a domain with the highest potential of tax collection increase. Nevertheless, direct taxes are affected too. It should be noted

15 See Danovakobra.cz. [online]. 2016. [cit. 2016-05-20]. Daňová kobra. Retrieved from: http://www.danovakobra.cz

16 See Financnisprava.cz. [online]. 2016. [cit. 2016-05-20]. Daňová kobra aktuálně. Retrieved from: http://www.financnisprava.cz/cs/financni-sprava/pro-media/danova-kobra/danova-kobra-zachranila-doposud-statnimu-rozpoctu-CR-pres-4-miliardy-korun-7084

that although the very idea of fighting tax evasion is built on sound foundations, instruments chosen for this goal arose emotions among the general (especially entrepreneurial) public and are thus perceived as somewhat controversial. The fact that most instruments have been introduced recently or are still waiting for their implementation makes it difficult to assess how they fulfil their function and thus improve the collection of taxes in the Czech Republic.

Abstract

The aim of this article is to briefly inform about the latest instruments for combating tax evasion in the Czech Republic since this is an area that the current government pays considerable attention to. I will discuss various instruments relating to indirect taxes (especially value added tax) and direct taxes. I will also briefly discuss some current procedural law aspects and criminal law aspects related to tax evasion.

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ONLINE GAMBLING TAXATION AND THE NEED FOR ITS REGULATION

Małgorzata Wróblewska[1]

1. Introduction

Gambling has always accompanied mankind and has been associated with the sacrum and the profane[2]. It has been present in many different cultures, appearing in the great Sanskrit Mahabharata[3], the Bible[4], the Quran[5] and other works such as Greek and Roman mythology[6]. The topic of gambling is very curious and controversial as it is connected with entertainment, political intrigue and "dirty money". Today the gambling sector is often seen negatively with many religions prohibiting it even though legal regulations allow it. Regardless of the risks which are inherent to the gambling phenomenon, it has been a part of the human experience and will undoubtedly remain so. This is why I am so interested in the topic of "sin tax" and its implications for the legal framework.

Before identifying the main issues involved, it is necessary to define the term gambling which has its etymology in the Middle English word *gammlen* meaning to play or be merry. In Polish, on the other hand, the

1 Gdansk University, Faculty of Law and Administration (Poland).

2 B. Wojewódzka, Hazard – zabawa, gra, namiętność, "Świat Problemów" 2012, No. 4.

3 The Mahabharata view, god Siva with his wife by playing dice affect the fate of the world.

4 It is not a simple issue to answer if gambling is a sin according to the Bible. There is an absence of single commandment in this case but this is wrong because it violates other biblical principles. The Bible does warn people to stay away from the love of money (Hebrews 13:5) and encourages to stay away from endeavor to "get rich quickly" (Ecclesiastes 5:10).

5 The Quran often condemns gambling and alcohol together in the same verse. They ask you [Muhammad] concerning wine and gambling. Say: In them is great sin, and some profit, for men; but sin is greater than profit (Quran 2:219).

6 Greeks and Romans were keen on dice devotees. The most famous dice players included Nero, Augustus, Caligula, Claudius I and Julius Cesar. R.A. Epstein, The Theory of Gambling and Statistical Logic, San Diego, San Francisco, New York, Boston, London, Sydney, Tokyo 1977, p. 126.

word *hazard* comes from the Arabic word *az-zahr* meaning dice or to throw a dice. The complexity of this topic means that it can be researched in various contexts[7]. Generally speaking, gambling is used to describe any game played for money in which, to a lesser or greater degree, the outcome is decided by fate. For internet gambling the term gaming is also used now.

According to The Cooperation Agreement between the gambling regulatory authorities of the EEA Member States concerning online gambling services signed in 2015 and updated in March 2016 (the Agreement), online gambling service means any service which involves wagering a stake with monetary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions that are provided by any means at a distance, by electronic means or any other technology for facilitating communication, and at the individual request of a recipient of services[8]. Online gambling is a profitable business and a rapidly developing sector of the market in the EU. In 2011, for example, income from this sector amounted to 9.3 billion Euro (10.9% of the overall gambling market), whereas this rose to 13 billion Euro in 2015 (14.2% of the overall gambling market)[9]. The expansion of the internet and other channels of data transfer (e.g. mobile phones, interactive TV platforms) has increased the possibilities of expanding such services across borders. The character of online activities means that gambling sites may operate in the EU regardless of any control by the European regulations and European gamblers may also search across borders for online gambling services which may be prohibited in their home country. As a consequence, new challenges connected with the legal environment of the gambling sector including taxation have arisen. Thus this article attempts to answer the question as to whether current tax regulations are sufficient on the EU

7 According to the Encyclopedia of Psychopharmacology, gambling is placing something of value (usually money) at risk in the hope of gaining something of greater value. Encyclopedia of Psychopharmacology [ed.] I.P. Stolerman, L.H. Price, Berlin Heidelberg 2015, p. 698, http://link.springer.com.springerlink.han.wsb.gda.pl/referencework/10.1007/978-3-642-36172-2, [available on 01.06.2016].

8 This Agreement is not binding.

9 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. Towards a comprehensive European framework for online gambling. /COM/2012/0596 final/. 23.10.2012.

level and, if not, to identify the reason why and whether it is possible to introduce such regulations to ensure effective taxation of these activities.

2. The online gambling tax policy of the EU

The remote gambling market is relatively young and in the EU there are only rudimentary regulations which define the gambling sector. This is related to the regulations of the Treaty on the Functioning of the European Union (TFEU) such as Art. 49 TFEU (right of establishment) and Art. 56 TFEU (freedom to provide services) as well as case law of the Court of Justice of the European Union (CJEU). There are more than 7 million citizens in the EU who gamble online[10]. They can be at risk of addiction and are vulnerable to financial and identity fraud or privacy breaches. Since gambling is a very contentious issue, it is not regulated by secondary EU law (directives and regulations)[11]. Therefore, in the EU there is nothing specific to define this issue. In 2011 a Green Paper on online gambling in the Internal Market was adopted[12] stating that Member States are free to set up their own policy in this sphere, including taxation, but this must be in compliance with the Treaty regulations. The Commission Communication "Towards a comprehensive European framework for online gambling"[13] of 2012 also does not deal with this question in relation to specific regulations – it only mentions mutual cooperation. In 2016 the agreement was signed which does not amend or supersede any law or tax regulations within the jurisdiction of the authorities, nor does it affect other existing or future administrative cooperation arrangements between the authorities.

This means that a lack of the EU tax regulations is a result of two things: firstly, they are set by individual Member States because of their

10 http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8570&lang=pt [available on: 01.06.2016].

11 M. Arendts, A view of European Gambling Regulation from the perspective of private operators [in:] A. Littler, C. Fijnaut (eds.), The Regulation of Gambling: European and National Perspectives. The Netherlands 2007, p. 46.

12 Green Paper on online gambling in the internal Market of 24 March 2011 (COM(2011)0128 final).

13 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions. Towards a comprehensive European framework for online gambling /* COM/2012/0596 final *

margin of discretion in defining this sector. Of course it is important to remember that by using this discretion the Member States are obliged to respect the basic principles, such as non-discrimination, proportionality, consistency and transparency, which have been established by the CJEU. Secondly, Member States have sovereign power in the sphere of direct taxation. Moreover, this is a very sensitive area as it is linked to the so called "grey and black economy"[14].

This is especially true in States where such services are prohibited. The lack of a common fiscal policy for all Member States in the question of gambling has resulted in a disproportion in its treatment. In States where online gambling is permitted it is, therefore, taxed and contributes to the fiscal budget. On the other hand, in States where it is prohibited taxpayers participating in the grey economy do not contribute any taxes as their operations are illegal and difficult to control in the internet without borders. As a result, taxpayers in Member States where online gambling is legal are discriminated and treated less favourably against those taxpayers resident in countries where it is not.

There are different types of online gaming services permitted and, consequently, taxation, player protection and responsibilities of gaming rules vary in Member States. Thus differences in tax rates are considerable: for example 5% in Latvia, 5-10% in Lithuania, 20% in the Netherlands, 12% in Poland, 20% in Portugal, and 5-18% in Slovenia[15]. As a result, the tax income of Member States is reduced because the tax payer does not inform the relevant tax authorities of eventual financial gains.

My research indicates that the ECJ has dealt with the issue of cross border gambling services 28 times in the period 1992-2016[16] and this

14 The grey economy is defined as a market where operators with a licence to provide services issued by one of the Member States function in a different Member States. This means that the service provider operates in other Member States without the required licenses. A black economy is defined as a market where operators function without any licenses at all. Green paper on on-line gambling in the Internal Market (COM (2011) 321, Brussels 24.03.2011, p. 4. http://www.mf.gov.pl/documents/766655/1188990/zielona_ksiega_ke.pdf [available on 19.05.2016].

15 Address: http://wrocmydogry.pl/wp-content/uploads/2014/02/20140211_prezentacja-debata.pdf [available on 20.06.2014].

16 C-275/92 Schindler case, C-124/97 Läärä & Others case, C-67/98 Zenatti case, C-6/01 Anomar & Others case, C-243/01 Gambelli & Others case, C-42/02 Lindman case, C-153/08

shows that the topic is very sensitive, difficult and politically charged. The EU law stipulates that gambling services are covered by regulations on the free movement of services[17] and, therefore, service providers are also free to take advantage of these rights[18]. This freedom cannot, however, lead to a distortion in the market as the market is a common good deserving special protection. However, the freedom of providing services can be limited in order to protect the overriding public interest as well as the coherence of the tax system. Furthermore, such a policy on the part of Member States must be proportional and applied in a systematic way. According to the CJEU, offering gambling services is treated as an economic activity. In the Lindman case[19], it was established that internal Finnish regulations infringe the right of taxpayers to take advantage of the freedom of services. In this particular case Finland introduced internal measures whose aim is to tax winnings resulting from lotteries organized exclusively in other Member States. I, therefore, agree with the position that entrepreneurs are differentiated between those whose registered office is located in the state they operate in and those who are active in any other Member State. As a result, this leads to the discriminatory treatment of entrepreneurs offering gambling services and paying tax legally in other Member States in comparison to those who operate analogically in a domestic market. In my opinion, the aim of setting internal regulations was to discourage domestic gamblers from using foreign services. Furthermore, this constitutes a limitation

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Commission the European Communities v. Kingdom of Spain case, C-344/13 and C-367/13 Blano and Fabretti Agenzia delle Entrate – Direzione Provinciale I di Roma – Ufficio Controlli case, C- 243/01 Piergiorgio Gambelli and Others case, C-338/04,C-359/04 &C-360/04 Placanica & Others case, C-42/07 Liga Portuguesa de Futebol Profissional &Bwin International (Santa Casa) case, C-203/08 Sporting Exchange & Others (Betfair) case, C-258/08 Ladbrokes Betting & Gaming and Ladbrokes International case, C-447 & C-448/08 Sjöberg & Gerdin case, C-409/06 Winner Wetten case, C-316/07 Stoß & Others case, C-46/08 Carmen Media Group case, C-64/08 Engelmann case, C-212/08 Zeturf case, C-347/09 Dickinger and Ömer case, C-72/10 and C-77/10 Costa and Cifone case, C-413/10 Pulignani case, C-176/11 HIT hoteli,, HIT LARIX case, C-470/11SIA Garkalns case, C-660/11 C-8/12 Biasci & others case, C-390/12 Pfleger & Others case, T-601/11 Dansk Automat Brancheforening case, C-463/13 Stanleybet International Betting Ltd case.

17 M. Diaconu, International Trade in Gambling Services, The Netherland 2010, p.155.

18 R. Szudoczky, Hungary: Hervis (C-385/12), Berlington Hungary (C-98/14), Delphi Hungary (C-654/13) [in:] ECJ- Recent Developments in Direct Taxation 2014 [ed.] M. Lang, P. Pistone, A. Rust, J. Schuch, C. Staringer, A. Storc, Wien 2015, p. 80.

19 C-42/02.

to consumers' rights to enjoy the freedom of movement of gambling services and cannot be justified by the common interest.

The best known cases on online tax gambling which have been considered are shown in table 1.

Table 1. The Cases of Gambling

No	Case	Judgement	Subject of proceedings
1.	C- 243/01 Reference for a preliminary ruling	Gambelli & Others 6.11.2003	Collection of bets on sporting events in one Member State and transmission by internet to another Member State.
2.	C- 243/01 Reference for a preliminary ruling	Piergiorgio Gambelli and Others 6.9.2003	Collection of bets on sporting events in one Member Sate and transmission by internet to another Member State.
3.	C-338/04 C-359/04 &C-360/04 Reference for a preliminary ruling	Placanica & Others 06.03.2007	Internet Gambling. Games of chance. Collection of bets on sporting events – Licensing requirement
4.	C-42/07 Reference for a preliminary ruling	Liga Portuguesa de Futebol Profissional &Bwin International (Santa Casa) 08.09.2009	Offer of games of chance via the internet.
5.	C-203/08 Reference for a preliminary ruling	Sporting Exchange & Others (Betfair) 03.06.2010	Games of chance. Offer of games of chance via the internet
6.	Case C-258/08 Reference for a preliminary ruling	Ladbrokes Betting & Gaming and Ladbrokes International 03.06.2010	Games of chance. Offer of games of chance via the internet.
7.	C-447 & C-448/08 Reference for a preliminary ruling	Sjöberg & Gerdin– 08.07.2010	Offer of gambling via the internet.

8.	C-72/10 C-77/10 Reference for a preliminary ruling	Costa and Cifone 16.02.2012	Collection of sports bets . Tax revenue. Gaming online.
9.	T-601/11 Actions for annulment	Dansk Automat Brancheforening 26.09.2014	Taxes on online gaming .State Aid.

http://ec.europa.eu/taxation_customs/common/infringements/case_law/index_en.htm, [available on 2014-05-10].

The Dansk Automat Brancheforening is one of the best known cases in online gaming. In 2010, Denmark launched new legislation on gaming taxation, depending on whether it is offered online or offline. Online operators pay a tax of 20% of gross gaming revenues whereas the current land-based casino operators are taxed as much as 70%. On September 26, 2014, the EU General Court issued that Denmark's measure constituted State aid within the meaning of Article 107(1) TFEU on operators of those games established in Denmark and created a tax advantage. This measure is compatible with the internal market because the positive effect of the liberalization of the Danish gaming sector outweighs potential distortion of competition. The decision of the EU General Court is a green light for the liberalization of Member States' gambling markets by applying a lower tax for online services in comparison with land-based services (e.g. Spain). From my point of view, the Commission's decision showed that the online gambling market should not only be open, but that it is acceptable to tax it with a lower rate as well.

VAT on gambling services is a different issue. In the EU any transaction between companies for a consideration other than the supply of goods is regarded as a service which should be taxable. The broad definition of exemption is included in the VAT Article 135(1)(i) of the EU VAT Directive because it foresees an exemption for betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State. Games that are not included in this definition, such as pinball machines and internet games, are subject to VAT which is payable by EU providers in their Member

State of establishment. However, the Commission decided that sports betting agents are not exempt from VAT[20]. From 1 January 2015, the EU launched changes related to the tax on electronic services. Before this time, the VAT rules were related to a country's legislation in which their services were based. This meant that the gambling operators offered services from VAT free countries to avoid taxation. From January 2015, the place of taxation is determined by the location of the consumer rather than at the country of supply. This means that some online gambling operators are required to pay tax, while others continue to be exempt. I believe that such regulations fulfill the principle of the universality of taxation and will help to identify operators who offer their services. For customers there may be a reduction in competition on the market as operators functioning illegally will be eliminated.

3. The online gambling tax policy of Poland

The tax policy on online gambling in Poland is an ongoing question with constant changes in the legal framework because fragmented regulations have lead to insufficient tax revenues. The most significant change occurred on June 30, 2011, the amendment of the Act on Gambling Games dated November 9, 2009 adopted on May 26, 2011 ("Amended Act") came into force[21].This amendment was made in connection with the need to introduce technical regulations for which there was an obligation of notification. Provisions covered by the amendment were an attempt to adopt Polish law to the requirements of Directive 98/34 EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations[22]. Since the 2011 amendment only mutual bets have been permitted. Also, online gambling has been illegal since that date which constitutes particularly restrictive legislation compared to other EU Member States. Moreover,

20 C-231/07 case.
21 Journal of Laws No. 201, item 1540.
22 Official Journal L 204, 21/07/1998 P. 0037 – 0048. There is a dispute whether the Amended Act is in force because of a lack of the European Commission notification. If not, the restrictive online regulations are valid.

any revenues accrued by the companies organizing such online betting will be limited by a 12% turnover tax, which is obviously considered a very high tax rate for this kind of activity in comparison to the rest of Europe and despite the existence of a considerable illegal gambling sector, there are no government plans as yet to lower this rate.

In practice, this also means that Polish entrepreneurs can increasingly avoid restrictive internal regulations by setting up their activities in other Member States with more liberal online gambling regulations such as the UK or Malta. For Polish taxpayers who take advantage of online gambling services located in other Member States the consequences of doing so are a financial penalty, a maximum prison sentence of three years, or both. This is due to the fact that online gambling is illegal in Poland and is treated as a criminal activity. This arises from the CJEU ruling which provides that Member States are entitled to decide on this matter independently and, therefore, to prohibit their citizens for online gambling. From my point of view, this solution is unsatisfactory for a Member State's tax policy as no State has jurisdiction over another Member and, therefore, has no means of collecting tax revenues from online gamblers. A further complication stems from the fact that payment institutions used by online gamblers cannot collect information about their clients and pass this on to entrepreneurs organizing online gambling activities. Furthermore, restrictive online gambling legislation does not meet its aims, as the growth in online gambling is approximately 20% annually[23]. Another indication that this legislation is ineffective is the 2011 case when the Polish tax authorities attempted to penalize an online gambler. This case concerned the situation in which a Polish player gambled online repeatedly for short periods from 2009 to 2011. He received a five thousand PLN fine and had to pay court costs of five hundred PLN. He appealed because the Polish act did not come into force until 2011. As a result, the court returned the case to the tax authorities because it was unable to issue a decision. The proof given by the tax authority was not sufficient as it consisted of bank statements from 2009-2011 and these do not prove that someone gambled illegally in Poland and neither do they indicate when gambling was supposed to

23 https://www.pwc.com/gr/en/publications/assets/glob, [available on 01.06.2016].

take place. The court also conferred that legislation was binding since 2011.

Moreover, the weakness of the Polish regulations is highlighted by the fact that according to the Berlington case, during which the Court stated the following: "the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as a recipient from the services offered by a supplier established in another Member State without being hampered by restrictions (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraphs 33 and 34)"[24] and, therefore, Member States on whose territory online gambling is permitted cannot restrict their citizens from participating in online gambling organized from the territory of other Member States. From my point of view, because gambling such as Lotto is legal in Poland and games of chance may be offered together with the fact that the Polish government gains taxation from such activities, it cannot, therefore, prohibit its citizens from taking advantage of online gambling in other Member States.

4. Conclusions

Gambling remains a controversial subject, one conditioned by its cultural setting. Its online version also raises many doubts, especially with relation to the way data may be transferred beyond the borders of the participant's state of residence. The legislative initiatives carried out both on the EU level (the European Commission) as well as on the level of individual Member States (tax authorities) are not universally accepted. This is undoubtedly due to the fact that gambling involves large sums of money: thus its position is very heavily emphasized by the entrepreneurs who carry out their activities in this sector. Within the framework of a well-organized market (one in which the grey economy is limited to an absolute minimum), entrepreneurs may be the source of substantial revenue for the state budget and players will not hesitate to

24 C-98/14 Berlington case.

inform the relevant tax authorities of their taxable winnings. However, this is not as simple as it seems, as online gambling is an activity which can lead to addiction and is particularly dangerous for young people using the internet. For this reason, it is difficult to find a satisfactory compromise on whether to legalize gambling or not. Legalization can bring increased tax revenues but the social costs related to treating gambling addictions may outweigh these financial gains in the long term. This research may lead us to draw the following conclusions.

There is a lack of harmonized regulation in the area of gambling in the EU, creating a situation in which, because of the sovereignty of individual Member States, both liberal and restrictive systems sit side by side in the common EU market. This relates to the legality or not of online gambling as well as to the rates of tax imposed on these activities. In turn, this creates a disadvantageous state of affairs for citizens and entrepreneurs of Member States, who not only find themselves in an uneven playing field but may even perceive themselves as being openly discriminated against. As a result, the CJEU has been increasingly dealing with matters related to gambling. It is my assessment that actions aimed at harmonizing regulations in the area of gambling should be made at EU level.

Taxation on gambling is an unusually problematic issue. On the one hand, it affects the sovereignty of Member States in the area of direct taxation and, on the other, gambling is classified mainly as a service and is, therefore, bound up with the question of VAT. Some EU Member States have a betting and gambling tax, even on online activities (e.g. the Netherlands). In my estimation, high tax rates lead to a decrease in consumer protection and an increase in the extent of the grey economy.

Research shows that the Polish Act of Gambling has not discouraged Poles from gambling and betting online. The state budget has not been increased by extra tax or licensing charges on these activities. Also, income from advertising has fallen. An increase in the possibilities of taking advantage of gambling online would allow for the proper licensing of these activities and for the state to take control of this market. As a negative phenomenon, there has been a rise in illegal online gambling and as the cases concerning the attempts to penalize Polish

gamblers for doing so have shown, Polish regulations have proven to be largely ineffective in this endeavour. With this in mind, I believe that it is necessary to initiate steps to liberalize this market in order to minimize the extent of illegal activities in this segment of the economy.

Abstract

This paper deals with the problem of online gambling taxation. It covers the online gambling tax policy of the EU. Within the frames of this article the online gambling tax policy of Poland was also presented.

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PAYMENT OF LOCAL TAXES VIA PAYMENT INSTRUMENTS – REMARKS ON SOLUTIONS ADOPTED IN THE TAX ORDINANCE

Anna Zalcewicz[1]

1. Introduction

One of the elements of contemporary tax codes, or as commanded by Polish tradition of naming – Tax Ordinance, is the presence of tax payment method rules. As early as the Tax Ordinance of 15 March 1934[2], a separate section was included by the legislator with provisions addressing payment of tax and advances (Art. 103 of the Tax Ordinance of 15 March 1934). Provisions addressing such issues were included in successive decrees on tax obligations[3] as well as the 1980 Tax Obligations Act[4].

Payment of tax, both in cash and in non-cash forms, is the primary means of performing a tax obligation leading to its expiration. The importance of this fact influences the need to capture the issue in laws of fundamental significance for citizens which comprehensively regulate the weighty social issue of taxes; these laws generally take the form of tax codes.

Proceeding to the analysis of matters concerning the current solutions in effect for the payment of taxes via payment instruments, one

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2 Tax Ordinance of 15 March 1934, Journal of Laws of 1936 no. 14 item 134 with amendments
3 Decree of 16 May 1946 on tax obligations, Journal of Laws of 1946 no. 27 item. 173 with amendments; Decree of 26 October 1950 on tax obligations, Journal of Laws of 1950 no. 49 item 452 with amendments.
4 Tax Obligations Act of 19 December 1980, Journal of Laws of 1993, no. 108, item 486 with amendments.

notices the evolution of the provisions of the Tax Ordinance Act[5] which has taken place over its almost 20 years in force (it went into force on 1 January 1998). Intensive changes on the payment market have not failed to impact tax law solutions. The lawmaker has made successive amendments concerning the manner in which taxes may be remitted in cashless form from bank wires through payment cards, finally allowing for payment via payment instrument. It is worth noting that local self-government entities, via local law, were the first to introduce solutions facilitating the payment of taxes via payment card, and then through the use of other payment instruments.

Enabling the possibility of payment of tax in a cashless form requires the introduction of appropriate regulations addressing such issues as the moment acknowledged as the day of payment of tax. This is important when considering the consequences of late payment of taxes on the one hand, while on the other, the extensive diversity of entities which can serve as payment intermediaries (including those with their seat outside the borders of Poland). The Polish legislator, however, also decided to regulate other issues, such as fees and provisions associated with payment via payment instrument.

In Poland at present (after amendments to the Tax Ordinance on 1 January 2009[6], which allowed for the first time payment of taxes and charges constituting the income of communes, counties and provinces[7] via payment card; separate legislation has addressed some issues concerning payment in a cashless form) the legislator allows for the payment of taxes and fees to local self-governments via various payment instruments, with some detailed solutions adopted for the execution of such payment. This paper will discuss the rules for making payment of local self-government taxes within the framework of the concepts adopted in the provisions of the Tax Ordinance.

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5 Tax Ordinance of 29 August 1997, consolidated text: Journal of Laws of 2015 item 613 with amendments.

6 Changes introduced via the Act of 7 November 2008 on amendments to the Tax Ordinance and some other acts, Journal of Laws of 2008 no. 209, item 1318.

7 According the Constitution of the Republic of Poland (Art. 164) "The commune (gmina) shall be the basic unit of local self-government". The county (powiat) and province (województwo) are other units of local self-government in Poland.

2. Payment of tax – general principles

It is accepted that the primary manner of performing tax obligations is payment in either cash or cashless form[8] (however, the legislator does not say this explicitly, and points to Art. 59 § 1 of the Tax Ordinance alongside a range of other possible ways of extinguishing tax obligations). At the same time, the legislator essentially allows the taxpayer to choose the form of payment; this choice is, at times, limited or disallowed (see Art. 61 § 1 Tax Ordinance). These rules apply both to taxes which contribute to the state budget as well as those constituting income of particular units of local self-government. An exception in this respect is payment by so-called "other payment instrument", as the possibility of the taxpayer taking advantage of it for payment of local self-government taxes is a decision of the appropriate organs of a given local self-government unit (Art. 61a Tax Ordinance).

In seeking to establish the rules for the performance of payment via payment instrument, including the scope of freedom afforded to local self-government units to determine the manner in which their taxes may be paid, it is necessary to determine the meaning of the terms "payment instrument" and "other payment instrument" as understood by the Tax Ordinance.

3. The concepts of a "payment instrument" and "other payment instrument" in the light of the Tax Ordinance

Determination of the meaning of the concepts "payment instrument" and "other payment instrument" must take into account both the provisions of the Tax Ordinance and the Payment Services Act[9]. The complementary application of these laws is essential, as the Tax Ordinance does not define the concept of a payment instrument

8 Compare, e.g., B. Deuter, Komentarz do art. 59, in: S. Babiarz, B. Dauter, B. Gruszczyński, R. Hauser, A. Kabat, Ordynacja podatkowa. Komentarz, Warszawa 2015, http://sip.lex.pl; A. Gomułowicz, J. Małecki, Podatki i prawo podatkowe, Warsaw 2011, p. 371; R. Mastalski, J. Zubrzycki, Ordynacja podatkowa. Komentarz, Wrocław 1998, p. 60.

9 Payment Services Act of 19 August 2011, Journal of Laws of 2011 no. 199, item 1175 with amendments.

(whereas the Payment Services Act does); however, the Tax Ordinance does make use of a concept not included in the Payment Services Act, id est the term "other payment instrument".

Analysing first the provisions of the Tax Ordinance, it should be held that, for tax law purposes, the lawmaker distinguishes two types of payment instruments (Art. 60 § 1(2) Tax Ordinance): transfer order and other payment instrument. In respect of the latter, the lawmaker simply defines it as "a payment instrument other than transfer order". In seeking an answer to the question of what a "payment instrument" is, we should invoke the legal definition contained in the Payment Services Act adopted pursuant to Directive 2007/64/EC[10]. In accordance with legal acts regulating payment services, "'payment instrument' means any personalised device(s) and/ or set of procedures agreed between the payment service user and the payment service provider and used by the payment service user in order to initiate a payment order"[11]. This means that the law allows for the initiation of a payment order and execution of payment. Among payment instruments, mention is made of electronic payment instrument such as payment cards as well as electronic money instruments (e.g. electronic wallet). Payment instrument is also every other procedure which facilitates the execution of a payment transaction (e.g. in the case of internet banking: a client ID number established for this purpose along with an individualized password, access codes)[12].

Therefore, under the Tax Ordinance,"other payment instrument" means every payment instrument apart from transfer order[13].

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10 Directive 2007/64/EC of the European Parliament of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319, 5.2.2007, p. 1.

11 Art. 4, p. 23 Directive 2007/64/EC.

12 B. Bajor, Instrument płatniczy, in: A. Zalcewicz, B. Bajor, Ustawa o usługach płatniczych. Komentarz, Warsaw 2016, p. 64-65. The literature also indicated electronic banking services as an electronic payment instrument, M. Grabowski, Instrumenty płatnicze, Warsaw 2013, p. 188.

13 It can be pointed out that in the scholarly literature, classifying this as a transfer order on the basis of provisions regulating payment services has proven controversial. There are views stating that on the grounds of the Payment Services Act, the particular payment services such as those listed in Art. 60 § 1(2) of the Tax Ordinance do not constitute payment instruments (M. Grabowski, Ustawa o usługach płatniczych. Komentarz, Warsaw 2012, p. 19), although in the context of electronic banking, in the case of a transfer order there are grounds for classifying it as a payment instrument; these include inter alia the fact of using a remotely accessible application (M. Grabowski, Instrumenty płatnicze w prawie polskim, Warsaw 2013,

4. Types of payment instruments that may be used to pay local taxes

Adopting the method employed by the Tax Ordinance, the first and the sole specifically identified payment instrument that may always be used to remit local self-government tax payments is the transfer order[14] (as previously mentioned, in cases set out in Art. 61 § 1 of the tax form, it is obligatory to make payment in this way). In accordance with the Banking Law, "credit transfer shall constitute an instruction of a debtor given to bank to debit their account with a specified amount and credit the creditor's account with that amount" (Art. 63c Banking Law[15]).

However, the remaining instruments (so-called "other payment instruments") may be used for payment of tax only upon an explicit decision to permit payment of taxes constituting the income of a commune, county, or province, respectively, via a specific payment instrument (taken by the communal council, county council or provincial assembly, respectively). These organs may also freely determine what type of payment instruments can be used for the payment of taxes.

Among the so-called "other payment instruments" we may also include various types of payment cards used for executing payment.

The legal definition of a payment card is contained in Art. 2(15a) of the Payment Services Act. This is a card facilitating the disbursement of cash or facilitating the submission of a payment order via an acceptor or a settlement agent, accepted by an acceptant in order to receive sums due to him. In practice, there are many different types of payment

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http://depotuw.ceon.pl/bitstream/handle/item/327/Instrumenty%20P%c5%82atnicze%20w%20prawie%20polskim.pdf?sequence=1), and also that electronic transfer order is treated as an electronic payment instrument (D. Cyman, Elektroniczne instrumenty płatnicze a bezpieczeństwo uczestników rynku finansowego, Warsaw 2013, p. 82). Presently, however, in accordance with the case law of the Court of Justice and the verdict of 9 April 2014 in the case C-616/11, T-Mobile Austria GmbH v. Verein für Konsumenteninformation, it is held that "the ordering of a transfer by transfer order form signed by the payer in person represents a set of procedures agreed between the user and the payment service provider and used by the user in order to initiate a payment order, and therefore constitutes a payment instrument".

14 In respect of this instrument, the legislator does not give organs of local self-government the right to allow payment in that form.

15 Act of 29 August 1997 – Banking Law (consolidated text: Journal of Laws of 2015 item 128, as amended).

cards, such as debit card, credit card, and charge card[16] (although the Payment Services Act defines only the concepts of debit card and credit card). Cards may be in material form (plastic card) or in digital form exclusively (virtual card).

Secondly, among payment instruments it is necessary to mention the instrument of electronic money. It may appear in various forms (cards or special software). This category also includes so-called electronic wallets.

The aforementioned payment instruments are the most commonly-occurring electronic instruments but it should be kept in mind that, in constructing the legal definition of a payment instrument, the legislator has adapted it to the specificity of the payment market, meaning creativity in the development of new solutions. This makes it difficult to list all devices and procedures facilitating the execution of a payment transaction and qualifying as a payment instrument. It can only be pointed out that in both the literature and in practice various categorizations of payment instruments are offered, such as: paper, card, and electronic (including mobile) instruments.

In analysing local laws, it can be stated that in Poland some communes have allowed for the possibility of payment of local self-government taxes via payment card[17] as well as "payment instrument"[18].

16 See, e.g., D. Cyman, Elektroniczne instrumenty płatnicze a bezpieczeństwo uczestników rynku finansowego, Warsaw 2013, p. 74; R. Kaszubski, Ł. Obzejta, Karty płatnicze w Polsce, Warsaw 2012, p. 61-79.

17 See, e.g., Resolution no. 412/XXIX/2012 of the Rybnik City Council of 19 December 2012 on payment of taxes and charges constituting income to the budget of the city of Rybnik via payment card, OJ Governor of Silesia of 23 January 2013, item 793; Resolution no. 52/15 of the Świeć City Council of 26 March 2015 on permissibility of payment of taxes constituting income of the communal budget of Świeć via payment card, OJ Governor of Kujawsko-Pomorskie of 31 March 2015 item 991; Resolution no. XV/172/2015 of the Margonin City and Commune Council of 12 November 2015 permissibility of payment of taxes constituting income of the communal budget of Margonin via payment card, OJ L Governor of Wielkopolska of 24 November 2015, item 7119.

18 For example, in 21 communes of the Katowice agglomeration it is possible to pay taxes via the Silesian Public Services Card, see e.g. Resolution no. 33/VII/2015 of the Sosnowiec City Council of 29 January 2015 on permissibility of payment of taxes via payment instrument, OJ Governer of Silesia of 3 February 2015, item 482.The relevant resolutions permitting payment via payment instrument have also been undertaken by some county organs (e.g. Resolution no. XVI/93/2016 of the Toruń County Council of 31 March 2016 on permissibility of payment of taxes constituting income of the communal budget of Toruń County via payment instrument); however, it must be remembered that local self-government taxes are not collected by the county budget, only some charges and fees.

However, it should be emphasized that in reality the possibility of executing payment of a tax using a given payment instrument will depend not only on the adoption of an appropriate resolution by the authorized organ of local self-government, but also the possession of appropriate devices and technical solutions facilitating the performance of such payments.

5. Term of payment of tax with the use of a payment instrument and costs of fees and provisions associated with such payment

The provisions of the Tax Ordinance (Art. 61a § 2) state that in the case of payment via a payment instrument, the term for the payment of the tax is held as the day on which the taxpayer's, tax remitter's or tax collector's account is debited, or an account in a bank or savings and credit union other than a payment account, or the day on which funds are debited from an electronic money instrument.

It should be observed that the day on which the aforementioned account of the taxpayer, tax remitter, or tax collector is debited need not be the same day on which the relevant local self-government entity's account is credited. Pursuant to the provisions of the Payment Services Act, the payment service provider is obliged to effect the crediting of the recipient of the sum from a payment transaction initiated by the entity submitting the payment order not later than by the end of the next business day following the receipt of the order[19]. In other words, crediting the appropriate account of the local self-government unit should take place not later than the end of the business day following the initiation of the payment (so-called D+1 term). In order to protect the interests of local self-government entities, the Payment Services Act (Art. 55) establishes the obligation to pay to the benefit of the relevant

19 Regulations address the concept of "a business day", which is "the day on which the relevant payment service provider of the payer or the payment service provider of the payee involved in the execution of a payment transaction is open for business as required for the execution of a payment transaction" (Art. 4(27) Directive 2007/64/EC); in Poland, the legislator defines a business day under the Payment Services Act as the working day of either the payer's payment service provider or the receiver's payment service provider (Art. 2(5) Payment Services Act).

local self-government entity interest equivalent to the default interest of tax arrears in the event of failure of the payment service provider to perform a payment transaction in a timely manner (bank, spółdzielcza kasa oszczednościowo-kredytowa (savings and credit union), etc.)[20].

Other solutions are introduced by the lawmaker in the case of a transfer order from the bank account of a taxpayer in a bank or credit institution, or the payment account of a taxpayer in an EU payment institution or EU electronic money institution without its seat or branch in the territory of Poland. In this case, the term for payment of the tax is held to be either the day on which the taxpayer submits the payment order (assuming the D+1 term is observed) or the day on which the sum is credited to the appropriate bank account of the local self-government entity (in the event D+1 is not observed). In this case, the risk of failure to observe the term is born by the taxpayer, and it is he who will bear the consequences of untimely payment of tax.

Another issue regulated by the Tax Ordinance is that of the costs of fees and provisions associated with payment via a payment instrument. This matter was not previously regulated in the Tax Ordinance, but as of 1 January 2016 the lawmaker has introduced regulations determining that the taxpayer shall bear the costs of fees and provisions associated with payment via payment instrument (prior to the performance of payment of tax via payment instrument the taxpayer is informed of the collection and amount of fees and provisions for payment via that instrument).

6. Summary

Regulation of matters concerning the payment of local taxes via payment instruments is a component of concepts contained in both historical and contemporary tax codes. However, one may observe an evolution of the scope of regulated material which, on the one hand, has led to an expansion of the catalogue of payment instruments that

20 The provisions of the Tax Ordinance concerning a tax collector are applied to liability of the payment service provider for failure to perform the obligation of crediting the account in the appropriate term (Art. 55(3) of the Payment Services Act).

can be used to pay tax. On the other hand, local self-government entities have obtained a certain scope of autonomy in defining the payment instruments that can be used to pay local taxes.

In assessing the existing solutions, it should be pointed out that, at present, the biggest problem results from the necessity of the taxpayer bearing the costs of fees and provisions associated with the payment of tax via a payment instrument. Considering the various solutions applied in the collection of fees from the acceptor of payment via payment instrument by entities operating given systems, it is necessary when performing payment of tax via payment instrument to pay in cash an appropriate sum covering the cost of all fees and provisions. It would thus seem justified in this case to introduce the possibility of collecting so-called surcharge for payment by payment card in such a manner as to cover all costs of fees and provisions associated with such a payment.

It should also be noted that contemporary tax law regulations serve not only to ensure the proper performance of tax liabilities. They should also contribute to achieving other objectives. In the case of permission to perform payment via payment instruments, this means support for the development of cashless transactions as well as limiting the administrative costs associated with the use of cash[21].

Abstract

This paper deals with the payment of local taxes via payment instruments from the perspective of newly adopted solutions in the tax ordinance. General payment of tax and the concepts of a "payment instrument" and "other payment instrument" in the light of the Tax Ordinance were presented in this article. The paper also depicts the types of payment instruments that may be used to pay local taxes. Attention is also paid to the term of payment of tax with the use of a payment

21 Circular no. 3462 of the Government draft bill to amend the Tax Ordinance and some other acts, justification, Sejm VII Term, http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3462. However, it should be noted that in introducing provisions allowing for payment via payment card of taxes constituting income to the budgets of local self-government entities, the justification invoked is "meeting the expectations of self-government practitioners", circular no. 951 of the Government draft bill to amend the Tax Ordinance and some other acts, justification, Sejm VI Term, http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/951

instrument and costs of fees and provisions associated with such payment.

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