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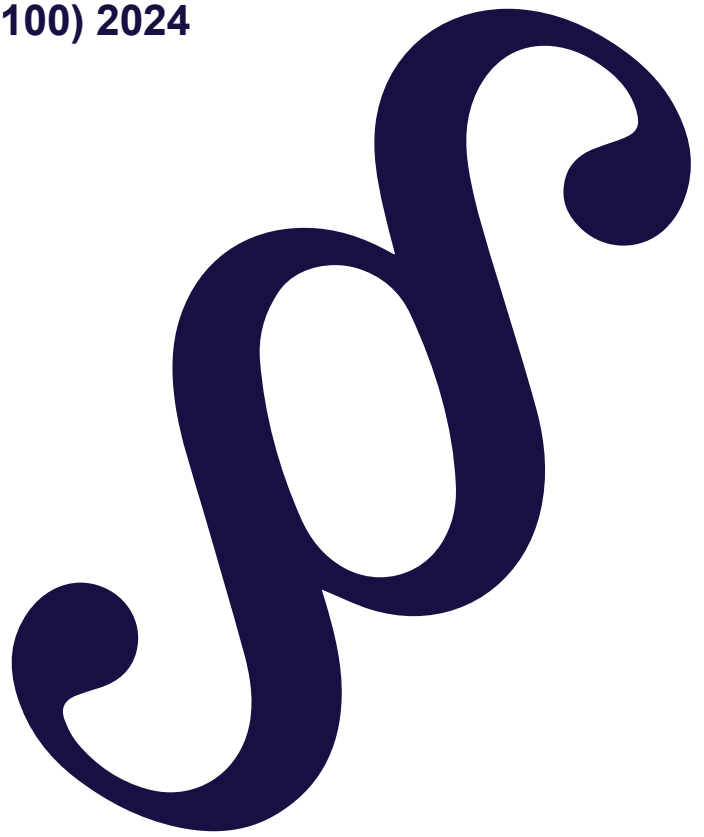

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Studies and articles / Studia i artykuły

STUDIA PRAWNICZE KUL
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On the need to guarantee deposits of local government units – a discussion against the resolution of Podkarpacki Bank Spółdzielczy in Sanok

O potrzebie objęcia ochroną gwarancyjną depozytów jednostek samorządu terytorialnego – rozważania na przykładzie przymusowej restrukturyzacji Podkarpackiego Banku Spółdzielczego w Sanoku

О необходимости распространения гарантий по вкладам на субъекты местного самоуправления – обсуждение на примере принудительной реструктуризации Подкарпатского Кооперативного Банка в Саноке

Про необхідність забезпечення гарантійного захисту вкладів органів місцевого самоврядування – міркування на прикладі примусової реструктуризації Підкарпатського кооперативного банку у Сяноку

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Summary: Local government, as a form of organizing local public life, participates in the exercise of public authority. Local government units (hereinafter: LGUs) run their own financial management and use specific financial outlays to carry out their responsibilities. They are also participants in the financial market and keep their free funds in bank accounts. The research conducted for the purposes of this study concerned the effects of excluding local government units from the deposit guarantee system. It attempts to assess the lack of guarantee protection of local government units in the context of compulsory restructuring conducted by the Bank Guarantee Fund (hereinafter: BFG). The dogmatic-legal method and the case study method were used. The research results allow us to conclude that the lack of protection of local government deposits is an important problem, and the applicable legislation does not provide due procedures, for example, in the selection of the right bank.
Key words: LGUs, deposit guarantee, banking services, banking market

Streszczenie: Samorząd terytorialny, jako forma organizacji lokalnego życia publicznego, uczestniczy w sprawowaniu władzy publicznej. Jednostki samorządu terytorialnego prowadzą własną gospodarkę finansową i wykorzystują określone nakłady finansowe do realizacji swoich zadań. Są także uczestnikami rynku finansowego, a posiadane wolne środki przechowują na rachunkach bankowych. Badanie prowadzone na potrzeby niniejszego opracowania dotyczyło skutków wyłączenia jednostek samorządu terytorialnego z systemu gwarantowania depozytów. Ich celem była próba oceny braku ochrony gwarancyjnej jednostek samorządu terytorialnego w kontekście przymusowej restrukturyzacji prowadzonej przez Bankowy Fundusz Gwarancyjny. W artykule posłużono się metodą dogmatyczno-prawną oraz studium przypadku. Otrzymane wyniki pozwalają wnioskować, że zagadnienie braku ochrony depozytów jednostek samorządu terytorialnego jest ważnym problemem, a obowiązujące ustawodawstwo nie zapewnia należytych procedur chociażby w zakresie wyboru właściwego banku.
Słowa kluczowe: jednostki samorządu terytorialnego, gwarancja depozytów, usługi bankowe, rynek bankowy

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Резюме: Местное самоуправление, как форма организации местной общественной жизни, участвует в осуществлении публичной власти. Субъекты местного самоуправления самостоятельно управляют своими финансами и используют определенные финансовые ресурсы для выполнения своих задач. Они также являются участниками финансового рынка и хранят свободные средства на банковских счетах. Исследования, проведенные в рамках данной статьи, касались последствий исключения субъектов местного самоуправления из системы гарантирования вкладов. Их целью была попытка оценить отсутствие гарантийной защиты субъектов местного самоуправления в контексте принудительной реструктуризации, проводимой Банковским гарантийным фондом. В статье использовался догматико-правовой метод и метод кейс-стади. Полученные результаты позволяют сделать вывод о том, что проблема отсутствия защиты вкладов субъектов местного самоуправления является актуальной, а действующее законодательство не обеспечивает надлежащих процедур, в том числе и в отношении выбора подходящего банка.

Ключевые слова: субъекты местного самоуправления, гарантии по вкладам, банковские услуги, банковский рынок

Резюме: Місцеве самоврядування, як форма організації локального суспільного життя, бере участь у здійсненні публічної влади. Органи місцевого самоврядування здійснюють власне фінансове управління і використовують певні фінансові ресурси для виконання своїх завдань. Вони також є учасниками фінансового ринку і зберігають свої вільні кошти на банківських рахунках. Аналіз, проведений для цілей цього дослідження, стосувався наслідків виключення органів місцевого самоврядування із системи гарантування вкладів. Його метою була спроба оцінити відсутність гарантійного захисту органів місцевого самоврядування в контексті примусової реструктуризації, проведеної Банківським гарантійним фондом. У статті використано догматико-юридичний метод та метод аналізу конкретних ситуацій. Отримані результати дозволяють зробити висновок, що питання відсутності захисту вкладів органів місцевого самоврядування є важливою проблемою, а чинне законодавство не передбачає належних процедур, принаймні щодо вибору відповідного банку.

Ключові слова: органи місцевого самоврядування, гарантування вкладів, банківські послуги, банківський ринок

Introduction

Local government units (LGUs), as participants in the banking market, hold bank accounts used for their operations. It should be noted that current legislation establishes specific rules for concluding bank account agreements by LGUs. Upon entering into a bank account agreement, an LGU becomes a depositor. At the same time, it is important to emphasize that LGUs, as participants in this market who leave idle funds in banks as deposits (under the terms and conditions of the agreement), are not subject to deposit guarantee protection. Deposits held in all domestic banks (except for Bank Gospodarstwa Krajowego) and in credit unions are guaranteed by the Bank Guarantee Fund (BFG).

Regulations that pertain to the financial aspects of LGU activity are enshrined in the Constitution of the Republic of Poland of 2 April 1997[1] and other acts.[2] We also need to point to the regulation of the European Charter of Local Self-Government.[3] Moreover, under Article 264 of the Public Finances Act of 27 August 2009,[4] banks handle the banking-related needs of LGUs. The research problem centres around issues also regulated in the Act of 10 June 2016 on the Bank Guarantee Fund, the deposit guarantee scheme and resolution.[5]

The research problem pertains to the lack of deposit guarantee protection for LGUs and focuses on considerations regarding possible changes in this area. The research area primarily covers legal aspects regulated by the Act on the BFG, the Public Finance Act, and the Public Procurement Law. Secondly, this area was extended to include the consequences of the first forced restructuring carried out by the BFG.

1. Local government units as participants in the banking market

The LGU-bank relation is bilateral. On the one hand, local governments use the services offered by banks, mainly depositing their funds in bank accounts or obtaining returnable sources of financial support. Thus, they become participants in the banking market. On the other hand, banks value providing services to LGUs mainly because they are stable, reliable, and have certain customers.[6] LGUs are considered safe bank customers with permanent cash inflows.[7] The European Charter of Local Self-Government emphasizes that local communities should have access to the offer of the capital market. Thanks to this, they will primarily be able to finance

1 Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483 as amended (hereinafter: Polish Constitution).

2 Commune Self-Government Law of 8 March 1990, consolidated text: Journal of Laws 2023 item 1688 as amended; Poviat Self-Government Law of 5 June 1998, consolidated text: Journal of Laws 2023 item 572 as amended; Voivodship Self-Government Law of 5 June 1998, consolidated text: Journal of Laws 2023 item 1688 as amended.

3 European Charter of Local Self-Government, Strasbourg, 15.10.1985, Journal of Laws 1994 no. 124, item 607.

4 Consolidated text: Journal of Laws 2024 item 1089 as amended.

5 Consolidated text: Journal of Laws 2023 item 1843 as amended (hereinafter: BGF Act).

6 Cf. A. Czajkowska, *Obsługa finansowa jednostek samorządu terytorialnego w strategiach banków*, Acta Universitatis Lodziensis. Folia Oeconomica 2006, no. 197, p. 207.

7 Najwyższa Izba Kontroli, Delegatura w Bydgoszczy, Informacja o wynikach kontroli bankowej obsługi wybranych jednostek samorządu terytorialnego, Bydgoszcz 2011, p. 4.

investment.[8] From the point of view of a bank's activity, the most optimal banking services include running a bank account, crediting current and investment activity, deposits, guarantees and organization of issuance of communal bonds. Maintaining a bank account is the starting point for such comprehensive care.[9] The doctrine notes that the legislator obliges local government units to have a bank account, but this involves encumbering their funds with risk.[10]

Local government units satisfy essential social needs, such as education, administration, local transport, or access to cultural institutions. Under Article 264 of the Public Finances Act, banking services for LGU budgets are delivered by a bank selected on terms specified in the Act of 11 September 2019 – Public Procurement Law.[11] The rules for providing banking services are specified in an agreement between an LGU and a bank. The Public Finances Act does not include a definition of the concept of "providing banking services to LGU budgets," which is why the literature points out that this term should accommodate all financial services necessary for the proper functioning of an LGU's budget.[12] The provision of banking services to the LGU budget should not include accounts of separate units that have legal personality. The Regional Chamber of Audit in Poznań, among others, shares this view.[13] The tender for choosing a bank is announced and carried out by the commune head, mayor, president of the city, poviat head or voivodship marshal.

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8 W. Miemiec, *Europejska Karta Samorządu Terytorialnego jako zespół gwarancji samodzielności finansowej gmin – wybrane zagadnienia teoretyczno-prawne*, in: *Funkcjonowanie samorządu terytorialnego – doświadczenia i perspektywy*, ed. S. Dolata, Opole 1997, p. 202.

9 Najwyższa Izba Kontroli, Delegatura w Bydgoszczy, Informacja o wynikach kontroli bankowej obsługi…, p. 4.

10 M. Mikliński, *Rachunki bankowe jednostek samorządu terytorialnego w świetle ryzyka*, in: *Wyzwania dla jednostek samorządu terytorialnego wynikające z nowelizacji ustaw: o finansach publicznych i o utrzymaniu czystości i porządku w gminach*, eds. J. Gliniecka, S. Obuchowski, T. Sowiński, Warszawa 2021, p. 157.

11 Consolidated text: Journal of Laws 2023 item 1720 as amended.

12 M. Zdebel, *Bankowa obsługa budżetu jednostki samorządu terytorialnego a zasady otwierania i prowadzenia rachunków wspólnych*, in: *Verus amicus rara avis est. Studia poświęcone pamięci Wojciecha Organiściaka*, eds. A. Lityński, A. Matan, M. Mikołajczyk, D. Nawrot, G. Nancka, Katowice 2020, p. 885; W. Srokosz, *Bankowa obsługa budżetu jednostki samorządu terytorialnego*, Finanse Komunalne 2012, no. 5, p. 33.

13 The Regional Chamber of Audit in Poznań, in a post-audit letter to the commune head of the Turek Commune, noticed, i.a., irregularities relating to the conclusion of a contract for the provision of comprehensive banking services to the Turek Commune along with LGUs that it administers, which included the Commune Public Library in Słodków, which is a local government cultural institution with legal personality. According to the Chamber, it is a violation of Article 264 (1) of the Public Finances Act.

The Public Finances Act does not specify any requirements as to the agreement referred to above; therefore, provisions of the Act of 23 April 1964 – Civil Code[14] and the Act of 29 August 1997 – Banking Law apply.[15] Under Article 275 of the Polish Civil Code, by a bank account contract, a bank commits to a bank account holder (here LGU), for a fixed or a non-fixed term, to keep their cash and, if the contract so provides, to carry out, on their instructions, money settlements. Under Article 52 of the Banking Law, the opening of a bank account is made by executing a written contract with the bank. Moreover, it is worth noting that the statutes do not lay down all elements of the content of such a contract. One may only name its required elements. The literature emphasizes that by using the phrase "in particular," the legislator creates an open catalogue.[16]

Under Article 18 of the Public Procurement Act, the manager of the ordering party is responsible for the preparation and carrying out of the public procurement procedure. Other persons may also be responsible, but to the extent to which they are vested with activities related to the procedure and activities related to the preparation of the procedure. The manager of the ordering party may vest, through the power of attorney, ordinance or another internal act, the performance of specified activities, which in consequence will result in professional responsibility or liability for violation of the discipline of public finances of persons who receive such competences.[17] The subject of the order should clearly and comprehensively take into account all requirements and circumstances that may affect the making of offers by participating banks.[18] When choosing the best offer, the ordering party must consider the price or other criteria that refer to the subject of the order, in particular, the quality, functionality, technical parameters, operational costs, and service. The object of the order is described clearly and comprehensively by means of sufficiently precise and comprehensible terms and by taking into consideration all requirements and circumstances that may affect the making of the offer.

The objective of an LGU bank account is to collect funds that come from the incomes and revenues of this unit (also on account of loans and credits taken out). It is also used to handle expenditures and payments from the budget of a given unit.

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14 Consolidated text: Journal of Laws 2024 item 653 as amended (hereinafter: CC).

15 Consolidated text: Journal of Laws 2023 item 1941 as amended.

16 Z. Ofiarski, *Prawo bankowe*, Warszawa 2021, p. 232.

17 P. Granecki, *Prawo zamówień publicznych. Komentarz*, Warszawa 2012, p. 147.

18 E. Kowalewska, *Bankowa obsługa jednostek samorządu terytorialnego*, Ekonomiczne Problemy Usług 2018, no. 4 (133), p. 201.

Additionally, LGUs may enter into fixed-term deposit contracts and gather their available cash there.[19]

Comprehensive service provision for an LGU budget may include in particular:[20]

1) conclusion of a (current or auxiliary) bank account contract;
2) ongoing banking services that involve:
   a) handling in- and out-payments from bank accounts;
   b) executing cashless settlements;
   c) handling bank payments in the Banking System;
   d) Dissuing cash cheques;
3) ensuring interest rates for all funds located in the LGU's bank accounts;
4) locating available funds in short-term deposit accounts;
5) provision of gratuitous online electronic banking system;
6) providing a short-term credit in a current account.

Local government units often rely on repayable sources of financing, such as credits. This proceeds under Article 89 of the Public Finances Act. It needs to be noted that the sum of commitments taken out must not exceed the amount specified for a given year in the LGU's budget resolution. The objective of Article 89 of the Public Finances Act is to determine limitations on the LGU's taking out various commitments by, for example, referring to their financial standing. A high creditworthiness index is a measure of an LGU's good financial standing.[21] Legal scholars and commentators point out that creditworthiness is affected by macroeconomic indicators, including those beyond the LGUs' control, such as the economic situation or the state of public finances, and those dependent on the LGUs, that is, income or innovative potential, economic attractiveness.[22] The fact that LGUs are allowed and able to obtain repayable funds deserves credit.[23] Unfortunately, LGUs'

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19 M. Kaczurak-Kozak, *Księgowania w układzie sprawozdawczości finansowej*, p. 6, https://www.ksiegarnia.beck.pl/media/product_custom_files/1/7/17256-ksiegowania-w-ukladzie-sprawozdawczosci-finansowej-fragment.pdf [access: 11.11.2023].

20 Cf. source material: https://bipreszel.warmia.mazury.pl/zamowienie/164/kompleksowa-obsluga-bankowa-budzetu-gminy-reszel-od-dnia-01-stycznia-2021-roku-do-dnia-31-grudnia-2023-roku-oraz-jednostek-organizacyjnych-gminy-reszel-wchodzacych-w-sklad-struktury-organizacyjnej-gminy.html, https://bip.lesnica.pl/10971/142/ogloszenie-o-zamowieniu-w-trybie-podstawowym-bez-negocjacji-pn-kompleksowa-obsluga-bankowa-gminy-i-jej-jednostek-organizacyjnych-na-lata-2023-2026-zp271102022.html [access: 11.1.2023].

21 E. Kowalewska, in: *Ustawa o finansach publicznych. Komentarz*, ed. Z. Ofiarski, Warszawa 2020, p. 597.

22 M. Jastrzębska, *Zarządzanie długiem jednostki samorządu terytorialnego*, Warszawa 2009, pp. 10–13.

23 E. Kowalewska, in: *Ustawa o finansach publicznych*…, pp. 598–599.

own incomes and incomes received as subsidies and grants are not sufficient to cover self-government expenses. This means that LGUs must make commitments.[24]

Irrespective of the macroeconomic situation, local governments should manage finances rationally. We may even say that LGUs need a financial partner who will provide them with comprehensive services. With banks' operation in mind, we need to emphasize that LGUs are increasingly seen as strategic clients, for whom services will be provided long-term. We may also note here an intensified interest of commercial banks in providing services to LGUs. As a leader in providing banking services, PKO BP comes to the fore. It looks after 300 local governments in Poland.[25]

2. Scope of guarantee protection – exclusion of local government units

It needs to be pointed out that under Article 22 of the BGF Act, a selective protection scope was introduced.[26] Thus, under Article 2 (3) in connection with Articles 20 and 21 of the BGF Act, LGUs were excluded from the normative definition of a depositor. It is also worth referring to the Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.[27] Under Article 5 (1) (j) of the Directive, LGUs' deposits as deposits made by public authorities are expressly excluded from repayment by the deposit guarantee scheme. The catalogue of actors excluded by statute from the concept of "depositor" is closed and exclusive. An extending interpretation is not admissible.[28]

Given the above, it needs to be stated that the legislator used the possibility prescribed under the law of the European Union, which gave the Member States the opportunity to exclude the protection of funds deposited in banks by, inter alia, regional and local authorities.[29] Based on this, we may also conclude that an LGU is not a depositor. This implies certain consequences which were made apparent by

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24 J. Zawora, P. Zawora, *Deficyt i zadłużenie samorządów gminnych w świetle ograniczeń ustawowych*, Przedsiębiorstwo i Region 2013, no. 5, p. 131.

25 Source material: https://media.pkobp.pl/172594-pko-bank-polski-wygral-przetargi-na-obsluge-budzetow-wroclawia-i-poznania [access: 11.11.2023] and https://o.forum-ekonomiczne.pl/samorzady-oczekuja-kompleksowej-obslugi-bankowej/ [access: 11.11.2023].

26 P. Zawadzka, in: *Ustawa o Bankowym Funduszu Gwarancyjnym, systemie gwarantowania depozytów oraz przymusowej restrukturyzacji. Komentarz*, eds. P. Zawadzka, P. Zimmerman, R. Sura, Warszawa 2017, p. 116.

27 OJ L 173, 12.06.2014, pp. 149–178 (hereinafter: DGS Directive).

28 Z. Ofiarski, *Prawo bankowe*, p. 719.

29 P. Zawadzka, in: *Ustawa o Bankowym Funduszu*…, p. 122.

the resolution and steps taken by the BGF. This exclusion was mostly dictated by the specific nature of the activity of LGUs and the fact that their limited number (compared to the general number of depositors) limits the effects on the stability of the financial system.[30] At the same time, the Polish legislator did not employ the possibility prescribed in Article 5 (2) (b) DGS Directive, which allows the Member States to decide to include in the coverage deposits held by LGUs with an annual budget of up to EUR 500,000. Moreover, it is worth noting that under Article 2 (1) of the Act of 1995, LGUs' funds were covered by an obligatory guarantee scheme.[31]

3. Resolution of Podkarpacki Bank Spółdzielczy in Sanok

When talking about the first resolution conducted by the BGF, that is the compulsory restructuring of Podkarpacki Bank Spółdzielczy in Sanok (hereinafter: PBS), we need to point out that since 2016, BGF has played the role of a resolution authority apart from its function of a deposit guarantor. It is worth emphasizing that resolution is an alternative to the declaration of insolvency, used in strictly defined situations only and after meeting statutory requirements.[32] In BGF's opinion, the resolution of PBS was necessary to ensure the continuation of its critical operations. The alternative was PBS's bankruptcy. In such a situation, LGUs who had funds in this bank would have lost them irretrievably (as seen in BGF's estimates). Given this, we may assume that the resolution protected these funds, though not fully, as this example shows.

The resolution of PBS in Sanok was initiated pursuant to the decision of the BGF Management Board[33] on 17 January 2020. As a result, PLN 182,875,609 of the bank's capital was written down. Out of the resolution instruments referred to in the BGF Act, a bridge institution was the chosen method. Bank Nowy BFG S.A was established with a capital of PLN 100 million. The BGF initiated the resolution because three conditions that oblige the Fund (under Article 101 (7) of the BGF Act) to take such actions were met.

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30 Ibidem, p. 116.

31 For more, see: L. Góral, *Publicznoprawna ochrona środków budżetowych jednostek samorządu terytorialnego*, Przegląd Ustawodawstwa Gospodarczego 2000, no. 10, p. 5.

32 For more, see: P. Szczęśniak, *Środki przymusowej restrukturyzacji banku*, Warszawa 2018, pp. 19 ff.

33 Resolution of the Management board of the Bank Guarantee Fund No. 25/DPR/2020 of 15 January 2020. The resolution commenced upon serving the decision.

At the time of initiation of the resolution, PBS in Sanok was the second largest cooperative bank in Poland. It had approximately 2.5 billion deposits. The BGF's decision to restructure this bank cost a total of PLN 182 million, of which the cost of PLN 100 million was borne by holders of subordinated bonds, which were written down completely. It needs to be emphasized that the remaining cost, that is, PLN 82 million, was borne by local government units that had cash in bank accounts (they lost 43% of the funds kept in the bank) and larger entrepreneurs (they lost 43%, but of the funds that were an excess over EUR 100,000).

The resolution of PBS in Sanok raised various controversies, mainly because not only members' shares and subordinated bonds were written down, but also part of deposits of large companies and local governments, who lost a total of PLN 80 million. The losses of the Sanok bank were thus covered.

The resolution of PBS was finalized on 27 October 2021 because BGF sold 100% of the shares of Bank Nowy BGF S.A. By doing so, it retrieved the entire amount dedicated to the creation of the bridge institution. The shares of Bank Nowy BFG S.A. were purchased by Wielkopolski Bank Spółdzielczy.

It needs to be pointed out that in the documentation prepared for the needs of the resolution, the value of the LGUs' deposits was specified in Estimation Report 1. According to the financial information presented by the BGF, as at 28 February 2019, PBS's commitments towards entities of the central and local government sectors were more than PLN 203,671,656.15. Assuming that these commitments followed solely from a bank account contract and its parties were only LGUs, we need to conclude that the LGUs' deposits in PBS (as at 28 February 2019) were more than PLN 203 million.

4. Effects of PBS's resolution on LGUs

When describing the example of the first resolution carried out by the BGF, we may talk on the one hand about the protection of LGUs' funds kept in this bank. However, this protection was not comprehensive. Only about 57% of the total funds deposited in this bank were repaid to local governments from Podkarpackie Voivodship. The remainder was taken to cover PBS's losses as required by law. The president of the BGF explained this decision that covering the loss at the cost of owners and certain creditors is the condition for engaging BGF's funds and performing the resolution. It presented a great burden for local governments, mostly from communes and poviats near Sanok. Approximately 35 local governments could have had their

bank accounts in PBS in Sanok, and many of them were small communes for whom these losses would have been most severe. For example, we may look at the Lesko Commune, where there was talk about a loss of more than PLN 2.2 million, which, in consequence, meant that this commune could not implement certain previously planned investments.

However, we must point out here that due to the writing down, as a result of PBS's resolution, of part of the funds owned by LGUs, steps were taken to allow the execution of local government's responsibilities. For example:

1) the Ministry of Finance paid an education and balancing subsidy in the amount of close to PLN 76 million to LGUs to cover mainly the costs of running schools, including teachers' salaries;
2) on 4 February 2020, the Ministry of Finance paid out, before the due time, an instalment of part of the education subsidy in the amount of PLN 80.7 million to 31 LGUs whose funds kept in bank accounts maintained by PBS in Sanok were written down as a result of the bank's resolution;
3) Bank Gospodarstwa Krajowego presented an offer to local governments of repayable financial mechanisms on preferential terms which would ensure liquidity.

The earlier payment of the education subsidy allowed LGUs to maintain their liquidity and ensured funds to execute their tasks. LGUs kept mainly the following funds in PBS: parts of the general education subsidy, funds from subsidies to cover commissioned tasks such as the payment of 500+ benefits, and funds from external funding for investment, e.g. from the EU or the Local Government Roads Fund. Ensuring an adequate level of funds to implement these tasks was, therefore, in the interest of LGUs themselves and also in the interest of the Ministry of Finance.[34]

Conclusions

When researching the subject specified in the title of this study, it is worth emphasizing that the Polish legislator honoured the requirements of the BRRD Directive. Its preamble clearly specifies the objective of this measure as minimization of the impact on the stability of the financial system, especially where public authorities have much easier access to credits than citizens. In other words, LGUs were included in the group of those entities that theoretically may incur greater losses than

[34] Source material: https://bip.brpo.gov.pl/pl/content/samorzady-bank-lokalny-tarapaty-BFG-RPO [access: 14.09.2023].

trading participants, and this is all in the interest of the stability of the financial system. The funds that LGUs may potentially lose as a result of resolution will be used to cover the bank's losses. In a way, the BGF's actions as part of the resolution were dependent on it. The position expressed in the BRRD Directive also is supported by the European Banking Authority because it concludes that the exclusion of LGUs from the deposit guarantee scheme is justified by the possibility of the state ensuring other forms of protection of local authority deposits. When it comes to the insolvency of PBS and the LGUs losing part of their deposits, the state launched a "compensation mechanism." At the same time, it needs to be emphasized that it is in no way a formalized protective mechanism, but only an ad hoc action. The loss of part of LGUs' deposits, irrespective of any other steps, will always have an impact on the LGUs' financial situation and long-term standing. Even a short-term suspension of execution of investment by certain local governments in Podkarpackie Voivodship was an essential problem, also organizational, and could have negative, for example, legal, consequences.

When analysing the situation of these LGUs that felt the consequences of BGF's decisions in the case of the resolution of PBS, they should become a starting point for a discussion on a possible need to protect LGUs' funds kept in bank accounts. This discussion should also concern the terms for choosing a bank for the provision of financial services for the local government. We may ponder whether granting LGUs the status of a depositor is possible and necessary at all. It would be wise to point out that LGUs hold their bank accounts mainly in cooperative banks. Such conclusions are extremely important because an analysis of insolvency in the banking sector in Poland shows us that the lion's share of cases of insolvency was, in fact, in such cooperative banks. In 1989–2011, 138 banks declared insolvency, of which 132 were cooperative banks. The recent insolvencies include the 2015 insolvency of Spółdzielczy Bank Rzemiosła i Rolnictwa in Wołomin. Ząbki Commune, which deposited its funds there, lost more than PLN 2 million. In 2016, another bank declared its insolvency, namely Bank Spółdzielczy in Nadarzyn, which also handled bank accounts of the local commune.

In conclusion, we need to clearly state that *de lege ferenda* actions need to be taken at the stage of a bank selection to maintain a bank account for the LGU. Therefore, we need to think about whether local governments are able to check the financial condition of the bank before signing the contract and whether they should be afforded such an opportunity. The possibility of verifying the bank's financial reports and various indicators that result from reporting is also indicated. The information made available by some local governments shows that capital ratio is sometimes taken into account assuming a specific threshold, e.g. 15%, above which

the ratio must not sit when signing the contract and which cannot fall under this value during the term of the contract. Some local governments monitor this ratio. The city of Płock may be given as an example here. Under the contract, the bank has an obligation to send the city yearly information on the capital ratio and notify the city if it falls under 15%. If it stays below 15% for longer than three months, the city has the right to terminate the contract. Another example of "good practices" in the provision of banking services is Poznań. In the course of the bank selection procedure, Poznań officials verified, i.a., financial information available on the websites of individual banks. Additionally, the number of branches and their offer were also inspected. These examples lend themselves to the conclusion that price should not be the sole criterion for selecting the bank. When choosing a bank on terms specified in public procurement regulations, the price criterion cannot be the only factor in assessing the offers. The bank's stability, measured by the amount of the initial capital, should be a necessary criterion.

We may postulate *de lege ferenda* that the legislator specified the rule for selecting a bank by reference to the financial situation of this institution, e.g. by stipulating proportionate calculation of the amount of the bank's initial capital against the budget (expenses) of a given LGU. Without a doubt, the key is to specify correctly the parameters of a tender for the provision of financial services to LGUs. It may be concluded that LGUs should, at this stage, set requirements as to having and maintaining a specific financial standing. Perhaps we should assume that basic financial indicators will be examined every quarter to make sure that the bank is in good financial condition. Should selected indicators fall below set thresholds, the local government could have the right to terminate the contract and withdraw its funds. Certain doubts may arise on account of this concern about the correct verification of these indicators. A question arises as to who, on the LGU side, should verify them.

It needs to be emphasized at the same time that local governments have different needs when it comes to banking services and different preferences as to how they should be delivered. This diversity may be satisfied if the criteria for assessing the banks' offer may be individually adjusted to the needs signalled. *De lege ferenda*, it might seem worth considering an expansion of the activity of Bank Gospodarstwa Krajowego so that it could offer to local governments not only credit and bond products, with no regard to their existing debt but also current banking services. Some scholars have already argued that Article 264 (1) of the Public Finances Act should be amended as follows: "Banking services for the budget of a local government unit shall be provided by Bank Gospodarstwa Krajowego or a bank selected on terms specified in public procurement regulations."

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STUDIA PRAWNICZE KUL
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Characteristics of service by a court enforcement officer in Polish civil proceedings in the context of Article 139 (1) of the Code of Civil Procedure

Charakterystyka doręczeń dokonywanych przez komornika sądowego w polskim postępowaniu cywilnym w kontekście art. 139 § 1 Kodeksu postępowania cywilnego

Характеристика вручения, осуществляемого судебным исполнителем в польском гражданском производстве в контексте статьи 139 § 1 Гражданско-процессуального кодекса

Характеристика вручення, які реалізуються судовим виконавцем у польському цивільному процесі в контексті статті 139 § 1 Цивільного процесуального кодексу

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Summary: The institution of service by a court enforcement officer has significantly impacted the regularity of the service of court letters. The provisions introduced put an end to the so-called fiction of service on individuals, which meant that after two attempts at service, the court could assume that the document had been effectively served. It was recognised that this too often led to prejudice to the rights of defendants, in particular those who had not lived at the addresses indicated by the plaintiffs for a long time, and often, due to the correct (fictitious) service of payment orders, they were obliged to pay the fees resulting from final court decisions. Unfortunately, under the previous legislation, there were cases of claimants giving unverified or even false information. The legislator obligatorily introduced into the Polish legal order, in Article 139[1] of the Code of Civil Procedure, the service of letters through a court enforcement officer if a statement of claim or any other writ of summons that gives rise to the need to defend the rights of the defendant has not been effectively served on the defendant under Articles 131–139 of the Code of Civil Procedure. Thus, contrary to the principle of routine service, the legislator imposed the resulting obligations not on the procedural authority but on the initiator of the proceedings in the case. This study aims to present the institution of the court enforcement officer in Polish civil proceedings and discuss its advantages and disadvantages. It is particularly relevant in light of the changes introduced by the amendment of the CCP of 9 March 2023, effective from 1 July 2023, which are designed to improve this type of service.

Key words: civil proceedings, court enforcement officer, service by a court enforcement officer

Streszczenie: Doręczenia komornicze istotnie wpłynęły na prawidłowość dokonanych doręczeń pism sądowych. Wprowadzone przepisy położyły kres tzw. fikcji doręczenia osobom fizycznym, która oznaczała, że po dwóch próbach doręczenia sąd mógł przyjąć, iż dokument został skutecznie doręczony. Uznano, że zbyt często prowadziło to do uszczerbku w prawach pozwanych, w szczególności tych, którzy od dłuższego czasu nie zamieszkiwali pod adresami wskazanymi przez powodów – często, z uwagi na prawidłowe (fikcyjne) doręczenie nakazów zapłaty, byli oni zobowiązani do zapłaty kwot wynikających z prawomocnych orzeczeń sądowych. Niestety, pod rządami poprzednio obowiązujących przepisów zdarzały się przypadki podawania przez powodów niezweryfikowanych lub wręcz nieprawdziwych adresów. Ustawodawca obligatoryjnie w art. 139[1] Kodeksu postępowania cywilnego wprowadził do polskiego porządku prawnego doręczanie pism za pośrednictwem komornika sądowego w przypadku, gdy pozew lub inne pismo wywołujące potrzebę obrony praw pozwanego

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nie zostało skutecznie doręczone pozwanemu zgodnie z art. 131–139 K.p.c. Tym samym ustawodawca, wbrew zasadzie doręczeń rutynowych, nałożył wynikające z nich obowiązki nie na organ procesowy, lecz na inicjatora postępowania w sprawie. Niniejsze opracowanie ma na celu przedstawienie instytucji komornika sądowego w polskim postępowaniu cywilnym oraz omówienie jej zalet i wad. Jest to szczególnie istotne w świetle zmian wprowadzonych nowelizacją Kodeksu postępowania cywilnego z dnia 9 marca 2023 r., obowiązującą od dnia 1 lipca 2023 r., które mają usprawnić ten rodzaj służby.

Słowa kluczowe: postępowanie cywilne, komornik, doręczenie komornicze

Резюме: Вручения через судебного исполнителя существенно повлияли на надлежащий порядок осуществления вручений судебных писем. Введенные правила положили конец так называемой фикции вручения физическим лицам, которая означала, что после двух попыток вручения суд мог считать, что документ был вручен надлежащим образом. Было признано, что это слишком часто приводило к ущемлению прав ответчиков, в частности тех, кто долгое время не проживал по указанным истцами адресам, зачастую благодаря правильному (фиктивному) вручению платежных поручений они были обязаны выплатить суммы, вытекающие из вступивших в законную силу судебных решений. К сожалению, при прежнем законодательстве были случаи, когда истцы указывали непроверенные или даже ложные адреса. Законодатель в обязательном порядке ввел в польский правопорядок в статье 139[1] Гражданско-процессуального кодекса вручение писем через судебного исполнителя в случае, если исковое заявление или иное письмо, вызывающее необходимость защиты прав ответчика, не было вручено надлежащим образом ответчику в соответствии со статьями 131–139 Гражданско-процессуального кодекса. Таким образом, законодатель, вопреки принципу обычного вручения, возложил возникающие обязанности не на процессуальный орган, а на инициатора производства по делу. Цель данного исследования – представить институт судебного исполнителя в польском гражданском производстве и обсудить его преимущества и недостатки. Это особенно важно в свете изменений, внесенных поправками к Гражданско-процессуальному кодексу от 9 марта 2023 года, вступившими в силу с 1 июля 2023 года, которые призваны усовершенствовать данный вид службы.

Ключевые слова: гражданское производство, судебный исполнитель, вручение через судебного исполнителя

Резюме: Вручення судовим виконавцем суттєво вплинуло на вірність вручення судових листів. Запроваджені правила поклали край так званій фікції вручення фізичним особам, яка означала, що після двох спроб вручення суд міг вважати, що документ був ефективно вручений. Було визнано, що це надто часто призводило до порушення прав відповідачів, зокрема тих, хто тривалий час не проживав за вказаною позивачами адресою – часто через належне (фіктивне) вручення платіжних доручень їх зобов'язували сплатити суми, що випливають з остаточних судових рішень. На жаль, за попереднім законодавством траплялися випадки, коли позивачі вказували неперевірені або навіть фальшиві адреси. Законодавець у ст. 139[1] Цпк ввів у польський правопорядок обов'язкове вручення листів через судового виконавця у випадку, якщо позовна заява або інший лист, що викликає необхідність захисту прав відповідача, не був ефективно вручений відповідачу відповідно до ст. 131–139 ЦПК. Таким чином, законодавець, всупереч принципу рутинного вручення, поклав обов'язки, що випливають з нього, не на процесуальний орган, а на ініціатора провадження у справі. Це дослідження має на меті представити інститут судового виконавця в польському цивільному процесі та обговорити його переваги та недоліки. Це питання є особливо актуальним у світлі змін, внесених поправкою до Цивільного процесуального кодексу від 9 березня 2023 року, яка набула чинності 1 липня 2023 року, що мають на меті вдосконалити цей вид служби.

Ключові слова: цивільне провадження, судовий виконавець, вручення судовим виконавцем

Introduction

By the Act of 4 July 2019 amending the Act – Code of Civil Procedure and certain other acts,[1] in Articles 139[1] § 1 and 2 of the Act of 17 November 1964 – Code of Civil Procedure,[2] the legislator has provided for a special mode of serving documents on a defendant who is a natural person. The institution of the so-called court enforcement officer service should be viewed holistically by interpreting Article 1391 of the CCP and the provisions contained in the Act of 22 March 2018 on Court Enforcement Officers.[3] This is because the introduced provision prescribes mandatory service of documents through a court enforcement officer where a statement of claim or another letter giving rise to a need to defend the rights of the defendant has not been effectively served on the defendant under Articles 131–139 of the Code of Civil Procedure. Thus, the legislator, contrary to the principle of routine service, imposed the resulting obligations not on the procedural body but on the initiator of the case proceedings.

The introduced provisions ended the so-called fiction of service on natural persons, which meant that after two attempts at service, the court could assume that the document had been effectively served. It was believed to lead to too frequent harm to the rights of defendants, in particular of those who had not resided at the addresses indicated by the plaintiffs for a long time, and often, due to the correct (fictitious) service of the payment orders, they were required to pay the fees arising from final court decisions. Unfortunately, under the previous legislation, there were cases of plaintiffs providing unverified or even false addresses of defendants, to which the court judgments were addressed, which, once final, would become enforcement titles.

This study aims to present the institution of service by a court enforcement officer in Polish civil proceedings and discuss its advantages and disadvantages. This is particularly important in view of the changes introduced by the CCP amendment of 9 March 2023,[4] in force from 1 July 2023, intended to improve this service. First, the paper will present service by a court enforcement officer introduced in 2019 and

1 Act of 4 July 2019 amending the Act – Code of Civil Procedure and certain other acts, Journal of Laws [Dziennik Ustaw] 2023 item 614.

2 Act of 17 November 1964 – Code of Civil Procedure, consolidated text: Journal of Laws 2024 item 1237 (hereinafter: CCP).

3 Act of 22 March 2018 on Court Enforcement Officers, consolidated text: Journal of Laws 2024 item 1458 as amended (hereinafter: the CEO Act).

4 Act of 9 March 2023 amending the Act – Code of Civil Procedure and certain other acts, Journal of Laws 2023 item 614.

the legal situation concerning the service of legal documents before its introduction. Finally, the advantages and disadvantages of this institution will be discussed, taking into account the amendment of 9 March 2023 and its impact on improving the entire service process.

1. Reasons for introducing the regulation of Article 139[1] of the CCP

The problems of fictitious service highlighted in the introduction and, above all, a significant increase in the number of civil cases considered by courts made it necessary to regulate the issues related to effective service of statements of claim and first letters in a case. Failure to receive these documents often led to court decisions being challenged, even years later, often during ongoing enforcement. Therefore, there were situations where the defendant resided at an address other than the one indicated in the statement of claim, and the documents were deemed to have been delivered under Article 139 § 1–3 of the CCP.[5]

Before changing the provisions concerning service in this area, the legal situation undermined the seriousness of the administration of justice by the courts, often leading to the legalisation of fictitious trials.[6] This issue was also raised by the Supreme Court, which approved in its ruling the substituted service of the first letters in a case[7] under Article 139[1] § 1 of the CCP. The legislator rightly pointed out that the meaning of the service of the document initiating the proceedings is crucial for the course of all further proceedings since, by definition, it causes all subsequent judicial documents to be deemed served.[8]

While it is true that the court is obliged to verify the defendant's address,[9] this verification was often only done after the service and, due to the limited possibilities (PESEL-SAD), usually without producing the intended results. Undeniably, the above risk was inherent in the essence of the hitherto existing regulation but,

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5 J. Bodio, in: *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, vol. 1, ed. T. Zembrzuski, Warszawa 2020, pp. 338–339.

6 Ł. Zamojski, *Doręczenie pozwanemu pierwszego pisma procesowego wywołującego potrzebę obrony na podstawie art. 139[1] KPC*, Monitor Prawa Handlowego 2019, no. 3, p. 14.

7 Decision of the Supreme Court of 8 December 2010, III CZP 105/10, Legalis database.

8 Explanatory Memorandum to Draft VIII.3137, Amendment to the Act – Code of Civil Procedure and certain other acts, point VII (49) (c); cf. K. Weitz, in: *Kodeks postępowania cywilnego. Komentarz*, vol. 1, ed. T. Ereciński, Warszawa 2016, p. 837.

9 Cf. Resolution of the Supreme Court of 16 February 2017, III CZP 105/16, OSNC 2017, no. 10, item 112.

unfortunately, encouraged abuse of procedural law by both the plaintiff and the defendant. This was because the parties initiating the civil proceedings could indicate any address for the defendant; frequently, despite knowing the actual address, a different one was given in the statement of claim.[10] On the other hand, the defendants often deliberately failed to receive documents from the court, aiming to obstruct the proceedings, and then, often after many months, raised the difficult-to-verify circumstance that they actually resided at a different address and were deprived of their right of defence. One has to agree with the position expressed in the doctrine that "the concept of procedural efficiency is not confined solely to the economy of proceedings and the maximum reduction in their duration." Efficiency is also the implementation of the guarantees covered by the right to trial. Service of a statement of claim is a fundamental procedural guarantee enabling the defendant to defend their rights.[11]

2. Personal scope of the regulation

Under Article 139[1] § 1 of the CCP, if a defendant is a natural person, despite the repeated notice under Article 139, *inability to serve a judicial document or refusal to accept it*, § 1, second sentence, has not received a statement of claim, other procedural document or a judgment giving rise to the need to defend their rights, sent to the address indicated, and has not previously been served with any document in the case as provided for in the preceding Articles, or if Article 139, *inability to serve a judicial document or refusal to accept it*, § 2, or any other special provision providing for the effect of service does not apply, the presiding judge informs the plaintiff accordingly, sending them a copy of the judicial document for the defendant and obliging them to serve that copy on the defendant through a court enforcement officer. Under Article 13 § 2 of the CCP, Article 139[1] § 1 and 2 of the CCP applies to the defendant and the participants in non-litigious proceedings according to Article 510 § 1 of the CCP. Given the content of the above provision, it becomes essential to determine to which entities it should apply.[12]

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10 As a rule, such practice is aimed at obtaining a default judgment, which is provided routinely with the order of immediate enforceability (Article 333 § 1 (3) of the CCP) and, in the absence of correspondence by the defendant, becomes final without hindrance.

11 J. Bodio, in: *Kodeks*…, pp. 343–344.

12 Cf. A. Sikorska-Lewandowska, *Problemy z dochodzeniem roszczeń po nowelizacji przepisów KPC o doręczeniach*, Nieruchomości 2020, no. 9, pp. 6 ff.

The above provision is explicitly excluded in Article 505^{29} § 1 of the CCP concerning the defendant in electronic writ-of-payment proceedings specifying that if service cannot be effected under Articles 131–139 of the CCP, the order is deemed served upon fulfilment of the conditions specified in Article 505^{34} § 1 of the CCP. Pursuant to the indicated provision, a payment order is deemed to have been served as long as the address at which the notices were left corresponds to the service address in these proceedings as disclosed in the PESEL register.

If the addresses do not correspond under Article 505^{34} § 2 of the CCP, the order is revoked, and the proceedings are discontinued.[13]

The lack of applicability of court enforcement officer service to electronic writ-of-payment proceedings may be incomprehensible. According to M. Borodziuk, recognition of the fiction of the service of payment orders issued in these proceedings based on the registered address must raise objections in the absence of an administrative requirement of residence registration.[14] Given that the letter is deemed served under Article 505^{34} § 1 of the CCP, the defendant is unable to effectively collect a statement of claim for the resumption of the proceedings on the ground that they did not reside at the address indicated in the PESEL register since Article 401 (2) of the CCP refers to the deprivation of the opportunity to defend one's rights "as a result of a violation of the law."

Using the term "defendant,"[15] the legislator excluded the possibility of applying the mandatory mode of service of documents through a court enforcement officer to other litigants, such as plaintiffs or applicants in non-litigious proceedings. For the same reason, Article 139^{1} of the CCP does not apply to experts, interpreters or witnesses. This is understandable given the material scope of the regulation, where a letter initiating proceedings, a statement of claim or a document requiring a party to defend itself is necessarily served on the parties to the proceedings.[16]

An additional condition for the application of court enforcement officer service, which does not follow directly from the wording of the provision, is that the defendant must be domiciled in the Republic of Poland. This is justified by the fact that the plaintiff cannot be expected to effect service abroad, which is subject

13 H. Bednorz-Godyń, *Doręczenia za pośrednictwem komornika sądowego*, Monitor Prawniczy 2023, no. 8, pp. 499 and 501.

14 M. Borodziuk, *Doręczenie komornicze w praktyce sądowej po zmianach procedury cywilnej dokonanych 7 listopada 2019 roku*, Prokuratura i Prawo 2021, no. 3, p. 108; K. Markiewicz, in: *Kodeks postępowania cywilnego*, vol. 1. *Komentarz. Art. 1–505^{39}*, ed. T. Szanciło, Warszawa 2019, p. 570.

15 However, based on Article 13 § 2 of the CCP, 13 § 2 CCP, the provision also applies to participants in non-litigious proceedings and, until the entry into force of the amendment of 9 March 2023, also applies to debtors in enforcement proceedings.

16 J. Bodio, in: *Kodeks*…, pp. 338–339.

to separate rules. The basis for service abroad is Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.[17]

Moreover, it follows from the wording of the provision that court enforcement officer service may only apply to a "defendant" who is a natural person. Therefore, the above provisions do not apply to legal persons, organisational units without legal personality but having legal capacity under separate provisions, or entrepreneurs entered in the National Court Register of Poland. Only Article 139 of the CCP applies to these entities, where the lack of effective service to the address disclosed in the relevant register makes it possible to declare the effect of service.[18]

3. Material scope of the regulation

Court enforcement officer service applies only to the documents specified in Article 139[1] § of the CCP, i.e. to a statement of claim (an application in non-litigious proceedings and, until 1 July 2023, pleadings in enforcement proceedings – Article 13 § 2 of the CCP) and to procedural documents giving rise to the need to defend a party's rights. The term "procedural documents" is meant by the legislator as the parties' letters, which include applications and declarations made outside a hearing (Article 125 § 1 of the CCP), which does not raise any interpretation doubts. On the other hand, the phrase "documents giving rise to the need for defence" generally refers to documents that may be served on the defendant even before the statement of claim is served on them, such as a request to secure evidence or a request to secure a claim.[19]

It is clear that not all documents from the plaintiff that affect the course of the proceedings give rise to the need to defend the defendant's rights. In each case, it is for the court to assess whether merely accepting that a given document has been served after issuing two advice notes does not infringe the defendant's rights in this case. In particular, the plaintiff's requests for a suspension of proceedings or

17 M. Borodziuk, *Doręczenie*…, p. 109.

18 M. Michalska-Marciniak, in: *Kodeks postępowania cywilnego*, vol. 1. *Komentarz. Art. 1–205*, ed. A. Marciniak, Warszawa 2019, p. 890; Ł. Zamojski, *Doręczenie*…, p. 17; K. Markiewicz, in: *Kodeks*…, p. 570.

19 J. Bodio, in: *Kodeks*…, pp. 343–344.

requests for an adjournment of the hearing do not harm these rights, as it is usually in the interest of the plaintiff and not the defendant that the court proceedings run smoothly.[20]

It follows from the juxtaposition of Article 139^1 § 1 of the CCP with Article 133 § 2, § 21 and § 22 of the CCP that this does not apply to court judgments. The legislator has explicitly narrowed its provisions to "procedural documents," while judgments are a separate category of a strictly official nature (Article 244 § 1 of the CCP). Hence, under Article 139 § 1–3 of the CCP, it is not defective to deem served an order to transfer a case according to jurisdiction or grant security for a claim delivered together with a statement of claim, for example. In the latter case, the regulation concerning service effectiveness should expressly state that the service is effective only with respect to the court judgment.

It should be emphasised that the legislator associates the service of the judgment with the effect of the running of the time limit for lodging an appeal and, once this limit expires, also of making a judgment final. The defendant has the option of subsequently contesting the effectiveness of that service by lodging an appeal on the ground that the time limit for doing so has not started to run.

A significant problem for the regulation in question is the case of payment orders issued under writ-of-payment and payment-order proceedings. Although a payment order is a judgment, since it is subject to service with the statement of claim and is a judgment closing the proceedings, it is not subject to service under Article 139 § 1–3 of the CCP. Apart from electronic writ-of-payment proceedings, the legislator has not provided for the consequences of the inability to serve a statement of claim in a case if a payment order is served along with it. Therefore, in case of failure to successfully serve the payment order with a copy of the statement of claim, the court letters should be served on the defendant through a court enforcement officer.[21]

Indeed, it should be stressed that Article 480^2 § 3 of the CCP implies the essence of the payment order, i.e. it should be served on the defendant with instructions concerning objection, the consequences of not appealing against the order and a copy of the statement of claim with instructions (Article 205^2 of the CCP). The cited provision applies only to the first attempt at service. At the same time, for the plaintiff's obligation to serve the documents through a court enforcement officer, Article 139^1 § 1 of the CCP should be treated as a *lex specialis*. This is because the plaintiff might serve the documents through a court enforcement officer but fails to

20 K. Markiewicz, in: *Kodeks*…, p. 570; J. Bodio, in: *Kodeks*…, p. 344.

21 M. Michalska-Marciniak, in: *Kodeks*…, p. 890; Ł. Zamojski, *Doręczenie*…, p. 16.

notify the court. Then, due to the expiry of the two-month time limit provided for in Article 1391 § 2 of the CCP, the court suspends the proceedings. The payment order may already become final by the time this decision is made.[22]

There was also a practice in the courts to oblige the plaintiff to serve through the court enforcement officer a copy of the statement of claim itself, together with the instructions specified in Article 205^2 of the CCP, while at the same time sending a copy of the document and the instructions. Only after the court obtains confirmation that the court enforcement officer has served the documents does it become reasonable to serve the copy of the payment order itself and instructions on the objection and the consequences of not appealing against the order. However, this practice does not increase the speed of the proceedings and may create difficulties when the defendant files a statement of defence. Moreover, this clashes with the previously indicated general provisions requiring the payment order to be served on the defendant with instructions concerning lodging an appeal and a copy of the statement of claim.

4. Suspension and discontinuance of proceedings due to lack of effective service

Under Article 139^1 § 2 of the CCP, the court requests the plaintiff to provide proof of service of the documents within two months, under pain of suspending the proceedings. This requirement does not apply when the court has the defendant's current address, provided in the course of other proceedings, or an address from the PESEL-SAD database disclosed relatively recently. If the court has an address from the PESEL-SAD database that differs from the address indicated in the statement of claim, it may try to serve documents to that address.[23]

To enable service through a court enforcement officer, a copy of the statement of claim with instructions should be sent to the plaintiff, together with an obligation to file a statement of defence within the set time limit (Article 205^1 § 1 and 2 of the CCP) when no payment order has been issued. Although this last proviso does not follow directly from the provisions in question, it is intended to streamline the proceedings. The simultaneous service of an obligation to file a statement of defence

22 P. Sławicki, P. Sławicki, *Doręczenia pism za pośrednictwem komornika sądowego w postępowaniu zabezpieczającym, klauzulowym i egzekucyjnym*, Przegląd Sądowy 2020, no. 11–12, p. 77–78.

23 Ibidem, p. 78.

sets a procedural time limit for the defendant. The lack of service of such an obligation in the light of Article 339 § 1 of the CCP makes it impossible to issue a default judgment, as the defendant is not served with an obligation setting a time limit for taking a position on the case, as required. This is not the case with a payment order, as the instruction on the time limit for lodging an appeal should be apparent from the wording of the order itself.

The view that "so-called court enforcement officer service calls into question the basis for the appointment of a guardian for a person whose residence is unknown given the inability to establish the defendant's residence, including following the failure of service of a document by a court enforcement officer" seems unfounded. The lack of effective court enforcement officer service should be regarded as a positive prerequisite for requesting the appointment of a guardian for the defendant under the invoked provisions of the Act. The necessity for the first service so that the defendant can mount a defence at trial will contribute to the more frequent appointment of guardians *ad litem*.[24]

The legislator explicitly orders the ineffective expiry of the two-month period to be treated as a positive prerequisite for suspending proceedings under Article 177 § 1 (6) of the CCP, and such legal basis should be included in the provision itself. The cited provision stipulates that the court may suspend the proceedings *ex officio* if, due to the plaintiff's missing or wrong address or the plaintiff's failure to provide the address of the defendant or data allowing the court to determine the numbers referred to in Article 208[1] of the CCP within the prescribed time limit, or the plaintiff's failure to comply with other orders, the case cannot be continued.[25]

It should be emphasised that the three possible actions of the plaintiff indicated in Article 139[1] § 2 of the CCP, as well as the filing of an application for the appointment of a guardian *ad litem* for the defendant whose residence is unknown (the application must be particularly motivated), are negative prerequisites for suspending the proceedings. At the same time, they are positive prerequisites for the resumption of the suspended proceedings. Moreover, it should be borne in mind that the court, under Article 182 § 1 (1) of the CCP, will resume proceedings only if a party requests resumption within three months from the date of the order to suspend the proceedings. Importantly, it should be noted that any actions listed in Article 139[1] § 2 of the CCP taken after the expiry of the statutory period specified therein will be ineffective under Article 169 § 1 of the CCP. However, the court should consider

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24 Ł. Zamojski, *Doręczenie*…, p. 14.

25 M. Kaczyński, in: *Kodeks postępowania cywilnego*, vol. IA. *Komentarz. Art. 1–424[12]*, ed. A. Góra-Błaszczykowska, Warszawa 2020, p. 592.

such action if it is combined with a request to resume the proceedings submitted within the statutory three months from the date of issuing the order to suspend the proceedings.[26]

5. Costs of court enforcement officer service

It is argued in legal studies that the catalogue of expenses in Article 5 of the Act of 28 July 2005 on Court Costs in Civil Cases is non-exhaustive.[27] It is also pointed out that the amending Act of 4 July 2019 includes the costs of service through a court enforcement officer and additional costs of service abroad, including translation costs, among the expenses chargeable to the parties.[28]

Service costs incurred by a party are included in the court costs. They constitute an element of the expenses necessary for the purposeful pursuit of rights and purposeful defence, which the unsuccessful party is obliged to reimburse the opponent upon request under Article 98 of the CCP. Under Article 108 of the CCP, it is accepted that the claims for reimbursement of legal costs remain definitively settled in the proceedings in which they arose and to which they are connected and cannot be asserted in a separate trial. However, no regulation expressly regulates cases in which service costs arise after the issuance of the judgment, closing the proceedings in the instance.[29]

Therefore, the issue of deciding on the costs of court enforcement officer service when the defendant does not file an objection or charges against the payment order remains problematic. Under Article 108 § 1 of the CCP, the court decides the costs in each judgment, closing the case in the instance. However, this judgment is a payment order, which is issued at a stage when it is not yet known whether there will be a need to incur the costs of court enforcement officer service.

Indeed, when the case is decided, under Article 394^{1a} § 1 (9) of the CCP, the court should include in the payment order the entirety of the decision on legal costs incurred up to the time of its issue. It is impossible to apply the procedure of

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26 Ł. Zamojski, *Doręczenie*…, p. 18.

27 See: M. Manowska, A. Rafalska, *Koszty procesu i koszty sądowe w postępowaniu cywilnym*, Warszawa 2017, pp. 148 ff.; Act of 28 July 2005 on Court Costs in Civil Cases, consolidated text: Journal of Laws 2024 item 1237 (hereinafter: CC Act).

28 A. Mendrek, *Nowe unormowania kosztów sądowych w sprawach cywilnych wynikające z nowelizacji z 4.07.2019*, Palestra 2019, no. 11–12, pp. 226–227.

29 H. Bednorz-Godyń, *Doręczenia*…, pp. 501–502.

supplementing the payment order (Article 353^2 of the CCP in conjunction with Article 351 § 1 of the CCP), as the deadline for filing an application in this respect is two weeks from the date of service of the copy of the payment order. The statutory deadline for notifying the court about the service of the letter through a court enforcement officer is two months. One way of solving the above problem was to pay the court enforcement officer the costs of the non-enforcement proceedings they conducted from the State Treasury or from an advance paid by the plaintiff and to subsequently charge them to the parties based on Article 108^1 of the CCP, which, unlike Article 108 of the CCP, allows this to be done at any time.

The above issue was resolved in the resolution of the Supreme Court of 20 October 2022, III CZP 96/22,[30] which stated that the plaintiff who incurred the costs of service through a court enforcement officer will be reimbursed by the defendant regardless of whether the plaintiff incurred the costs in the course of the proceedings or after the judgment closing the case. If the costs of court enforcement officer service are incurred after the conclusion of the proceedings, the basis for awarding them from the defendant is Article 108^1 of the CCP. Thanks to this decision, there is no obstacle to subsequently awarding the costs of court enforcement officer service from the defendant to the plaintiff in a separate order.

6. Practical application of court enforcement officer service. Direction of change

As mentioned at the beginning, court enforcement officer service was introduced to streamline service processes and replace the fiction of service concerning natural persons. It aims to eliminate the situation where the party initiating the proceedings indicates the wrong address of the opposing party so that the documents are deemed served after two advice notes to accelerate the proceedings and obtain a favourable outcome. Another example is the reverse situation, where a party deliberately fails to collect documents and then triggers measures aimed at reinstating court deadlines or resuming proceedings to protract the proceedings. Unfortunately, several years of practice have shown that it is not a flawless institution, so in the amendment that entered into force on 1 July 2023,[31] the legislator decided to

30 Resolution of the Supreme Court of 20 October 2022, III CZP 96/22, Legalis database.

31 Act of 9 March 2023 amending the Act – Code of Civil Procedure and certain other acts, Journal of Laws 2023 item 614.

introduce certain changes aimed at eliminating practical problems associated with the service of documents arising from the execution of the instruction contained in Article 139[1] of the CCP.

As a reminder, until now, under the aforementioned provision, in case of ineffective service, after the second advice note and the impossibility of invoking the fiction of service, the court would forward the documents to be served to the plaintiff, ordering the latter to serve them through a court enforcement officer. The plaintiff, within two months from the date of service, was required to file an acknowledgement of service of the document on the defendant through the court enforcement officer or would return the document and indicate the defendant's current address or submit proof that the defendant resides at the address indicated in the statement of claim. After the ineffective expiry of the above, the court would suspend the proceedings *ex officio* and discontinue the proceedings after another three months from the order of suspension.

Following the changes introduced by the amendment of 9 March 2023, the party initiating the proceedings, which was obliged by the court to effect service through a court enforcement officer within two months from the date of being served that obligation, will either file an acknowledgement of service of the documents on the defendant through the court enforcement officer or return them with written proof that the defendant resides at the address indicated in the statement of claim. Interestingly, a party cannot indicate a different address of the defendant but can only submit proof that the defendant resides at the address provided in the statement of claim. More importantly, it was clarified that this should be written proof.[32] In addition, it was specified that if the plaintiff demonstrates that the defendant resides at the address indicated in the statement of claim, documents sent in the manner concerning the service of documents in civil proceedings by a postal operator will be deemed served. The subsequent service of this documentation by a court enforcement officer to the same address will not restart the running of the time limits that the Act provides for. This is a clear effort to accelerate the service procedure. As before the amendment, the plaintiff would often send another request with new addresses, interrupting the running of the statutory time limits for suspension or discontinuance of the proceedings and forcing the court to start the whole service procedure anew in the event of another failure at effective service.

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32 Written proof may include, but is not limited to: information from the court enforcement officer who established the defendant's address; acknowledgement of receipt of other mail; or acknowledgement of receipt of a remittance.

There is a special solution concerning court enforcement officer service in non-litigious proceedings. It is used if, in the event of failure to receive the documents by a participant in the proceedings, the presiding judge considers service through a court enforcement officer necessary. Therefore, the court must decide whether to use court enforcement officer service in these proceedings. On the other hand, the regulations concerning court enforcement officer service in the event of failure to collect mail do not apply to letters sent by court enforcement officers in enforcement proceedings, which were rare in any case.

Another effort to assist the courts is the solution allowing the courts, under certain circumstances, to dispense with court enforcement officer service. Thus, the court does not apply court enforcement officer service in the above case if the validity of the defendant's address indicated in the statement of claim is not in doubt. This solution is particularly relevant in cases where the defendant's address is known to the court from other ongoing proceedings or where the plaintiff includes relevant proof in the statement of claim to confirm that the defendant will not receive the court letters sent to them.

In addition, the amendment also introduced a solution concerning court enforcement officer service in cases where the plaintiff resides or is established abroad and is not represented by an advocate, legal counsel or patent agent practising in the Republic of Poland, requiring the court *ex officio* to order the service of documents on the defendant through a court enforcement officer. Thus, there is no need to direct correspondence intended for court enforcement officer service to the plaintiff abroad.

The described amendment also introduced significant changes to the Act on Court Enforcement Officers.[33] A court enforcement officer, upon an order of the court or a request of a plaintiff obliged by the court, personally serves judicial notices, procedural documents and other judicial documents directly on the addressee against acknowledgement of receipt and date indication or establishes that the addressee does not reside at the address given. The court enforcement officer does so within 14 days of receiving the order. An obligation to effect service is submitted to the court enforcement officer with the service request. Submitting the obligation addressed to the guardian *ad litem* is tantamount to the guardian *ad litem* demonstrating their authority to request service. Following the changes, if the court enforcement officer finds an adult member of the addressee's household at the address given, they may serve the letter on them unless the information available indicates

[33] R. Reiwer, in: *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Komentarz*, ed. R. Reiwer, Warszawa 2021, p. 22.

that the letter should be served on the addressee personally. If the court enforcement officer has information that shows the address given is no longer valid before attempting service, they serve the letter on the addressee at the address known to them, provided that this court enforcement officer is competent to effect service.[34]

The court enforcement officer's role is to establish whether the addressee resides at the address indicated. Therefore, they may request the necessary information from other institutions and persons not involved in the proceedings under pain of a fine. The court enforcement officer includes their findings in the report they draw up. If the addressee resides at the address given and the attempt at service proves unsuccessful, the court enforcement officer leaves a notice in the addressee's mailbox, door or other appropriate place of the attempted service, together with information that the letter can be collected at the court enforcement officer's office and instructions that it must be collected within 14 days of the date on which the notice was left. After the expiry of the period for collection of the letter, it is deemed to have been served on the last day of that period, and the court enforcement officer returns it to the entity ordering service, stating the findings made and indicating the date of service.

Having taken the steps related to court enforcement officer service, the court enforcement officer shares the findings with the ordering entity by sending them a copy of the report.[35] If the court enforcement officer returns a letter after an unsuccessful attempt at service and establishes that the addressee does not reside at the address indicated, the ordering entity may request that the court enforcement officer take steps to establish the addressee's current address.[36] In addition, the court enforcement officer may also use information held *ex officio* if the current address of the addressee is known to them.[37]

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34 B. Falkowski, in: *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Komentarz*, eds. M. Siembierowicz, M. Świtkowski, Warszawa 2018, Commentary on Article KomSądU, Article 3a, Nb.

35 P. Czyszkowski, *Doręczenie komornicze jako nieegzekucyjna czynność komorników sądowych*, Przegląd Prawa Egzekucyjnego 2022, no. 4, p. 70.

36 For this purpose, the court enforcement officer may request the necessary information from the following entities: tax authorities, pension authorities, banks, cooperative savings and credit unions. Controversy concerning the exclusion of housing associations from the above catalogue, J. Szachta, *Doręczenie korespondencji pozwanemu przez komornika sądowego. Zagadnienia wybrane. Problemy praktyczne*, Forum Prawnicze 2019, no. 6, p. 49.

37 J. Lipińska, *Poszukiwanie przez komornika sądowego aktualnego adresu zamieszkania pozwanego na podstawie art. 3b ustawy o komornikach sądowych*, Przegląd Prawa Egzekucyjnego 2022, no. 4, p. 35; Ł. Zamojski, *Doręczenie*…, p. 16.

Conclusions

Service by a court enforcement officer should be assessed favourably despite the many controversies related to its introduction and subsequent practical functioning. Legitimate concerns arose from court enforcement officers and claimants, chiefly the plaintiffs. Court enforcement officers often argued that this was an additional, wholly unwarranted obligation that significantly prolonged the entire proceedings and that the regulations favoured the defendant's use of procedural obstruction. On the other hand, those ordering court enforcement officer service argued that non-enforcement proceedings in the form of court enforcement officer service were an excessively costly solution, and they considered a court enforcement officer a "very expensive postman," not consistently achieving effective service due to statutory restrictions.

This does not change that the legal situation before the introduction of Article 139^1 § 1 and 2 of the CCP, together with the generally accepted "fiction of service" regarding all entities, raised many objections and allowed both parties – the initiators of the proceedings by indicating wrong addresses of the other party and the defendants by challenging the effectiveness of fictitious service – to harm the administration of justice. Although such a risk was inherent in the essence of the regulation in force at the time (motivated by the otherwise correct assumption that, in most cases, the plaintiff knows the correct address of the defendant's residence), unfortunately, it encouraged abuse of procedural law both by the plaintiff and the defendant.

The regulation in question should be assessed favourably in terms of the stability of court judgements and partly in terms of the efficiency of the proceedings. The changes introduced by the amendment of 9 March 2023 eliminate doubts and non-uniform practice in courts. The possibility for the court to dispense with court enforcement officer service and serve documents on an adult household member, wife, or husband translates into an increase in the effectiveness of service and the dynamics of the proceedings and undoubtedly helps to accelerate proceedings in a given case. The legislator also rightly pointed out that it was unreasonable to attempt the service of documents if it was known in advance that the addressee, i.e. the plaintiff, did not reside there.

A minor disadvantage of the regulation in question appears to be the still relatively high cost of court enforcement officer service and, in certain circumstances, the long time needed to make effective service. In this situation, one could consider expanding and introducing a court service unit instead of a court enforcement

officer service, with commission remuneration for staff calculated according to the number of letters served.

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STUDIA PRAWNICZE KUL
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Environmental protection solutions and real estate tax

Rozwiązania z zakresu ochrony środowiska a podatek od nieruchomości
Решения в области охраны окружающей среды и налог на недвижимость
Охорона навколишнього середовища та податок на нерухомість

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Summary: This study analyses property tax regulations in the context of taxation of land occupied by photovoltaic farms and taxation of electrofilters and hydroelectric power plants in the context of environmental solutions. The analysis of the current regulations leads to the conclusion that there are solutions in the real estate tax that can be regarded as, to put it mildly, not encouraging "green" behaviour, an example of which is the highest rate of taxation land occupied by a photovoltaic power plant, as well as the taxation of elements of hydroelectric power plants. Also, the "randomness" in the taxation of structures in property tax raises doubts about the taxation of electrostatic precipitators, resulting in the lack of the expected incentive (stimulus) of an ecological nature for the installation of such facilities. The author used the dogmatic and legal analysis method and an analysis of administrative court decisions.

Key words: tax, property tax, local taxes, structures, business activity

Streszczenie: Przedmiotem opracowania jest analiza regulacji podatku od nieruchomości w kontekście opodatkowania gruntów zajętych na farmy fotowoltaiczne oraz opodatkowania elektrofiltrów i elektrowni wodnych w kontekście rozwiązań ekologicznych. Analiza obowiązujących przepisów prowadzi do wniosku, że w podatku od nieruchomości występują rozwiązania, które można uznać za co najmniej niemotywujące do zachowań „ekologicznych", czego przykładem jest opodatkowanie najwyższą stawką gruntów zajętych na elektrownię fotowoltaiczną, jak również opodatkowanie elementów elektrowni wodnych. Ponadto „przypadkowość" w opodatkowaniu budowli w podatku od nieruchomości powoduje wątpliwości odnośnie do opodatkowania elektrofiltrów, co skutkuje brakiem oczekiwanej zachęty (bodźca) o charakterze ekologicznym do instalowania tych obiektów. Autor posłużył się analizą dogmatyczno-prawną oraz analizą orzeczeń sądów administracyjnych.

Słowa kluczowe: podatek, podatek od nieruchomości, podatki lokalne, budowle, działalność gospodarcza

Резюме: Предметом данной работы является анализ регулирования налога на недвижимость в контексте налогообложения земель, занятых фотоэлектрическими фермами, и налогообложения электрофильтров и гидроэлектростанций в контексте экологических решений. Анализ действующих норм приводит к выводу о наличии в налоге на недвижимость решений, которые можно рассматривать, по крайней мере, как немотивирующие для «экологичного» поведения, примером которых является налогообложение по максимальной ставке земли, занятой фотоэлектрической станцией, а также налогообложение элементов гидроэлектростанций. Кроме того, «случайность» в налогообложении сооружений в рамках налога на имущество вызывает сомнения в налогообложении электрофильтров, что приводит к отсутствию ожидаемого стимула (побуждения) экологического характера для установки этих сооружений. Автор использовал догматико-правовой анализ и анализ решений административных судов.

Ключевые слова: налог, налог на имущество, местные налоги, сооружения, хозяйственная деятельность

Резюме: Предметом дослідження є аналіз податкового законодавства на нерухоме майно в контексті оподаткування землі, зайнятої під фотоелектричні ферми та оподаткування електрофільтрів і

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гідроелектростанцій у контексті екологічних рішень. Аналіз чинного законодавства дозволяє зробити висновок, що в податку на нерухоме майно існують рішення, які можна вважати принаймні такими, що не мотивують "екологічної" поведінки, прикладом чого є найвища ставка оподаткування землі, зайнятої під фотоелектричну станцію, а також оподаткування елементів гідроелектростанцій. Крім того, "випадковість" оподаткування будівель податком на нерухоме майно викликає сумніви щодо оподаткування електрофільтрів, що призводить до відсутності очікуваного екологічного стимулу для встановлення цих об'єктів. Автор використовував догматико-правовий аналіз та аналіз рішень адміністративних судів.

Ключові слова: податок, податок на нерухоме майно, місцеві податки, будівлі, підприємницька діяльність

Introduction

It is indisputable that, apart from the fiscal function, taxes, especially those related to, i.a, property rights, such as real estate tax, can also stimulate specific social processes.[1] Nowadays, as part of sustainable development policy, one of the priority goals of such taxes is to care for the natural environment, which involves the appropriate shaping of tax solutions. At the same time, the theory distinguishes a group of so-called "ecological taxes," which consist of environmentally friendly emission taxes, indirect taxes and tax-related fees that stimulate financial solutions.[2] At the same time, it is undisputed that these taxes not only serve to implement the desired solutions for ecological effects but also are one of the most effective tools for influencing the environment.[3] Economic goals can be achieved by introducing not only specific "ecological" taxes but also "ecological" solutions in the existing taxes.[4] In this context, doubts arise regarding the assessment of legal solutions in the real estate tax as having a significant impact on environmental protection.

At the same time, there are other important arguments justifying the analysis of real estate tax regulations also in the context of ecological solutions. The importance of real estate tax is indicated, on the one hand, by the economic argument that the annual revenues to municipal budgets from this tax amount to over PLN 20 billion, and on the other hand, by numerous arguments relating to normative issues in this tax. In particular, the real estate tax applies to over 50,000 judgements of administrative courts,[5] including several resolutions of the Supreme Administrative Court of Poland, and, since 2011, eight judgements and one signalling decision of

1 R. Dowgier, A. Olechno, S. Grabowska, *Municipal Tax Policy in State Emergencies*, Białostockie Studia Prawnicze 2024, vol. 29, no. 1, p. 147.

2 J. Głuchowski, *Podatki ekologiczne*, Warszawa 2002, p. 11 and 177.

3 Ibidem, p. 11 and 21.

4 A. Ogonowska, *Ekologiczne aspekty w polskim systemie podatków*, in: *System podatkowy w Polsce. Jego rola i znaczenie w procesach gospodarowania*, ed. W. Bożek, Szczecin 2016, p. 263.

5 Behind the Central Database of Administrative Court Judgments.

the Constitutional Tribunal have been passed.[6] On the other hand, real estate tax at the legal level seems to be ideal also as a tool of tax policy in the field of ecology. It is characterised by, among others, simplicity of structure, brevity of regulations, stable subject of taxation and lack of "revolutionary" changes over several years. Additionally, taking into account the subject of taxation under this tax, including land and buildings, among others: related to energy production and pollution of land, air or water, *prima facie* it seems to be an appropriate instrument for achieving ecological goals. Concurrently there is a doubt as to whether the legislator is properly implementing this goal. This assumption should be verified by analysing the applicable real estate tax regulations in the scope of current problems resolved in the jurisprudence and being disputed in the doctrine. The provisions of two typical tax exemptions related to environmental protection, which are included in this tax as a typical environmental protection instrument, will be omitted in the analysis.

This study analyses real estate tax regulations in the context of taxation of land used for photovoltaic farms and taxation of electrostatic precipitators and hydropower plants in the context of ecological solutions. The choice of the above problems was dictated by their topicality and connection with the issue of ecology.[7] Also, due to the judgement of the Constitutional Tribunal of 4 July 2023,[8] which declared the unconstitutionality of the provisions defining a structure in real estate tax, as a result of which its new definition should be in force from 1 January 2025, the legislator now has the opportunity to take into account, for example, preferential facilities serving ecological purposes. In this context, this article should also be treated as a voice in the debate on the direction of possible legal solutions.

1. Legal framework

When characterising the principles of real estate taxation, it should be noted that under Article 3 section 1 point 1 of the Act of 12 January 1991 on Taxes and Local

6 See broadly: R. Dowgier, *The Impact of Abstract Control by the Constitutional Court on the Recovery of Property Tax Overpayments: Procedural Issues*, Białostockie Studia Prawnicze 2023, vol. 28, no. 2, pp. 68–69.

7 Of course, there are a great number of other issues such taxation of wind farms (see K. Teszner, *Legal Aspects of Taxation of Offshore Wind Farms in Poland*, Studia Iuridica Lublinensia 2023, vol. 32, no. 3, pp. 220–233), which are outside the scope of this analysis.

8 Case no. SK 14/21.

Fees,[9] real estate taxpayers are natural persons, legal persons, organisational units, including companies without legal personality, which are owners of real estate or parts thereof, or buildings or parts thereof. Based on Article 2 section 1 and Article 3 section 1 of the Act on Taxes and Local Fees, buildings, structures (related to running a business) and land or parts thereof owned by natural persons are subject to real estate tax. Pursuant to Article 5 section 1 points 1 and 2 of the said Act, the amount of tax rates is determined by municipal councils and depends on the type of real estate and its purpose. The Act on Taxes and Local Fees in Article 5 section 1 point 1 letters a and c, and point 2 letters b and e, provides different maximum tax rates for buildings or their parts and land related to business activity and real estate that is not related to business activity. Pursuant to Article 1a section 1 point 3 of the said Act, land and buildings related to running a business are defined as land and buildings owned by an entrepreneur or another entity conducting business activity.[10] Ownership should be understood in accordance with Article 336 of the Civil Code Act of 23 April 1964[11] as actual possession by an owner and ownership by a usufructuary, pledgee, tenant, leaseholder or a person having another right which involves specific authority over someone else's property (dependent possessor).

Based on Article 2 section 2 of the Act on Taxes and Local Fees, agricultural land is exempt from real estate tax, except when it is taken over for business purposes. In turn, according to Article 1 of the Act of 15 November 1984 on Agricultural Tax,[12] land classified in the register of land and buildings as agricultural land is subject to agricultural tax, with the exception of land used for business activities other than agricultural activities. Interpreting Article 1 of the Agricultural Tax Act in connection with Article 2 section 2 of the Act on Taxes and Local Fees, it should be stated that land classified as agricultural in the register of land and buildings will not be subject to agricultural tax if it is used to conduct business activities other than agricultural activities.

Court judicature has repeatedly commented on the understanding of the concept of "taking possession" of agricultural land for business purposes. The courts

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9 Consolidated text: Journal of Laws 2023 item 70 as amended (hereinafter: the Act on Taxes and Local Fees).

10 In accordance with the judgment of the Constitutional Tribunal of 24 February 2021, Article 1a section 1 point 3 of the Act of 12 January 1991 on Local Taxes and Fees (Journal of Laws 2019 item 1170), understood as meaning that the connection of land, building or structure with running a business is determined only by the possession of the land, building or structure by an entrepreneur or other entity conducting business activity, has been found inconsistent with Article 64 section 1 in connection with Article 31 section 3 and Article 84 of the Constitution of the Republic of Poland.

11 Consolidated text: Journal of Laws 2024 item 653 (hereinafter: Civil Code).

12 Consolidated text: Journal of Laws 2020 item 333 (hereinafter: Act on Agricultural Tax).

find that the concept of "occupation for the conduct of a business activity" cannot be identified with the concept of "connection with the conduct of a business activity" as defined in Article 1a section 1 point 3 of the Act on Taxes and Local Fees,[13] which means that in order to tax agricultural land with the real estate tax, the mere possession of land by an entrepreneur is not enough within the meaning of Art 1a section 1 point 3 of the Act on Taxes and Local Fees. The above position was justified by the fact that synonymous interpretation prohibits the assumption that the legislator assigns the same meaning to different phrases.[14] Courts commonly assume that the scope of both concepts is that land taken for conducting business activity will always be related to conducting this activity, but mere possession by the entrepreneur or another person conducting business activity is not enough. However, judicature recognises that taking possession is also a requirement for the land to be considered occupied for business purposes.[15] In turn, in the judgements of the Voivodship Administrative Court of 20 January 2009,[16] referring to the literal interpretation of Article 2 section 2 of the Act on Taxes and Local Fees, it is indicated that, in accordance with the definitions contained in the Polish dictionary, the word "zająć", "zajmować" (occupy) means – to fill up a space with oneself or an object, and the phrase "zająć się", "zajmować się" (engage in) means – to start doing something or work on something, to do some work. These definitions show that the concept of "land occupied for conducting business activities" should be understood as the actual performance of specific activities (actions on the land) resulting in the achievement of intended goals or achievement of a specific result related to the conducted business activity. The jurisprudence draws attention to the fact that the occupation of land for running a business means that the land is taken exclusively from agricultural production through actual activities.[17] The courts recognise that such a situation arises, for example, when melioration works are commenced, roads are marked out, and water and sewage networks are reconstructed.[18] The above theses, established in judicature, should be fully accepted.[19]

As a result, based on court judicature, land on which such activity is actually conducted should be considered as "occupied for conducting business activities."

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13 The judgment of the Voivodship Administrative Court of 8 September 2005, III SA/Wa 346/2005.

14 The judgment of the Voivodship Administrative Court of 30 October 2007, I SA/Wr 819/07.

15 The judgment of the Voivodship Administrative Court of 2 April 2014, I SA/Gd 1631/13.

16 From III SA/Wa 2129/08 to III SA/Wa 2130/080.

17 Among others, judgment of the Supreme Administrative Court of 16 July 2010, II FSK 1637/09.

18 The judgments of the Supreme Administrative Court of 2 April 2010, II FSK 1942/08 and 10 January 2007, II FSK 97/06.

19 See W. Morawski, in: T. Brzezicki, K. Lasiński-Sulecki, P. Majka, W. Morawski, *Ustawa o podatkach i opłatach lokalnych. Komentarz*, ed. W. Morawski, Gdańsk 2016, pp. 195–196.

The analysis of court judgements also leads to the conclusion that the assessment of the occupation of agricultural land for business purposes should be related to actual (observable) activities that make it impossible to conduct other activities. Although the theses from the judgements mentioned above are undisputed, in practice, the analysed regulation gives rise to interpretation disputes, among other things: in the scope of preparatory activities related to the investment in the event of undertaking only formal and legal (i.e. not actual) activities.[20] At the same time, the judicature does not raise any doubts about the taxation of land in a situation where an investment is implemented. In such circumstances, agricultural land should always be treated as occupied for business purposes. For example, in the judgement of the Voivodship Administrative Court of 5 February 2007,[21] it was found that lands classified in the land register as wasteland and agricultural land were subject to the regulations of the Act on Taxes and Local Fees and were subject to taxation as of the commencement of construction-related activities on them. In the Court's opinion, taking possession of land to conduct a business activity covers not only the actual performance of activities falling within the scope of this business, but also activities aimed at the performance of such economic activities, and therefore also the so-called preparatory activities. In turn, in the judgement of the Voivodship Administrative Court of 6 February 2014,[22] it was indicated that preparatory activities aimed at generating income include actual activities involving interference in the land causing a change in the land that prevent its use as agricultural land. A similar view was expressed even in the actual situation in which agricultural activity was still carried out on the land in parallel with its occupation.[23]

2. Land occupied for a photovoltaic farm

In the context of the abovementioned understanding of the term "occupied" for running a business, a doubt arises whether it should be applied to the assessment of

20 See e.g. judgment of the Voivodship Administrative Court of 4 December 2007, I SA/Kr 757/07; judgment of the Voivodship Administrative Court of 4 December 2012, I SA/Gl 531/1; judgment of the Voivodship Administrative Court of 11 September 2007, I SA/Go 384/07; judgments of the Supreme Administrative Court of 2 April 2010, II FSK 1942/08; judgment of the Supreme Administrative Court of 10 January 2007, II FSK 97/06; judgment of the Voivodship Administrative Court of 14 September 2006, I SA/Wr 19/06.

21 I SA/Wr 1354/06.

22 I SA/Gl 817/13.

23 The judgment of the Supreme Administrative Court of 3 April 2015, II FSK 604/13.

a typical situation in which a photovoltaic farm was built on agricultural land. The problem is related to the possibility of further agricultural use of the plot on part of which the solar power plant equipment is located. The doubt concerns whether, on the surface of the land on which the farm is located, which is indisputably the part "occupied" for running a business, for the purposes of determining the type of tax paid, it is necessary to separate the part of the land including the buildings to the foundations of which the photovoltaic panels are attached – and consider only this specific part of the land as subject to real estate tax. In turn, the remaining part of the land to be used for agricultural purposes (e.g. sheep grazing, keeping apiaries or growing plants) will be subject to agricultural tax as agricultural land that is not used for business activities.

In the Voivodship Administrative Court's judgement of 7 May 2019,[24] which was one of the first to address the above issue, it was assumed that in the light of Article 1 of the Agricultural Tax Law, it is irrelevant whether or not there will be agricultural activity on the land. What is important is that if the land is occupied for the performance of economic activities – this circumstance, so to speak, "takes it out" of agricultural taxation and moves it into the scope of property taxation. It therefore makes no sense to analyse from the perspective of agricultural activities whether the area will be used in part or entirely for agricultural purposes. It is important that the entrepreneur needs this area to run a photovoltaic farm and that the area is fenced. The court pointed out that if the taxpayer-entrepreneur did not need the land, it would not have been fenced. If the taxpayer uses and fences the land, it means that the area is occupied for business purposes. Even conducting agricultural and at the same time business activities in a given area gives priority to real estate tax, and agricultural tax is excluded under Article 1 of the Agricultural Tax Act. According to this provision, land is excluded from agricultural tax not only when it is occupied "exclusively," i.e. 100%, for running a business, and not only when agricultural activity there is excluded or significantly limited.[25] The court stated that if a photovoltaic farm is located on land, it is impossible to conduct proper, complete and rational agricultural activity there. Therefore, the entire area under the photovoltaic power plant should be considered as occupied for business activities and, therefore, it will be subject to real estate tax at the highest rates for real estate related to business activities. Additionally, the Court noted that if the agricultural land on which the photovoltaic power plant is located is fenced, this results in

24 III SA/Wa 1932/18.

25 The judgment of the Supreme Administrative Court of 9 August 2023, III FSK 385/23.

a clear separation of agricultural land for use in business activities. Even if the land can be used, for example, for animal farming, this activity will not be primary, but incidental.[26]

The above theses should be divided by pointing out that already during the construction of the photovoltaic farm, the plots, despite their agricultural nature, are entirely occupied for business purposes, which results in their area being taxed with real estate tax at the rates applicable to real estate related to running a business. Similarly, if, after completion of construction, the investment results in the location of photovoltaic farm equipment on the entire plot and its fencing, this results in the taxpayer taking over the entire agricultural land for business purposes.[27]

Therefore, there is no basis for measuring each time the area of the land on which the farm is located to calculate real estate tax, delimiting only the land on which the buildings with photovoltaic panels attached to them are located, and considering the remaining part of it that is used for agricultural purposes, such as grazing animals or growing plants, as not used for business activities.[28]

As a side note, it should be mentioned that in the context of treating agricultural land as subject to real estate tax, interpretation problems analogous to the one described above arise in the situation of taxation of protection zones of industrial plants[29] and land occupied for mineral extraction and then subjected to recultivation.[30]

3. Taxation of structures related to environmental protection

The definition of structure contained in Article 1a section 1 point 2 of the Act on Taxes and Local Fees stipulates that structure is a construction object within the

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26 Similar judgment of the Voivodship Administrative Court of 7 March 2023, I SA/Gd 1071/22.

27 For a different opinion, see: D. Jankowska, A. Kałążny, *Opodatkowanie elektrowni fotowoltaicznych – im dalej w las, tym więcej drzew*, Przegląd Podatkowy 2022, no. 4, p. 42.

28 R. Dowgier, L. Etel, G. Liszewski, B. Pahl, *Komentarz do art. 2*, in: *Podatki i opłaty lokalne. Komentarz*, 2021 [LEX database].

29 See the judgment of the Voivodship Administrative Court of 16 April 2024, I SA/Wr 800/23.

30 See more broadly P. Majka, *Taxation of Agricultural Land Used for Conducting Business Activity in the Light of Judicial Practice of Administrative Courts*, in: *Essential Problems with Taxation of Agriculture*, eds. M. Burzec, P. Smoleń, Lublin 2017, pp. 140–142 and 146–147; R. Dowgier, L. Etel, G. Liszewski, B. Pahl, *Komentarz do art. 2*; the judgment of the Supreme Administrative Court of 7 September 2022, III FSK 939/21; B. Pahl, *Opodatkowanie użytków rolnych zajętych na farmy fotowoltaiczne. Glosa aprobująca do wyroku WSA z dnia 13 kwietnia 2018 r., I SA/Lu 26/18*, Przegląd Podatków Lokalnych i Finansów Samorządowych 2020, no. 7, pp. 35–40.

meaning of provisions of the construction law, which is not a building or object of small architecture, or a construction device within the meaning of the provisions of the construction law related to a construction object that ensures the possibility of using the object in accordance with its purpose. Based on Article 3 point 1 of the Construction Law Act of 7 July 1994,[31] a construction object should be understood as a building, structure or small architectural object together with installations ensuring the possibility of using the object in accordance with its intended purpose, constructed using construction products. Therefore, a building within the meaning of the Act on Taxes and Local Fees should be considered to be a building that has been clearly indicated in the definition of a building or in other provisions of the Construction Law.[32] At the same time, in accordance with Article 3 point 3 of the Construction Law, buildings include, in particular: airports, roads, railway lines, bridges, viaducts, flyovers, tunnels, culverts, technical networks, free-standing antenna masts, free-standing advertising devices permanently attached to the ground, earth structures, defensive structures (fortification), protective structures, hydrotechnical structures, tanks, free-standing industrial installations, or technical devices, sewage treatment plants, landfills, water treatment plants, retaining structures, overground and underground pedestrian crossings, land development networks, sports buildings, cemeteries, monuments, and also construction parts of technical equipment (boilers, industrial furnaces, nuclear power plants, wind farms and other devices) and foundations for machines and devices, as technically separate parts of objects constituting a functional whole. In turn, pursuant to Article 3 point 9 of the Construction Law, a construction device is considered a technical device ensuring the possibility of using the facility in accordance with its intended purpose, and includes connections and installation devices, including for sewage treatment or collection, passages, fences, parking areas and areas for garbage bins.

Due to the classification of an object as a structure in real estate tax, there is a broader problem assessed as "industry-related" in the taxation of structures, which is additionally not based on clear criteria adopted by the legislator but seems accidental.[33] The legislator does not use a clear criterion for classifying objects that are subject to real estate tax as buildings. Similar facilities with the same function are often subject to taxation or do not constitute buildings, depending on which industry they belong to, e.g. energy, telecommunications, gas, mineral extraction,

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31 I.e. Journal Laws 2023 item 682 (hereinafter: Construction Law).

32 The judgment of the Constitutional Tribunal of 13 September 2011, P 33/2009.

33 P. Karwat, G. Liszewski, P. Majka, W. Morawski, K. Radzikowski, *Czy cały wiatrak jest budowlą przy obliczaniu podatku od nieruchomości?*, Wysokie Napięcie, 15.09.2018, https://wysokienapiecie.pl/13142-turbina-wiatrowa-budowla-podatek-od-nieruchomosci-opinia-prawnikow/ [access: 1.04.2024].

etc. In terms of legal solutions regarding buildings in light of environmental protection issues, doubts arise, among others: about taxation of electrostatic precipitators, as well as hydrotechnical facilities related to the operation of hydroelectric power plants.

In the field of ecological facilities, doubts arise first of all regarding the basis for taxing the so-called electrostatic precipitators, which are devices used to purify exhaust gases from dust to protect the atmosphere. Until about 2020/2021, in the judicature of administrative courts, electrostatic precipitators were generally considered to be technical devices related to a building, which allowed them to be classified as a building device within the meaning of Article 3 point 9 of the Construction Law, being a structure subject to real estate tax.[34] Currently the judicature questions the automaticity of the above approach, pointing out that the essence of the matter of classifying electrostatic precipitators, apart from the issue of their potential classification into the category of buildings, requires demonstrating what type of building the electrostatic precipitators are associated with and that this building constitutes a structure (or building) within the meaning of the Act on Taxes and Local Fees.[35] Therefore, it is currently not certain whether these devices are subject to real estate tax,[36] especially whether they are buildings.[37]

Next, attention should also be paid to policy related to real estate tax imposed on power plant facilities generating energy from renewable sources. The provisions of the Act on Taxes and Local Fees introduce uniform taxation of hydro, photovoltaic and wind power plants,[38] based on the recognition that only the building

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34 See the judgment of the Voivodship Administrative Court of 22 April 2021, I SA/Po 853/20 and judgment of the Voivodship Administrative Court of 14 September 2016, I SA/Gl 783/16 (these judgments were annulled).

35 The judgments of the Supreme Administrative Court of 19 September 2023, III FSK 1256-1257/22.

36 See the judgments of the Voivodship Administrative Court of 11 April 2023, I SA/Po 1539-1542/22; judgment of the Voivodship Administrative Court of 29 June 2022, I SA/Po 10/22; judgment of the Voivodship Administrative Court of 11 July 2023, I SA/Rz 183/23.

37 See the judgments of the Voivodship Administrative Court of 28 March 2024, I SA/Po 84-25/24. See also the doctrinal views: P. Banasik, *Opodatkowanie podatkiem od nieruchomości urządzeń technicznych na przykładzie elektrofiltrów*, Przegląd Podatkowy 2019, no. 10, pp. 41–47; T. Gwóźdź, *Opodatkowanie podatkiem od nieruchomości urządzeń technicznych w Polsce – zagadnienie wybrane*, Kwartalnik Prawa Podatkowego 2021, no. 2, p. 44; W. Morawski, in: *Podatek od nieruchomości w orzecznictwie sądów administracyjnych. Komentarz. Linie interpretacyjne*, eds. W. Morawski, T. Brzezicki, K. Lasiński-Sulecki, O. Łunarski, P. Majka, J. Wantoch-Rekowski, Warszawa 2013, p. 75.

38 It is worth mentioning the historical problem of taxation of wind farms in 2017–2018 – Article 3 point 1 of the Act on Investments in Wind Farms (Journal of Laws 2016 item 961) introduced, from 1 January 2017, the rule that a wind farm is a structure within the meaning of the construction law, consisting of at least a foundation, a tower and technical elements. However, in point 2 of Article 3 of this Act, it was clarified that the technical elements of a wind power plant are: a rotor with a set

parts of these power plants are subject to real estate tax as structures (in the case of photovoltaic farms – foundations and the supporting structure, in the case of wind farms – foundation and tower), which seems to meet the postulate of equality. In this context, however, there is significant doubt regarding the taxation of hydropower plants because construction elements constitute a disproportionately large part of these power plants compared to other power plants, which significantly affects the tax base. Article 3 point 3 of the Construction Law lists hydrotechnical structures, and the annex to the Construction Law Act includes "hydrotechnical structures for damming, discharge and regulation, such as: dams, water thresholds and stages, weirs, flood gates, embankment locks, siphons, embankments for flood protection, canals, navigable locks, edges and groynes, drainage ditches" in category XXVII. The set of construction objects of category XXIV also includes water management objects such as water and above-water reservoirs and fish ponds. In view of the above, a hydroelectric power plant is recognised in the judicature as a structure listed in the Construction Law as a hydrotechnical structure which should also be recognised as such under the Act on Taxes and Local Fees.[39]

Additionally, in practice, there is a problem with determining the tax base for structures constituting hydropower plants[40] due to the age of the hydrotechnical facilities that constitute them (usually they are several dozen years old), in the case of which their "market value" is often determined as the tax base, which causes procedural difficulties.[41] The above problems, resulting in burdensome taxation of hydroelectric power plants in light of the need to introduce incentives for renewable energy generation, allow for the formulation of a postulate on the need for preferential treatment of hydroelectric power plants compared to other power plants.

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of blades, a drive transmission unit, a power generator, control systems and a gondola unit with a mounting and a rotation mechanism (additionally, there was an amendment to category XXIX in the Annex of the Construction Law Act). Then, the change in this regulation in 2018 resulted in the restoration of the status quo from before 2017 for taxation purposes as of 1 January 2018, i.e. taxation only of the construction parts of a windmill.

39 See the judgment of the Voivodship Administrative Court of 22 September 2020, I SA/Gd 364/20.

40 Pursuant to Article 4 section 1 point 3 of the Act on Taxes and Local Fees, the tax base for buildings or their parts related to running a business is the value referred to in the provisions on income taxes, determined on January 1 of the tax year, constituting the basis for calculating depreciation in that year not reduced by depreciation write-offs, and in the case of fully depreciated structures – their value as of January 1 of the year in which the last depreciation write-off was made. Pursuant to Article 4 section 5 of the Act on Taxes and Local Fees, if the buildings or parts thereof referred to in section 1 point 3, no depreciation deductions are made – the tax base is their market value, determined by the taxpayer on the date of tax liability.

41 The judgment of the Supreme Administrative Court of 10 May 2023, III FSK 2077/21.

Conclusion

Currently, there is no doubt about the need to use legal regulations concerning environmental protection, including standards specifying the conditions for the use of environmental resources and regulations as an incentive for environmental protection behavior. For this purpose, primarily environmental protection law regulations are used, which provide for, among others, benefits and sanctions for entities using natural resources.[42] It is also justified to use tax regulations regarding the taxation of entrepreneurs for this purpose.

The conducted analysis leads to the conclusion that real estate tax is currently not used by the legislator as a tool to achieve a wide range of environmental protection objectives.[43] It is obvious that it was not created with broad ecological solutions in mind, and the applicable regulations in this area are limited to exemptions for land, buildings and structures located in national parks or nature reserves and serving directly and exclusively to achieve objectives in the field of nature conservation (Article 7 section 1 point 8 of the Act on Taxes and Local Fees) and land constituting wasteland, ecological land, wooded and bushy land (Article 7 section 10 on Taxes and Local Fees). At the same time, the nature of the real estate tax implies that it could be an effective tool of ecological policy.

The analysis of the applicable regulations leads to the conclusion that there are solutions in the real estate tax that can be described, to put it mildly, as not encouraging "green" behavior, an example of which is the highest rate of taxation of land occupied for a photovoltaic power plant, as well as taxation of elements of hydroelectric power plants. Also, the general "randomness" of taxation of buildings in real estate tax causes doubts regarding the taxation of electrostatic precipitators, which results in the lack of the expected ecological incentive to install these facilities.

Translated by Grzegorz Gałdyn

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42 A. Gorgol, *Prawo ochrony środowiska jako ustawa daninowa*, Krytyka Prawa. Niezależne Studia nad Prawem 2020, vol. 12, no. 4, p. 74.

43 This is not an exception, because the literature emphasises that the Polish tax system is characterised by a small number of taxes related to environmental protection, A. Ogonowska, *Ekologiczne aspekty*…, p. 266.

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On the dissonance between the legislature's actual and declared objectives of shaping the agricultural system

O dysonansie między rzeczywistymi a deklarowanymi przez ustawodawcę celami kształtowania ustroju rolnego

О диссонансе между реальными и декларируемыми законодателем целями формирования сельскохозяйственного строя

Про дисонанс між реальними та задекларованими законодавцем цілями формування аграрного устрою

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Summary: At the root of the restrictive legal regulations that were introduced in the Act of 11 April 2003 on Shaping the Agricultural System is the assumption of the special importance of agricultural real estate in the socio-economic system in Poland.

The objectives of the legislator can be reconstructed primarily based on the preamble to the Act, as well as the content of Article 1 of the UKUR At the same time, these goals should be interpreted as a set of values and substantive requirements for the formation of the agricultural system.

The preamble to the UKUR specifies the goals that the legislature intended the regulation to achieve, in particular: to strengthen the protection and development of family farms that are the basis of the agricultural system of the Republic of Poland, ensuring the proper development of agricultural land in the country, ensuring food security for citizens and supporting diversified agricultural activities conducted in accordance with environmental requirements and conducive to rural development.

On the other hand, the provision of Article 1 of the UKUR specifies *expressis verbis* the objectives to be achieved with the use of the instrumentality provided by the law, including among them: 1) improving the area structure of farms; 2) counteracting excessive concentration of agricultural real estate; 3) ensuring that agricultural activities are carried out on family farms by qualified persons; 4) promoting the development of rural areas; 5) implementing and applying agricultural support instruments; 6) active state policy.

The tasks expressed in Article 1 of the UKUR are not consistent with the conceptual assumptions expressed by the legislator in the preamble, which are accepted as justification for the legislative activity undertaken. The juxtaposition of the content of the preamble of the UKUR and Article 1 of the UKUR with the political and legal environment in which the law operates, allows one to conclude that there has been a dissonance between the actual and revealed intentions of the legislator's action.

Key words: agricultural system, objectives of shaping the agricultural system, agricultural property, family farm, rural development, food security

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Streszczenie: U podstaw restrykcyjnych regulacji prawnych, które wprowadzono w ustawie o kształtowaniu ustroju rolnego, leży założenie o szczególnym znaczeniu nieruchomości rolnych w ustroju społeczno-gospodarczym Polski. Cele ustawodawcy można zrekonstruować przede wszystkim na podstawie preambuły ustawy, jak też treści art. 1 ustawy o kształtowaniu ustroju rolnego. Cele te powinny być jednocześnie interpretowane jako zbiór wartości i merytorycznych wymogów kształtowania ustroju rolnego.

W preambule ustawy o kształtowaniu ustroju rolnego określono cele, które zgodnie z założeniami ustawodawcy ma realizować regulacja, a są nimi: wzmocnienie ochrony i rozwój gospodarstw rodzinnych stanowiących podstawę ustroju rolnego Rzeczypospolitej Polskiej; zapewnienie właściwego zagospodarowania ziemi rolnej w Rzeczypospolitej Polskiej; zapewnienie bezpieczeństwa żywnościowego obywateli oraz wspieranie zróżnicowanego rolnictwa prowadzonego w zgodzie z wymogami ochrony środowiska i sprzyjającego rozwojowi obszarów wiejskich.

Z kolei przepis art. 1 ustawy o kształtowaniu ustroju rolnego *expressis verbis* określa cele, które mają zostać osiągnięte przy zastosowaniu instrumentarium przewidzianego w ustawie, zaliczając do nich: 1) poprawę struktury obszarowej gospodarstw rolnych; 2) przeciwdziałanie nadmiernej koncentracji nieruchomości rolnych; 3) zapewnienie prowadzenia działalności rolniczej w gospodarstwach rodzinnych przez osoby o odpowiednich kwalifikacjach; 4) wspieranie rozwoju obszarów wiejskich; 5) wdrażanie i stosowanie instrumentów wsparcia rolnictwa; 6) aktywną politykę państwa.

Zadania wskazane w art. 1 ustawy o kształtowaniu ustroju rolnego nie są spójne z wyrażonymi przez ustawodawcę w preambule założeniami koncepcyjnymi, które przyjmowane są jako uzasadnienie dla podejmowanej działalności ustawodawczej. Zestawienie treści preambuły ustawy o kształtowaniu ustroju rolnego oraz art. 1 tej regulacji ze środowiskiem polityczno-prawnym, w którym ustawa funkcjonuje, pozwala stwierdzić, iż doszło do dysonansu pomiędzy rzeczywistymi a ujawnionymi intencjami działania ustawodawcy.

Słowa kluczowe: ustrój rolny, cele kształtowania ustroju rolnego, nieruchomość rolna, gospodarstwo rodzinne, rozwój obszarów wiejskich, bezpieczeństwo żywnościowe

Резюме: В основе ограничительных правовых норм, введенных Законом о формировании сельскохозяйственного строя, лежит предположение об особой значимости сельскохозяйственной недвижимости в социально-экономической системе Польши. Цели законодателя можно реконструировать, прежде всего, на основе преамбулы к Закону, а также содержания статьи 1 Закона о формировании сельскохозяйственного строя. Эти цели следует одновременно интерпретировать как набор ценностей и содержательных требований к формированию сельскохозяйственного строя.

В преамбуле к Закону о формировании сельскохозяйственного строя изложены цели, которые, по замыслу законодателя, должно преследовать данное регулирование, а именно: усиление защиты и развития семейных хозяйств, составляющих основу сельскохозяйственного строя Республики Польша; обеспечение надлежащего управления земельными ресурсами сельскохозяйственного назначения в Республике Польша; обеспечение продовольственной безопасности граждан; поддержка многоотраслевого сельского хозяйства, функционирующего в соответствии с требованиями охраны окружающей среды и способствующего развитию сельских территорий.

В свою очередь, положение статьи 1 Закона о формировании сельскохозяйственного строя expressis verbis определяет цели, которые должны быть достигнуты с использованием инструментов, предусмотренных Законом, в том числе: 1) улучшение территориальной структуры хозяйств; 2) противодействие чрезмерной концентрации сельскохозяйственной недвижимости; 3) обеспечение ведения сельскохозяйственной деятельности в семейных хозяйствах лицами, имеющими соответствующую квалификацию; 4) поддержка развития сельских территорий; 5) внедрение и применение инструментов поддержки сельского хозяйства; 6) активная государственная политика.

Задачи, обозначенные в статье 1 Закона о формировании сельскохозяйственного строя, не соответствуют концептуальным посылкам, выраженным законодателем в преамбуле, которые принимаются в качестве обоснования осуществляемой законодательной деятельности. Сопоставление содержания преамбулы Закона о формировании сельскохозяйственного строя и статьи 1 данного нормативного акта с политико-правовой средой, в которой функционирует данный Закон, позволяет сделать вывод о наличии диссонанса между реальными и выявленными намерениями деятельности законодателя.

Ключевые слова: сельскохозяйственный строй, цели формирования сельскохозяйственного строя, сельскохозяйственная недвижимость, семейное сельское хозяйство, развитие сельских территорий, продовольственная безопасность

Резюме: В основі обмежувальних правових норм, запроваджених Законом про формування аграрного устрою, лежить припущення про особливу важливість сільськогосподарської нерухомості в соціально-економічній системі Польщі. Цілі законодавця можна реконструювати, насамперед, на основі преамбули до Закону, а також змісту статті 1 Закону про формування аграрного устрою. Ці цілі слід одночасно інтерпретувати як набір цінностей та змістовних вимог до формування аграрного устрою.

У преамбулі Закону про формування аграрного устрою визначено цілі, які, згідно з припущеннями законодавця, має реалізувати закон, а саме: посилення захисту та розвитку сімейних фермерських господарств, що становлять основу аграрного устрою Республіки Польща; забезпечення належного управління сільськогосподарськими землями в Республіці Польща; забезпечення продовольчої безпеки громадян та підтримка диверсифікованого сільського господарства, яке ведеться з дотриманням вимог охорони довкілля та сприяє розвитку сільських територій.

У свою чергу, положення статті 1 Закону про формування аграрного устрою expressis verbis визначає цілі, які мають бути досягнуті за допомогою інструментів, передбачених Законом, серед яких 1) поліпшення територіальної структури сільськогосподарських підприємств; 2) протидія надмірній концентрації сільськогосподарської нерухомості; 3) забезпечення ведення сільськогосподарської діяльності в сімейних господарствах особами, які мають відповідну кваліфікацію; 4) підтримка розвитку сільських територій; 5) впровадження та застосування інструментів підтримки сільського господарства; 6) активна державна політика.

Завдання, зазначені у статті 1 Закону про формування аграрного устрою, не узгоджуються з концептуальними припущеннями, висловленими законодавцем у преамбулі, які прийняті в якості обґрунтування здійснюваної законодавчої діяльності. Зіставлення змісту преамбули Закону про формування аграрного устрою та статті 1 цього нормативно-правового акту з політико-правовим середовищем, в якому функціонує Закон, дозволяє зробити висновок про дисонанс між дійсними та виявленими цілями законодавця.
Ключові слова: аграрний устрій, цілі формування аграрного устрою, сільськогосподарська нерухомість, сімейне фермерське господарство, сільський розвиток, продовольча безпека

1. Concept of agricultural system

The notion of agricultural system has no legal definition. According to an encyclopaedia entry, an agricultural system is a socio-political system and also a type of relationship of basic means of production (mainly land) ownership and their use in agriculture, and the resulting social relations between different groups of agricultural and rural population.[1]

In agricultural law, this term has both narrow and broad meanings. In the narrow meaning, dominant in the interwar period, the term meant all ownership relations in agriculture, where ownership was understood as a legal form of property. In the broader sense, the agricultural system is treated as a component of the social and economic system. According to A. Stelmachowski, an agricultural system is an arrangement of ownership relations and forms of production organisation in agriculture, as well as organisational forms of the agricultural market.[2] Nowa-

1 https://encyklopedia.pwn.pl/haslo/ustroj-rolny;3991879.html [access: 30.06.2023].

2 A. Stelmachowski, in: *Polskie prawo rolne na tle ustawodawstwa Unii Europejskiej*, eds. P. Czechowski, M. Korzycka-Iwanow, S. Prutis, A. Stelmachowski, Warszawa 1999, p. 19.

days, recognising the accuracy and validity of the noted definition, it also involves another element – the concept of multifunctional development of rural areas. In accordance with this concept, agricultural policy was included in a comprehensively formulated rural development policy, taking into account the productive, social, cultural and ecological functions of rural areas.[3] Multifunctionality is expressed in the diversification of agricultural activity and boosting the economic development of rural areas. The essence of this policy is to promote and support complementary activities in agriculture that guarantee additional sources of agricultural income (agrotourism, crafts, trade, souvenir production, adaptation of farm buildings for non-agricultural purposes) and to create conditions for the sustainable and balanced development of rural areas (placing the small and medium-sized industry in rural areas, infrastructure development, promotion of employment in the service sector for agriculture).[4] The literature underlines that the model of multifunctional rural development is one of the core categories of policy concerning agriculture and rural areas in Poland, the position of which has been strengthened in the course of its evolution since the beginning of the political transformation process. The integration of the country's economy with the European Union is an important and favourable condition for the application of this concept, due to the priority of diversifying the economy of rural areas and the developed instruments of its support within the Common Agricultural Policy.[5]

Thus, the notion of agricultural system goes beyond the type of relations between the basic means of production (mainly land) which, in turn, is often referred to as agrarian structure or land ownership system. Obviously, neither the agricultural system nor the agrarian structure are constant or unchangeable. On the contrary, they undergo significant changes under the influence of general transformations in the social and economic system of the country. These changes may be revolutionary or evolutionary.[6]

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3 J. Mikołajczyk, *Współczesne funkcje obszarów wiejskich na tle koncepcji multifunkcjonalnego rolnictwa*, Studia Iuridica Agraria 2012, vol. 10, pp. 367–384.

4 E. Tomkiewicz, in: *Prawo rolne*, ed. A. Stelmachowski, Warszawa 2008, p. 544.

5 M. Adamowicz, M. Zwolińska-Ligaj, *The Concept of Multifunctionality as an Element of Sustainable Development of Rural Areas*, SGGW Scientific Papers, European Politics. Finance and Marketing 2009, no. 2 (51), p. 11.

6 K. Marciniuk, *Pojęcie własności rolnej w kontekście regulacji dotyczących kształtowania ustroju rolnego i przemian struktury agrarnej*, in: *Kwestia agrarna. Zagadnienia prawne i ekonomiczne*, ed. P. Litwiniuk, Warszawa 2016, pp. 112–113.

There is no doubt that the recently adopted amendments[7] to the Act of 11 April 2003 on Shaping the Agricultural System[8] are revolutionary changes. The Act on Shaping the Agricultural System has introduced far-reaching legal rationing in reference to agricultural real estate. Trading in these properties – based on various legal events – is subject to significant restrictions.

2. Objectives of shaping the agricultural system

Underlying the restrictive legal regulations introduced in the Act on Shaping the Agricultural System is the assumption of a special significance of agricultural real estate in the social and economic system in Poland.

This point of view is confirmed by the justification of the bill, which reads:

> Agricultural property (farmland) is the most important means of food production and of fulfilling the fundamental obligation to feed the entire population. The properties enabling the agricultural use of land are not universal, permanent or unchangeable. The progress of civilisation, urbanisation processes and climate changes result in the resources of agricultural land decreasing fairly quickly due to changes in their purpose, degradation of their productive properties or total devastation of the environment. For these reasons, agricultural land should be treated as a non-marketable public good and as such should be subject to special legal regulations. As a rule, legal protection should be implemented as quantitative protection, aiming at maintaining the existing area of agricultural land and ensuring its proper use, and as qualitative protection, aiming at not deteriorating the soil production properties and restoring the lost properties of agricultural land. Also, provisions laying down rules and procedures for trade in agricultural property have a protective character. In view of the above, it is necessary to introduce appropriate legal provisions which will allow for the proper distribution of agricultural real estate as a non-monetisable public good.[9]

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7 These are the changes introduced by: the Act of 14 April 2016 on the Suspension of Sale of Real Property of the Agricultural Property Stock of the State Treasury and Amendments to Certain Acts, Journal of Laws 2016 item 869 (hereinafter: the Suspension Act), and the Act of 26 April 2019 amending the Act on Formation of the Agricultural System and Certain Other Acts, Journal of Laws 2019 item 1080.

8 Act of 11 April 2003 on Shaping the Agricultural System, consolidated text: Journal of Laws 2022 item 2569 (hereinafter: UKUR).

9 Justification of the Bill on the Suspension of the Sale of Properties of the Agricultural Property Stock of the State Treasury and on the Amendment of Certain Acts, 8th Sejm, Sejm print no. 293, 4.03.2016, www.sejm.gov.pl, pp. 1–2.

The goals of the legislator can be reconstructed primarily based on the preamble to the Act, as well as the content of Article 1 of the UKUR These goals, according to E. Klat-Górska, should be simultaneously interpreted as a set of values and substantive requirements for shaping the agricultural system.[10]

2.1. Objectives resulting from the preamble of the Act on Shaping the Agricultural System

After several years of the Act on the Formation of the Agricultural System being in force, on the occasion of the amendment made in April 2016, the legislator decided to supplement the text of the Act with a preamble which is to specify the declared objectives of the regulation. According to the added preamble, the Act on the Shaping of the Agricultural System was enacted "to strengthen the protection and development of family farms, which under the Constitution of the Republic of Poland constitute the basis of the agricultural system of the Republic of Poland" (Article 23), as well as "to ensure the proper management of agricultural land in the Republic of Poland, to ensure food security for the citizens and to support sustainable agriculture conducted in accordance with the requirements of environmental protection and fostering the development of rural areas." However, as K. Marciniuk points out, there are no provisions in the text of the Act that would serve the fulfilment of at least some of the declared objectives of the regulation (e.g., there are no provisions concerning the promotion of sustainable agriculture conducted in accordance with the environmental requirements).[11] A similar point of view is presented by T. Czech, indicating that this declaration, however, is not reflected in reality.[12]

Analysing the political and legal premises accompanying the regulation and determining the character of the preamble of the UKUR from the perspective of the types of preambles distinguished in the literature, it should be pointed out that in this case, it is a motivational preamble, indicating the reason for issuing a legal act.[13] In the motivational preambles, the legislator explains the motives of their action,

10 E. Klat-Górska, *Ustawa o kształtowaniu ustroju rolnego. Komentarz*, Warszawa 2014, p. 31.

11 K. Marciniuk, in: *Prawo rolne*, ed. P. Czechowski, Warszawa 2019, p. 229.

12 T. Czech, *Kształtowanie ustroju rolnego. Komentarz*, Warszawa 2020, p. 20.

13 For more on this topic see: S. Lewandowski, *Charakter normatywny preambuły*, Studia Iuridica 1998, vol. 36, pp. 131–134. The author divides preambles into four types and distinguishes substantive, motivational, historical and ethical preambles.

although the actual motives may not coincide with the revealed motives of the regulation. The primary objective declared in the preamble is to strengthen the protection and development of family farms. They are to – in accordance with the first sentence of Article 23 of the Constitution of the Republic of Poland[14] – constitute the basis of the agricultural system of the Republic of Poland.

The preamble of the UKUR may be defined as: 1) a complex preamble, encompassing the purpose of the Act and its constitutional legal basis, 2) a complete preamble, which is not limited to one element, but indicates almost all the elements that are usually found in preambles and result from the above-mentioned definition of the concept. The preamble of the UKUR is a preamble in the formal sense, i.e., one that constitutes the part of a normative act following the title and preceding the articulated part.[15] At the same time, however, the last of the indicated types draws attention to the material meaning of the preambles. As noted by M.E. Stefaniuk: "The preamble in the material sense takes the form of numbered articles or paragraphs with content that could just as well be found in the preamble. Usually, it is Art. 1 or 2, in which the aim of the normative act is first indicated in a general way, and then the detailed tasks to be performed are listed."[16]

Applying these observations to the Act on Agricultural Real Estate, one may formulate a conclusion that Article 1 of the regulation contains a preamble in a substantive sense. The provision of Article 1 of the Act defines the principles of shaping the agricultural system, as well as objectives guiding the legislator. Hence, the division of preambles into formal and substantive types is not of a separable nature in the case of the Act. The analysed Act has features of both types of preambles. It is another matter whether in the substantive sense, i.e., that resulting from Article 1 of the UKUR, the preamble would be helpful in decoding the main intentions of the legislator.[17]

However, with the addition of the preamble to the text of the Act, Article 1, which defines its objectives, was not changed. Nevertheless, the preamble strengthened the meaning of this provision. This raises the question as to whether the restrictive provisions of the Act which make it more difficult to acquire agricultural real estate, cover with their scope such legal instruments that fulfil the assumptions

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14 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997 no. 78, item 483 as amended.

15 J. Mikołajczyk, *Functions of the Preamble in the Act on Shaping of the Agricultural System*, Studia Iuridica Lublinesia 2017, vol. 26, no. 1, p. 134.

16 M.E. Stefaniuk, *Preambuła aktu normatywnego w doktrynie oraz w procesie stanowienia i stosowania polskiego prawa w latach 1989–2007*, Lublin 2009, p. 53.

17 J. Mikołajczyk, *Functions of the Preamble*…, p. 134.

and objectives of the Polish agricultural real estate tax exemption expressed in its preamble and Article 1.

2.2. Objectives resulting from Article 1 of the Act on Shaping the Agricultural System

Pursuant to Article 1, the Act determines the principles of shaping the agricultural system of the state through:

1) improving the area structure of agricultural holdings;
2) preventing excessive concentration of agricultural real estate;
3) ensuring that agricultural activity on agricultural holdings is carried out by persons with appropriate skills;
4) promoting rural development;
5) implementing and using agricultural support instruments;
6) an active state agricultural policy.

E. Klat-Górska is right when she points out that the phrase "an act determines the principles of shaping the agricultural system of the state by […]" has been used, on the one hand, in a descriptive sense, as a certain general definition of a set of postulates determining the direction for both law-making actions (indicating not only what states of affairs the legislator should achieve, but also what values they should not infringe), as well as for the process of applying legal regulations.[18] On the other hand, the legislator has indicated what aims should be taken into account in agricultural real estate trade in connection with shaping the agricultural system of the state by means of legal norms.[19]

In the justification of one of the more spectacular judgements concerning the issue at hand, one can read that "The introduction into force of the Act of 11 April 2003 on Shaping the Agricultural System was dictated by the legislator's intention to regulate agricultural trade through mechanisms leading to the improvement of the area structure of agricultural holdings, counteracting the excessive concentration of agricultural real estate and ensuring that family holdings are run by persons with appropriate qualifications. The adopted solutions are to ensure a source of income for agricultural families and to contribute to the improvement of living

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18 E. Klat-Górska, *Ustawa o kształtowaniu*…, p. 30.

19 G. Bieniek, *Kształtowanie ustroju rolnego*, in: *Nieruchomości. Problematyka prawna*, eds. G. Bieniek, S. Rudnicki, Warszawa 2011, p. 136.

standards in rural areas by means of enlarging family farms."[20] Therefore, it is worth having a closer look at the aims of shaping the agricultural system outlined by the legislator.

2.2.1. Improvement of the area structure of agricultural holdings

The area structure of agricultural holdings depends on many factors, including natural, social, economic and cultural determinants.[21] In economic and agricultural literature, it is often emphasised that one of the main reasons which hinders the development of Polish agriculture is the fragmentation of the agrarian structure.[22] Due to a high percentage of very small farms (up to 2 ha of agricultural land) and small farms (2–5 ha), Poland is characterised by one of the less favourable farm area structures among EU countries. Therefore, it is necessary to take measures aimed at increasing the area of farms with a simultaneous increase in their productivity, especially in the context of possibilities of Polish agricultural holdings to compete with EU farms.[23] However, so far, no research method has been developed that would make it possible to search for the relationship between a specific legal tool and its influence on the change of farm area structure.

Measures aimed at improving the area structure of agricultural holdings are of a varied nature. This category includes solutions aimed at limiting trade in agricultural real estate. They make it possible to preserve an appropriate agricultural area through the application of area standards (which are to shape the size of agricultural holdings, counteract their irrational division, or prevent the excessive concentration of agricultural real estate[24]) and entrust the National Agricultural Support Centre (hereinafter referred to as KOWR) with powers related to exercising

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20 Judgment of the Supreme Court of 20 August 2018, IV CSK 455/17, LEX no. 2577319.

21 Z. Truszkiewicz, *Adekwatność instrumentów prawnych kształtowania ustroju rolnego*, Przegląd Prawa Rolnego 2019, no. 2, p. 76.

22 Agrarian structure – according to the EU doctrine – is a set of factors that affect agricultural production, the level of income of agricultural producers and the productivity of their labour. As cited in: A. Lichorowicz, *Harmonizowanie polskiego ustawodawstwa strukturalnego w rolnictwie z ustawodawstwem Unii Europejskiej (na przykładzie prawnego pojęcia gospodarstwa rolnego)*, Państwo i Prawo 1996, no. 4–5, p. 131.

23 For more on this topic, see: J. Bożek, J. Szewczyk, *Struktura obszarowa gospodarstw rolnych w Polsce na tle innych krajów Unii Europejskiej*, Wiadomości Statystyczne. The Polish Statistician 2020, vol. 65, no. 9, pp. 48–62.

24 K. Stefańska, *Normy obszarowe jako kryterium określenia terminu „nieruchomość rolna" i „gospodarstwo rolne" (zagadnienia wybrane)*. For more on this topic, see: R. Michałowski, *Normy obszarowe w obrocie nieruchomościami rolnymi*, Studia Iuridica Agraria 2007, vol. 6, pp. 156–169.

pre-emptive rights and purchasing agricultural real estate. The issue of direct prerequisites for introducing particular solutions or their effectiveness remains an open question.

Undoubtedly, the aim of the Act on Shaping the Agricultural System should be the creation of strong and economically stable farms operating as family farms.[25]

In order to be effective, the pursuit of improvement of the area structure of Polish agricultural holdings cannot be reduced exclusively to the regulation of trade in agricultural real estate. Such an approach allows to significantly reduce the negative process of area fragmentation of agricultural holdings. However, it is not enough to build positive tendencies in the area development of Polish agricultural holdings. Therefore, the existence of instruments stimulating undertaking investment activities by farmers (e.g., in the sphere of legal and tax instruments) is justified, including mainly through increasing the area of managed agricultural holdings.[26]

The analysis of legal instruments influencing how the agrarian structure is shaped shows that they do not constitute a coherent, logically constructed system. Individual legal acts, the provisions of which stimulate the area structure of agricultural holdings even indirectly, are treated by the legislator instrumentally, but not with a view to building a rational, comprehensive and coherent system of state influence on changes in this structure. The entry into force of the UKUR has been assessed in literature as the first step towards the creation of a consistent legal instrument which could lead to permanent positive changes in the agrarian structure.[27] At the same time, however, definition problems with reference to basic conceptual categories of the Act – the notions of agricultural holding and family holding, and above all, doubts with reference to the so-called lower area standard (defined *de lege lata* at the level of not less than 1 ha of the area of agricultural real property or the total area of agricultural holding) do not allow one to define an optimal area structure.[28]

Analysing statistical data, Z. Truszkiewcz pointed out that in 28 years (between 1990 and 2018), the average total area of an individual agricultural holding increased from 7.1 ha to 10.8 ha (by 3.7 ha), and the average area of agricultural land in these holdings increased from 6.3 ha to 9.7 ha (by 3.4 ha). In 2003 (the year in which the Act on Agricultural Holdings came into force), these standards were

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25 D. Łobos-Kotowska, M. Stańko, *Ustawa o kształtowaniu ustroju rolnego. Komentarz*, Warszawa 2020, p. 25.

26 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi. Komentarz*, vol. 9, ed. P. Popardowski, Warszawa 2021, p. 97.

27 P.M. Kosmęda, *Zmiany w strukturze obszarowej i własnościowej gospodarstw rolnych po wejściu w życie nowelizacji kodeksu cywilnego z 28 lipca 1990 r.*, Studia Iuridica Agraria 2010, vol. 8, p. 77.

28 D. Łobos-Kotowska, M. Stańko, *Ustawa o kształtowaniu*…, p. 24.

7.4 ha and 8.2 ha, respectively. The quoted data confirmed Z. Truszkiewicz's conviction that the Act on Agricultural Holdings does not have any influence on the improvement of the area structure of agricultural holdings, but it generates enormous social costs and limits proprietary rights.[29]

2.2.2. Preventing the excessive concentration of agricultural real estate

As P. Popardowski points out, the aim related to counteracting the excessive concentration of agricultural real estate (Article 1 point 2 of the UKUR) remains in close substantive relation with aiming at improving the area structure of agricultural holdings (Article 1 point 1 of the UKUR). Measures that promote building an appropriate area structure of holdings must be connected with the simultaneous elimination of threats to access to land which occur in the process of excessive concentration of agricultural real estate. This process leads to limitations in the availability of land for production needs. In this way, the development possibilities of agricultural holdings are narrowed.[30] The author adds that the problem of excessive concentration is related mainly to the perception of agricultural land as an attractive form of capital investment. The purchase of agricultural real estate for investment purposes is not always connected with maintaining its productive character.[31]

The very notion of "concentration of agricultural real estate" is vague and it is further narrowed by the predicate "excessive." In the case of the predicate "excessive," it is obvious and clear vagueness, where the range of vagueness of designations, about which this predicate could be pronounced, may be determined by indicating a certain limit point (the number of hectares of land above which real estate concentration may be considered excessive). But in the combination of both vague notions, there appears – as stressed by K. Czerwińska-Koral – a multidirectional fuzziness.[32]

The vagueness of phrases in the legal text is undesirable, particularly in the case of orders and bans addressed to citizens. In such a situation, it may constitute grounds for challenging the regulation in question as failing to meet the requirement of

29 Z. Truszkiewicz, *Adekwatność instrumentów prawnych*…, p. 80.

30 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi*…, p. 98.

31 Ibidem.

32 K. Czerwińska-Koral, *Pojęcia niedookreślone w przepisach ustawy o kształtowaniu ustroju rolnego*, Studia Iuridica Agraria 2016, vol. 14, pp. 196–197.

adequate definition of the norms concerning civil rights and freedoms.[33] This point of view is confirmed by the jurisprudence of the Constitutional Tribunal. In the judgement of 12 September 2005, the Constitutional Tribunal indicated a twofold danger, which is connected with the use of undefined phrases: "the practice of application of these provisions may relatively easily be distorted, as a result of invoking such phrases, without any attempt to fill them with content resulting from the circumstances of a given case and without a reliable justification communicated to the addressees of the decision."[34]

Specifying the criterion of "excessive concentration" is therefore not an obvious issue. It may be assumed, however, that there is an excessive concentration of agricultural real estate when a farm, both from a material (upper area standard) and subjective point of view, loses its features of a family farm.[35] Defining both the lower and the upper area norm (defined *de lege lata* at the level of 300 ha of agricultural land for a family holding) is a debatable issue. In the case of application of tools by KOWR in the form of the right of first refusal and the right of purchase, the basis is not only "a directional guideline," i.e., "an area limit serving to define a family holding and an individual farmer," but also: the specific nature of a given region, the size of farms, their economic potential, the demand for land used to expand family farms, the area of land from the Agricultural Property Stock which can be allocated for these purposes, limiting access to agricultural land for smaller, economically weaker farms, the purchase of agricultural land from local farmers or the purpose of purchase.[36]

2.2.3. Ensuring that agricultural activity on agricultural holdings is carried out by persons with appropriate qualifications

The literature aptly indicates that this issue must be considered at two levels.

First, agricultural land, being obviously one of the basic objects of property law in the civil sense, is at the same time a public good and subject to social obligations.

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33 M. Śliwka, *Znaczenie zwrotów niedookreślonych na tle orzecznictwa polskiego Trybunału Konstytucyjnego*, Studia Iuridica Lublinesia 2010, vol. 13, p. 271.

34 Judgment of the Constitutional Tribunal of 12 September 2005, SK 13/05.

35 D. Łobos-Kotowska, M. Stańko, *Ustawa o kształtowaniu…*, p. 26.

36 Order No. 20/16 of the President of the Agricultural Property Agency of 13.05.2016 on the implementation of the pre-emptive right and the right of purchase stipulated in the Act on Shaping the Agricultural System, point VI.2.

Therefore, in order to preserve its agricultural values, it is necessary for agricultural production to be carried out by persons with appropriate qualifications.

Second, it is common for land to be sold off to non-farmer investors and holding companies. As a consequence, the business models thus created are based more on land speculation than on agricultural production.[37]

Against this background, P. Popardowski adds that making the acquisition of agricultural real estate conditional on the acquirer having appropriate agricultural qualifications is intended to serve two purposes:

a) a person possessing appropriate qualifications guarantees the running of a productive agricultural holding. This is because such a person has the knowledge and experience that allow them to run agricultural production properly;
b) leaving an agricultural holding to a person having agricultural qualifications makes it possible to assume that this person will continue its production activity. For such persons, owning an agricultural holding is tantamount to having at one's disposal a factor of production suitable for the pursuit of their professional aspirations.[38]

There is no doubt that proper use of the production potential of agricultural real estate is influenced by the real estate being purchased by persons with appropriate agricultural qualifications. Therefore, in the UKUR as a rule it is assumed that agricultural real property may be purchased only by an individual farmer (Article 2a section 1 of the UKUR), and the possession of such status depends on possessing appropriate agricultural qualifications (Article 6 of the UKUR). Therefore, Article 1 (3) of the UKUR is about qualifications and not about the potential ability of a person having any education to assimilate knowledge in the scope of agricultural production.[39]

In the UKUR, agricultural qualifications are defined fairly broadly. They are also held by a person who does not have agricultural education, as long as they can prove at least 3 or 5 years of experience in agriculture, depending on the non-agricultural education they possess. However, experience is defined quite liberally (Article 6 section 2 item 2 and section 3 and 3a of the UKUR). In the opinion of Z. Truszkiewicz, agricultural qualifications defined in such a way are in fact a fiction which is to hinder the purchase of agricultural real estate. The author adds that even if they were more strictly defined, the requirement to have qualifications would be incompatible with economic freedom. Z. Truszkiewicz argues that there

37 D. Łobos-Kotowska, M. Stańko, *Ustawa o kształtowaniu*…, p. 26–27.

38 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi*…, p. 99.

39 A. Majewski, *Problematyka kwalifikacji do prowadzenia działalności rolniczej w gospodarstwach rolnych*, Studia Iuridica Agraria 2005, vol. 5, pp. 125–142.

are no substantial reasons, referring to the specificity of agricultural activity, for constructing the requirement of such agricultural qualifications, apart from creating formal barriers. It should also be noted that the negative effect of using agricultural qualifications is closing the agricultural environment to people from outside the agricultural sector.[40]

2.2.4. Support for rural development

It is a truism to state that the functions to be performed by rural areas are economic, administrative, social and ecological. They are diverse and penetrate various spheres of life. While previously rural areas were identified exclusively with agriculture, production and the rural economy, *de lege lata* their heterogeneous character is emphasised.

As was rightly pointed out, supporting rural development is based on perceiving interactions between agricultural production and rural development. Appropriate development of agriculture in terms of production and income translates into the improved functioning of the rural area. Thus, there is a functional relationship between agricultural production and farmers' interests and the countryside and rural community. Rural area is based, therefore, on the occurrence of a complex of (social and spatial) components, for which their connection with production activity in agriculture acts as an integrating factor. This special relationship between the rural community and rural areas and agriculture is related to the fact that the effects and characteristics of rural management are directly reflected in the social conditions occurring in the area.[41]

These issues have been acknowledged by the Polish legislator.[42] As an example, one can indicate here Article 2a section 4 (3) UKUR within the framework of which preferences were created for a natural person who applies for permission to purchase agricultural real estate in order to extend an agricultural holding, if this person (young farmer) has been granted assistance in starting agricultural activity

40 Z. Truszkiewicz, *Adekwatność instrumentów prawnych*…, pp. 83–84.

41 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi*…, p. 99.

42 D. Łobos-Kotowska, M. Stańko, *Ustawa o kształtowaniu ustroju rolnego*…, pp. 26–27. See also: P.A. Blajer, W. Gonet, *Ustawa o kształtowaniu ustroju rolnego. Komentarz*, Warszawa 2020, p. 20. The issue is viewed differently in: T. Czech, *Kształtowanie ustroju rolnego*…, p. 21. The author indicates that: "In Art. 1 item 4 of the UKUR, support for the development of rural areas is also declared. The analysis of particular provisions of the commented Act indicates that this issue is in fact not covered by its scope."

in accordance with the provisions of the Act of 20 February 2015 on Supporting Rural Development with the participation of the European Agricultural Fund for Rural Development under the Rural Development Programme for 2014–2020.[43]

2.2.5. Implementation and use of agricultural support instruments

Agricultural support instruments are mechanisms (legal tools) used by the legislator. They are currently implemented on the basis of the provisions of the aforementioned Act of 20 February 2015 on Supporting Rural Development with the participation of the European Agricultural Fund for Rural Development under the Rural Development Programme 2014–2020. It is worth noting that the start date of the new Common Agricultural Policy (CAP) was postponed to 1 January 2023 due to protracted negotiations and the need to continue payments to farmers and other beneficiaries. Under the transitional regulation for 2021 and 2022,[44] the provisions in force in 2014–2020 for the CAP have been extended and new elements have been included, in particular regarding the Green Deal and enabling the transition to new strategic plans for agricultural policy.

It is the legislator's intention that the instruments concerning trade in agricultural real estate, which were included in the UKUR, should create conditions facilitating the implementation and application of instruments supporting agriculture. According to P. Popardowski, the noted aim should be understood to mean that the solutions of the UKUR, especially concerning the prerequisites for purchasing agricultural real estate, should allow for maintaining coherence with the requirements adopted for the implementation and application of agricultural support instruments.[45]

However, J. Bieluk is right when he emphasises that the Act does not create *per se* the conditions determining the obtaining of support, as this is not the subject of its provisions.[46] A similar view in this respect was formulated by T. Czech. The author stressed that this provision is inadequately constructed,

43 Act of 20 February 2015 on Supporting Rural Development with the participation of the European Agricultural Fund for Rural Development under the Rural Development Programme for 2014–2020, consolidated text: Journal of Laws 2021 item 182.

44 OJ L 437, 28.12.2020, pp. 1–29.

45 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi*…, p. 100.

46 J. Bieluk, *Ustawa o kształtowaniu ustroju rolnego. Komentarz*, Warszawa 2019 [Legalis database], Article 1, line no. 15.

since the implementation and application of agricultural support instruments cannot be an aim in itself, but should aim at a certain result.[47]

2.2.6. Pursuing an active agricultural policy

Article 1 poit 6 of the UKUR declares an active pursuit of agricultural policy. This objective should be reduced to a normative description of forms of activity of the National Support Centre for Agriculture in trading in agricultural real property.

There is a well-known opinion that the activity exposed in Article 1 (6) of the UKUR in the realisation of fundamental objectives of the agricultural policy should be perceived at two levels:

1) in formally granting to the National Support Centre for Agriculture (KOWR) extensive competencies that allow it to actively participate in and control agricultural real estate trade;
2) in the expectation that KOWR should actively use the competencies granted to it in order to ensure the proper implementation of the basic assumptions of national agricultural policy.[48]

There is no doubt that the actions of the National Agricultural Fund aimed at implementing the state policy in the scope of control of agricultural land trade cannot remain in contradiction with the principles of EU law, including the freedom of capital flow. However, the European Parliament accepts the position of the German Constitutional Tribunal expressed in the ruling of 12 January 1967[49] that trade in agricultural land need not be as free as trade in any other form of capital, in particular, because of the impossibility of increasing the area of land. However, it is necessary to comply with basic principles such as proportionality, non-discrimination and the protection of the public interest. This legal framework should determine the active policy of the state in the discussed scope and constitute a guideline for achieving the objectives of the UKUR.[50]

The above analysis of the objectives of shaping the agricultural system declared by the legislator leads to the conclusion that the UKUR does not regulate the shaping of the agricultural system in a comprehensive manner, but concentrates on introducing mechanisms to trade in agricultural land which are to have a positive

47 T. Czech, *Kształtowanie ustroju rolnego*…, p. 21.
48 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi*…, p. 100.
49 1 ByR 169/63, BVerfGE 21, 73–87.
50 D. Łobos-Kotowska, M. Stańko, *Ustawa o kształtowaniu*…, p. 30.

impact on the agricultural system. In order to describe the role of the UKUR in influencing the agrarian structure of the country, it is important to emphasise that this Act concentrates on the issue of regulating trade in agricultural real property. However, what remains outside the sphere of normative interest is an equally important matter of involving instruments encouraging farmers to take action to improve the area structure of farms. Agrarian reconstruction, as P. Popardowski points out, cannot be perceived only through the prism of measures limiting trade in agricultural real estate (area standards, requirements concerning agricultural qualifications, the requirement of administrative consent, etc.). The author rightly points out that for a real improvement of structural conditions, it is necessary to apply a complex approach. Therefore, apart from introducing rationing solutions, it is justified to apply legal instruments encouraging farmers to carry out structural changes in their agricultural holdings. Only in this way it is possible to initiate processes allowing for abandoning the hitherto disadvantageous structural arrangement of agricultural production. The indicated function should be performed by tax preferences related to investment activities in agricultural holdings in order to improve their production capacity or financing mechanisms, the granting of which to a farmer will depend on taking actions towards the structural reconstruction of agricultural holdings.[51]

3. The Act on the Formation of the Agricultural System as an instrument to achieve a political objective

According to A. Lichorowicz, striving to fulfil a political goal which was to create a system preventing socially unfavourable effects of uncontrolled purchase of land by foreigners, including speculation, as well as haste in the last stage of legislative works resulted in the Act containing regulations which do not fully correspond to its title and goals declared in its Article 1.[52] The title of the Act suggests that it specifies comprehensively all aspects related to shaping the agricultural system, while the aim of the regulation originally declared in Article 1 of the UKUR is the improvement of the area structure of agricultural holdings, counteracting excessive concentration of agricultural real estate and ensuring that agricultural activity in

51 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi*…, p. 55.

52 More on this topic: A. Lichorowicz, *Instrumenty oddziaływania na strukturę gruntową Polski w ustawie z dnia 11 kwietnia 2003 r. o kształtowaniu ustroju rolnego*, Kwartalnik Prawa Prywatnego 2004, vol. 13, no. 2, pp. 387–388.

agricultural holdings is conducted by persons with appropriate qualifications. This list, as indicated above, has been additionally extended on the basis of the amendment to the Act of 2019. Pursuant to subsequent points of Article 1 of the UKUR added by virtue of this amendment, this Act defines the principles of the agricultural system of the state also as supporting the development of rural areas, the implementation and application of agricultural support instruments, as well as active agricultural policy of the state.

The juxtaposition of the content of the preamble of the UKUR and Article 1 of the UKUR with the political and legal environment in which the Act functions, allows a conclusion to be drawn that there was a dissonance between the actual and revealed intentions of the legislator. T. Kurowska is right in pointing out that the drafting of the UKUR was motivated by "a political goal and not by concern for the proper shape of ownership and structural transformations in agriculture in market economy conditions, where a family farm, among other production units in agriculture, would be subject to particular care and protection of the state."[53] What is more, the aim of passing the act, which in fact came down to ensuring control over the ownership turnover of agricultural real estates, determined the way the term family holding is defined in the act.[54]

Paradoxically, the noted contradiction between real and revealed intentions of the legislator is also indicated by the legislator themselves. A spectacular example here is a fragment of the justification of the Act that reads:

> The aim of the proposed Act is to strengthen the protection of agricultural land in Poland against its speculative purchase by domestic and foreign persons who do not guarantee that the acquired land will be used for agricultural purposes in accordance with the social interest. The legal regulations in force in this matter do not in any way counteract the speculative purchase of agricultural real estate and do not guarantee that the real estate purchased will be used for agricultural purposes.[55]

A similar conclusion results from the analysis of an opinion of the Legislative Council, which indicates that

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53 T. Kurowska, *Ochrona gospodarstwa rodzinnego – uwagi de lege lata i de lege ferenda*, Studia Iuridica Agraria 2010, vol. 8, p. 21.

54 K. Stefańska, *Pojęcie gospodarstwa rodzinnego w ustawie o kształtowaniu ustroju rolnego*, Studia Iuridica Agraria 2005, vol. 5, pp. 191 ff. See also: K. Stefańska, *Przesłanki prawnego różnicowania pojęcia gospodarstwa rolnego*, in: *Z zagadnień prawa rolnego, cywilnego i samorządu terytorialnego. Księga jubileuszowa profesora Stanisława Prutisa*, eds. J. Bieluk, A. Doliwa, A. Malarewicz-Jakubów, T. Mróz, Białystok 2012, p. 293.

55 Justification of the Bill on the Suspension of the Sale of Properties…

> The justification of the bill – in the part concerning the indication of the public interest in favour of introduced changes – is inconsistent to some extent. On the one hand, the legislator refers to important values, the protection of which is the unquestionable obligation of public authorities in the Republic of Poland – food security of the state, the need to ensure the use of agricultural land for agricultural purposes, maintaining the existing area of agricultural land and ensuring its proper use, not deteriorating the productive properties of soil, and restoring the lost value of agricultural land. On the other hand, the justification of the bill emphasises that the 12-year protection period for the purchase of Polish agricultural land by foreigners enshrined in the Treaty of Accession of Poland to the EU ends on 1 May 2016. In the opinion of the Legislative Council, it is not clear what type of threats to the public interest arise from the end of the abovementioned protection period and how these threats may be eliminated by the bill under review.[56]

Polemicising with this standpoint, M. Korzycka recognises the regulation analysed here as comprehensive and appropriate, and even as "pro-national and pro-state" in the scope especially of its aims and importance in the Polish legal order.[57] A position of compromise is presented by M. Zubik, who on the one hand emphasises the existence of public interest in regulating by the legislator the issue of trading in agricultural land, but on the other hand points out that "certainly, the recognition of a farm as a family farm does not depend on the citizenship of its owner."[58] Referring to the question of citizenship, the author warns the legislator against the discriminatory character of differentiation criteria, postulating also that these criteria should meet the "requirement of rationality, adequacy and proper balancing of limitations resulting from the protected constitutional goods."[59]

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56 M. Kaliński, A. Wyrozumska, K. Wójtowicz, M. Wiącek, M. Bojarski, D. Kijowski, Opinia Rady Legislacyjnej z 26 lutego 2016 r. o projekcie ustawy o wstrzymaniu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa oraz o zmianie niektórych ustaw, Rada Legislacyjna przy Prezesie Rady Ministrów, RL-0302-5/16, point II, subpoint 6.

57 M. Korzycka, Analiza prawna przepisów ustawy o wstrzymaniu sprzedaży nieruchomości Zasobu Własności Rolnej Skarbu Państwa oraz o zmianie niektórych ustaw zwana dalej ustawą (Senat print 124) (Opinions and Expert Opinions OE-248), Kancelaria Senatu, Biuro Analiz i Dokumentacji, April 2016, p. 5.

58 M. Zubik, *Gospodarstwo rodzinne – niedoceniona szansa współkształtowania konstytucyjnych podstaw ustroju rolnego poprzez sądownictwo konstytucyjne*, in: *Prawne mechanizmy wspierania i ochrony rolnictwa rodzinnego w Polsce i innych państwach Unii Europejskiej*, ed. P. Litwiniuk, Warszawa 2015, p. 56.

59 Ibidem.

Conclusion

There is no doubt that the Act on Shaping the Agricultural System is one of the normative elements co-creating the structural conditions for agricultural activity in Poland.

The preamble to the UKUR specifies the objectives that the legislator intends the regulation to pursue, in particular:

- strengthening the protection and development of family farms which are the basis of the agricultural system of the Republic of Poland,
- ensuring proper management of agricultural land in the Republic of Poland,
- ensuring food security for citizens,
- promoting diversified agriculture in line with environmental requirements and fostering rural development.

The formulated catalogue of objectives emphasises the constitutional principle of a family farm constituting the basis of the agricultural system (Article 23 of the Constitution of the Republic of Poland) and refers to the current challenges of the Common Agricultural Policy of the European Union.

Article 1 of the UKUR specifies *expressis verbis* the objectives to be achieved with the use of the instruments provided for in the Act. The objectives of the UKUR which were declared by the legislator include: 1) improvement of the area structure of agricultural holdings; 2) counteracting excessive concentration of agricultural real estate; 3) ensuring that agricultural activity is carried out on family holdings by persons with appropriate qualifications; 4) supporting the development of rural areas; 5) implementing and applying agricultural support instruments; 6) active state policy.

In the context of the considerations presented here, one should not lose sight of the political and legal context in which the regulation was introduced. Neither in the preamble nor in Article 1 of the Act on Agricultural Real Estate, was one of the primary and actual goals of the legislator explicitly expressed. The provisions of the UKUR aim at preventing the purchase of agricultural real estate for purposes not related to agricultural activity (investment, speculation, etc.). However, the above-mentioned aim may be derived from the preamble which mentions the appropriate management of agricultural land. It is reflected in numerous provisions of the Act.[60] In order to fulfil this objective, the legislator, in the text of Article 2b § 1 of the UKUR, imposed on the purchaser of agricultural real estate the obligation to run the agricultural holding which included the real estate for at least 5 years.

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60 See, in particular, Articles 2a (1) and 9 (3) of the UKUR.

Moreover, the socio-political analysis indicates that the provisions of the Act on Shaping the Agricultural System are to hinder foreigners from purchasing agricultural real estate in Poland, creating a system of preferences for persons who have already established and run family farms in Poland. This is done, among others, by the criterion of *domicile* specified in Article 6 section 1 of the Act on Shaping the Agricultural System.[61]

The presented aim induces the legislator to create – in the Act on Shaping the Agricultural System – a closed, complete normative system of rationing the trade in agricultural real estate. It should be noted that at the same time, it causes many dysfunctions in the application of the Act in practice, especially in confrontation with the principle of the autonomy of will in civil law transactions and the need to implement other public objectives.[62]

As emphasised by P. Popardowski, the comparison of tasks specified in the preamble and Article 1 of the UKUR with legal instruments included in the Act indicates that this legal Act concentrates mainly on issues related to the protection of Polish agricultural land against excessive concentration.[63] This leads to the conclusion that the legal mechanisms included in the Act only partly contribute to the proper shaping of the agricultural system.

The objectives declared by the legislator do not reflect all the problematic issues related to the shaping of the agricultural system. As a consequence, the title of the Act misleadingly suggests that through the solutions included in this act, the agricultural system is shaped in a comprehensive way.

Moreover, the tasks expressed in Article 1 of the UKUR are not consistent with the conceptual assumptions expressed by the legislator in the preamble, which are accepted as a justification for the undertaken legislative activity. The juxtaposition of the content of the preamble to the UKUR and Article 1 of the UKUR with the political and legal environment in which the Act functions allows one to conclude that there is a dissonance between the actual and revealed intentions of the legislator.

At the same time, defining the objectives of the Act is not an accidental procedure. Through this legislative procedure, the legislator sets the directions for the interpretation of individual provisions. It is through interpretation that the basic assumptions of the legislator should be achieved. However, this procedure is particularly risky where a given legal regulation leaves a considerable margin

61 T. Czech, *Kształtowanie ustroju rolnego*…, pp. 21–22.

62 Ibidem, p. 21.

63 P. Popardowski, in: *Prawo rolne. Obrót nieruchomościami rolnymi*…, p. 9.

of decision-making to its executors, in this case the National Support Centre for Agriculture.[64]

Undoubtedly, the scope in which the content of the preamble and Article 1 of UKUR, as well as the values stemming from these regulations, are taken into account in the process of interpreting the law will be determined by the findings of the bodies applying the law. It is aptly pointed out in the doctrine that it is not insignificant that the legislator formulates the purpose of the Act directly in its provisions, because, in the case of interpretation doubts, this procedure helps to correctly introduce the interpretation of the ambiguous provision in terms of purpose.[65] In this context, it should be indicated, as it is done by J. Bieluk, that it is extremely important how the objectives of the Act will be understood by decision-makers – in this case, by KOWR because the application of the instruments included in the Act (pre-emptive right, purchase right, granting consent to purchase real property and the waiver of obligations related to land acquisition) depends on this body. It should be remembered that the use of the right of pre-emption and the right of purchase is not subject to any control under any procedure. The decision on exercising the pre-emptive right is not a decision from the point of view of administrative law, it is a management right of the General Director of the KOWR (directors of field offices acting on the basis of his/her authorisation) subject to evaluation only within the internal structures of the KOWR.[66]

Therefore, K. Marciniuk is right to note, against the background of the analysed here problem of discrepancy between actual goals and those declared by the legislator of the UKUR, that

> instead of creating instruments to stimulate the transformation of the area structure of Polish agriculture, this Act concentrates *de facto* on the maintenance of the *status quo* and has at most a protective function, protecting individual farmers from competition in the acquisition of agricultural real estate by capital investors from outside the agricultural sector. It seems that this undoubtedly advantageous function of the Act does not exhaust the needs which Polish agriculture faces in the scope of area structure transformation towards the structures permanently increasing the production efficiency and at the same time profitability of Polish agriculture.[67]

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64 D. Łobos-Kotowska, M. Stańko, *Ustawa o kształtowaniu*…, p. 23.

65 P. Czechowski, P. Wieczorkiewicz, *Problemy ingerencji prawnej w swobodę obrotu nieruchomościami rolnymi w ustawie o kształtowaniu ustroju rolnego i jej wpływ na interpretację ustawodawstwa krajowego*, Studia Iuridica Agraria 2005, vol. 5, p. 25.

66 J. Bieluk, *Ustawa o kształtowaniu ustroju rolnego*…, Article 1, line no. 9.

67 K. Marciniuk, *Prawne instrumenty ingerencji władzy publicznej w obrót nieruchomościami rolnymi jako środki kształtowania ustroju rolnego*, Białystok 2019, p. 393.

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The normative significance of the valuation report in light of the resolution on disposing of real estate under a "premises in exchange for land" settlement

Normatywne znaczenie operatu szacunkowego w świetle podjęcia uchwały o zbyciu nieruchomości z rozliczeniem „lokal za grunt"

Нормативное значение отчета об оценке объекта оценки в свете принятия решения об отчуждении недвижимости в порядке расчета «помещение в обмен на землю»

Нормативне значення звіту про оцінку майна в світлі прийняття рішення про продаж нерухомого майна з розрахунком "приміщення за землю"

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Summary: With effect from 1 April 2021, the Act of 16 December 2020 on Disposing of Real Estate under a "Premises in Exchange for Land" Settlement entered into force. This act introduced a new model of trading in real estate owned by communes and districts, which allows for a non-monetary settlement of part of the transaction. Article 4 (1) of the act identifies the first step necessary to manage local government's real estate, which involves adopting a resolution by the competent constituting body on disposing of real estate under a "premises in exchange for land" settlement. However, crucial for the present study is paragraph 2 of the said article. According to this provision, a draft resolution specifying the rules for disposing of real estate under a "premises in exchange for land" settlement shall include a valuation report determining the value of such real estate, drawn up by a property valuator not earlier than three months before submitting this draft resolution to the council. In the author's opinion, two research problems are associated with the current content of Article 4 (2), pertaining to 1) the impact of the validity period and purpose of the valuation report on the defectiveness of the resolution; 2) the consequences of integrating the valuation report with the content of the draft resolution that lays down rules on disposing of real estate under a "premises in exchange for land" settlement in terms of copyright matters. The dogmatic method was used during the research.

Key words: premises in exchange for land, resolution on disposing of real estate, valuation report

Streszczenie: Z dniem 1 kwietnia 2021 r. weszła w życie ustawa z dnia 16 grudnia 2020 r. o zbywaniu nieruchomości z rozliczeniem „lokal za grunt". Akt ten wprowadził nowy model obrotu nieruchomościami stanowiącymi własność gminy oraz powiatu, który pozwala na niepieniężne rozliczenie części dokonywanej transakcji. W ust. 1 art. 4 tej ustawy wskazano pierwszy etap niezbędny do zagospodarowania nieruchomością samorządową, którym jest podjęcie przez właściwy organ stanowiący uchwały o zbyciu nieruchomości z rozliczeniem „lokal za grunt". Kluczowy dla niniejszego studium jest jednak ust. 2 tego artykułu. Jak stanowi ten przepis, do projektu uchwały określającej zasady zbywania nieruchomości z rozliczeniem „lokal za grunt" dołącza się operat szacunkowy określający wartość tej nieruchomości, sporządzony przez rzeczoznawcę majątkowego nie wcześniej niż na trzy miesiące przed dniem przedłożenia radzie tego projektu uchwały. W ocenie autora, z obecnej treści art. 4 ust. 2 wynikają dwa problemy badawcze dotyczące: 1) wpływu okresu i celu sporządzenia operatu szacunkowego na wadliwość uchwały; 2) prawnoautorskich konsekwencji zintegrowania operatu

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szacunkowego z treścią projektu uchwały określającej zasady zbywania nieruchomości z rozliczeniem „lokal za grunt". Na potrzeby przeprowadzonych badań posłużono się metodą dogmatyczną.

Słowa kluczowe: lokal za grunt, uchwała o zbyciu nieruchomości, operat szacunkowy

Резюме: С 1 апреля 2021 года вступил в силу закон от 16 декабря 2020 года об отчуждении недвижимости в порядке расчета «помещение в обмен на землю». Данный закон ввел новую модель реализации недвижимости, находящейся в собственности гмины или повята, которая позволяет осуществлять неденежные расчеты по части осуществляемой сделки. В пункте 1 статьи 4 данного закона указан первый этап, необходимый для управления имуществом местных органов власти – принятие компетентным учредительным органом решения об отчуждении имущества в порядке расчета «помещение в обмен на землю». Однако для данного исследования принципиально важным является пункт 2 данной статьи. Согласно этому положению, к проекту решения, устанавливающему правила отчуждения недвижимого имущества в порядке расчета «помещение в обмен на землю», должен быть приложен отчет об оценке объекта оценки, определяющий стоимость такого имущества, составленный оценщиком имущества не ранее чем за три месяца до даты внесения данного проекта решения в совет. По мнению автора, из нынешнего содержания статьи 4 (2) вытекают две исследовательские проблемы, касающиеся: 1) влияния периода и цели составления отчета об оценке на дефектность решения; 2) правоустанавливающих последствий интеграции отчета об оценке объекта оценки и содержания проекта решения, определяющего принципы отчуждения недвижимости в порядке расчета «помещение в обмен на землю». Для целей проведенного исследования использовался догматический метод.

Ключевые слова: помещение в обмен на землю, решение об отчуждении недвижимости, отчет об оценке объекта оценки

Резюме: 1 квітня 2021 року набув чинності Закон від 16 грудня 2020 року про продаж нерухомого майна з розрахунком "приміщення за землю". Цим законом запроваджено нову модель торгівлі нерухомістю, що належить громаді та району, яка дозволяє здійснювати негрошові розрахунки частини проводженої трансакції. У п 1 ст. 4 цього ж Закону було вказано на перший етап, необхідний для правильного освоєння нерухомого майна місцевого самоврядування, яким є прийняття уповноваженим органом рішення про продаж нерухомого майна із розрахунком "приміщення за землю". Однак ключовим моментом для цього дослідження є параграф 2 цієї статті. Згідно з цим законом, до проєкту постанови, що визначає правила продажу нерухомого майна із розрахунком "приміщення за землю", додається звіт про оцінку вартості нерухомого майна, складений оцінювачем не раніше, ніж за три місяці до дня внесення цього проєкту рішення на розгляд радою. На думку автора, із дійсного змісту ст. 4 розділ 2 виникають дві проблеми дослідження: 1) вплив періоду та мети складання звіту про оцінку на дефектність рішення; 2) юридичноавторські наслідки інтеграції звіту про оцінку до змісту проєкту постанови, що визначає принципи продажу нерухомого майна з розрахунком "приміщення за землю". Для досягнення цілей даного дослідження було автором використано догматичний метод.

Ключові слова: приміщення за землю, закон про продаж нерухомого майна, звіт про оцінку майна

Introduction

On 1 April 2021, the Act of 16 December 2020 on Disposing of Real Estate under a "Premises in Exchange for Land" Settlement (hereinafter: PFL Act) came into effect.[1] This legal act undoubtedly introduced a new model of trading in real estate

1 Consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 1525.

owned by communes and districts and real estate that constitutes their resources. Contrary to rules on trading in real estate stemming from the Act of 21 August 1997 on Real Estate Management (REM),[2] the new model of disposing of real estate allows the sale of real estate from communal or district real estate resources with the inclusion in the price of this real estate of the price of premises and buildings transferred by the real estate buyer to the commune or district. This innovative approach to cashless settlements of all or part of the price of sale of self-government real estate required the creation of an additional procedure which would provide a basis to shape the future content of the contract of sale for such real estate. Only in this way is the commune or the district able to model the sale relationship so that a cash payment is due only on the difference between the price of the real estate obtained through a public tender and the price of premises or buildings that the buyer (investor) commits to transfer to the commune or the district as part of a "premises in exchange for land" settlement. Hence, Article 4 (1) identifies the first step necessary to manage local governments' real estate, which involves adopting a resolution on disposing of real estate under a "premises in exchange for land" settlement. Pursuant to that provision, such a resolution shall be adopted by the following organs:

1) the commune council – for real estate from that commune's real estate resources, pursuant to Article 18 (2) (9) (a) of the Commune Self-Government Law of 8 March 1990 (hereinafter CSGL);[3]
2) the district council – for real estate from that district's real estate resources, pursuant to Article (12) (8) (a) of the District Self-Government Law of 5 June 1998 (hereinafter: DSGL).[4]

However, the key to this publication is Article 4 (2) of the PFL Act, stipulating that "The draft resolution specifying rules for disposing of real estate under a 'premises in exchange for land' settlement, hereinafter 'real estate disposal resolution,' shall include a valuation report that specifies the value of this real estate drawn up by a property valuator not earlier than three months before the date of submitting this draft resolution to the council referred to in subsection 1." The act drafters believed, and expressed it in the explanatory memorandum,[5] that attaching the real estate valuation – carried out by a property valuator not earlier than three months before the date of submitting the draft resolution to the commune council – is justified for two reasons, which must also be invoked directly:

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2 Consolidated text: Journal of Laws 2023 item 2029 as amended.
3 Consolidated text: Journal of Laws 2023 item 1688 as amended.
4 Consolidated text: Journal of Laws 2023 item 573 as amended.
5 https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=766 [access: 3.11.2023].

1) based on, inter alia, the presented valuation, the commune council shall set the price for 1 square metre of the usable surface for premises or buildings that will be given by the investor to the commune in the future as part of a "premises in exchange for land" settlement; this price is reflected in the content of the resolution and is applied in further settlement between the commune and the real estate buyer;
2) the limitation of validity of this real estate valuation procedure to three months before the date of bringing the draft before the commune council, laid down in this procedure with regard to general rules stipulated in provisions on real estate management, also results from the adopted model of settlement between parties to the contract of sale of the real estate (this valuation is, as has already been signalled before, one of the factors that affect the arrangements for the price of 1 square metre of the usable surface of premises and a building subject to the "premises for land settlement", in effect under the public tender and in the entire period of cooperation between the commune and the investor; additionally, it is a basis to set the starting price of the real estate transferred in the public tender).[6]

The author of this article believes that the assumptions presented in Article 4 (2) of the PFL Act have not been subsequently expressed in the normative content of this provision. It may be added, as will be presented later in this paper, that the current content of Article 4 (2) creates two research problems pertaining to:

1) the impact of the validity period and purpose of the valuation report on the act's defectiveness;
2) the consequences of integrating the valuation report with the content of the draft resolution that lays down rules on disposing of real estate under a "premises in exchange for land" settlement and its copyright subject matter.

1. Significance of the valuation report to the resolution adoption procedure that takes into consideration rules on disposing of real estate under a "premises in exchange for land" settlement

One must first turn to the linguistic wording of Article 4 (2) of the PFL Act from the perspective of § 6, § 8, § 29 and § 154 of the Regulation of the Council of Ministers

6 Ibidem, p. 12.

of 20 June 2002 on "Legislative Technique" (hereinafter: LT).[7] Two assumptions crucial to further discussion result from the provision analysed:

1) the valuation report that specifies the value of real estate drafted by a valuator shall be attached to the draft resolution on rules of disposing of real estate under a "premises in exchange for land" settlement;
2) the real estate value specification must be done by a property valuator not earlier than 3 months before the date on which the said draft resolution is submitted to a competent decision-making authority.

The first assumption means that one needs to answer the question of what role will the document prepared by the valuator play in the content of this act (resolution). Pursuant to LT, legal acts, regardless of their rank (§ 143 or § 141), should be worded so that they clearly and precisely express the legislator's intentions to the addressees of these norms (§ 6). Moreover, the drafters must use correct linguistic expressions in their basic and universally accepted meaning (§ 8 (1)). The term "attach" means to add a thing to another thing[8] and cause a thing to become larger by adding a certain element to it.[9] It is additionally pointed out here that the valuation report is a key element especially from the perspective of Article 4 (11) of the PFL Act, since the total price of premises and buildings allocated for transfer by the investor to the commune or district as part of a "premises in exchange for land" settlement cannot be higher than the value of the real estate which the resolution concerns, specified in the valuation report attached to the draft act. Also, one cannot avoid Article 6 (3) of the PFL Act either, pursuant to which the competent authority specifies the starting price of the real estate disposed of in the public tender as not lower than the value of this real estate specified in the valuation report attached to the draft resolution on disposing of the real estate. It needs to be stated in this context that this valuation report not only supplements the content of the resolution but also confirms the validity of solutions specified by this resolution. In this sense, the valuation report will constitute an attachment to the legal act within the meaning of § 29 of LT with all related implications. This conclusion also confirms a completely different approach to the valuation report in the REM, in which the legislator does not propose a similar method of using the valuation report as one of the elements of acts issued by executive and law-giving authorities, under their competence. In light of Article 67 of the REM, the value of the real estate resulting from the valuation report is the main criterion for setting the real estate's

7 Consolidated text: Journal of Laws 2016 item 283.

8 https://sjp.pwn.pl/sjp/dolaczyc;2453200.html [access: 3.11.2023].

9 https://wsjp.pl/haslo/podglad/2788/dolaczyc/3915395/do-akt [access: 3.11.2023].

price, which, as a rule,[10] should not be lower than its value. Moreover, the analysed construction of "attaching" the valuation report to the normative act of a competent authority was not applied during a similar procedure in its model, that is the non-tender sale of real estate at a discount (Article 68 (1) of the REM). A competent authority may give a discount on the set price not lower than its value (Article 67 (3) of the REM), based on a governor's ordinance or a resolution of the council or assembly. Apart from this, such a legal act will specify, in particular, the conditions for granting discounts and percentage rates. In turn, the absence of a clear reference to the use of a valuation report during the resolution-making procedure under REM in no way compromises its rank and significance for maintaining correctness when disposing of the commune's real estate.

The second assumption involves the valuation report having to meet a specific deadline. Pursuant to 4 (2) of the PFL Act, the valuation report should be prepared by a certified expert valuator, not earlier than three months before the date of submitting the draft of the analysed resolution to the competent decision-making authority. Special focus must be given to the fact that this timeframe will not be very significant at the time of adopting a relevant resolution. Such a solution must be given credit because it aptly accounts for the circumstances on which the executive authority has no impact, that is how the commune's decision-making authority is organised and donated to. In cases for the legality of these resolutions, especially those pending before a governor, the moment of submitting the draft resolution will be crucial even though a considerable amount of time may pass between that moment and the moment of adopting that resolution. Practical problems that may arise here are associated with rules on the validity of the valuation report under REM, which, pursuant to Article 1 (2) of the PFL Act will be applied in unregulated cases. This is why, contrary to the explanatory memorandum to the PFL Act referred to before, one needs to emphasise that this provision only points to the obligation of a specific validity of such a report and its being able to be used in this procedure not to its validity because this question results from provisions of the REM. Pursuant to Article 156 (3) of the REM, the valuation report may be, as a rule, used for the purpose for which it was created within 12 months from the date of its creation. It also needs to be taken into account that to set the price under Article 67 (1) and (2), the executive authority must also rely on the value of this real estate, which is confirmed by the valuation report. It is worth pointing out that after

[10] Exceptions to this assumption include a discount on the selling price (Article 68 of the REM) and the starting price for the second tender (not lower than 50% of the value, Article 67 (2) (2) of the REM) and negotiations with the buyer (not lower than 40% of the value, Article 67 (2) (4) REM).

those 12 months from the date of making the report, its further use is possible if a property valuator confirms that document's validity within the next 12 months of this confirmation. Naturally, all of this is on the condition that legal determinants or factors referred to in Article 154 of the REM have not changed. Therefore, it is vital to adhere to the maximum 24-month period for carrying out the entire procedure counted from the date of drafting the valuation report, to the adoption of the resolution that lays down rules for disposing of the real estate under a "premises in exchange for land" settlement, until the date of signing of a contract that transfers the ownership of the real estate under the "premises in exchange for land" scheme. One can use, analogically, the robust achievements of administrative courts in rulings on cases where the valuation report constitutes evidence detrimental to the settlement of the case in both instances.[11] Therefore, just like in administrative or court proceedings, where both instances must rely on up-to-date valuation reports, in this case of the disposal discussed here, each manifestation of the intent of the commune's body relating to the value of the real estate must be made within the period of validity of the valuation report.

2. The importance of the purpose and lapse of valuation report validity for the defectiveness of a "premises in exchange for land" resolution

The lapse of validity of the valuation report gives rise to two potential problems which may ultimately force the organiser of the tender to restart the entire process. It is crucial to expose the fact that pursuant to Article 156 (4) of the REM, a valuation report may be updated only by the valuator who has prepared it. It is crucial to

[11] See judgement of the Supreme Administrative Court of 1 March 2017, II OSK 1058/11, I OSK 1074/15, LEX no. 2316835; judgement of the Supreme Administrative Court of 2 October 2012, II OSK 1058/11, LEX no. 1234113, which directly prescribe that the date of validity of the valuation report also applies to the executive organ, because it is a competent authority in this case and its responsibility is not limited solely to reviewing the first instance ruling, but also involves re-examination of the case. Given the above, the case-related material, that is the valuation report, must be usable. See also judgement of the Supreme Administrative Court of 12 October 2017, I OSK 901/17, LEX no. 244037; judgement of the Supreme Administrative Court of 29 January 2019, OSK 608/17, LEX no. 2634376; judgement of the Supreme Administrative Court of 11 February 2010, I OSK 564/09, LEX no. 898206; judgement of the Supreme Administrative Court of 11 February 2010, I OSK 564/09, LEX no. 898206; judgement of the Supreme Administrative Court of 27 February 2018, I OSK 854/16, LEX no. 247888; judgement of the Supreme Administrative Court of 5 November 2020, II FSK 1943/18, LEX no. 30962887; judgement of the Supreme Administrative Court of 2 October 2012, II OSK 1058/11, LEX no. 1234113.

establish whether after the validity of the report is confirmed it may still be relied on for the purpose for which it was drafted. It is a material circumstance because the additional 12 months is counted not from the date of confirming the validity, but from the date of lapse of the period of the first 12 months counted from the date it is made. Therefore, the confirmation will have a retrospective effect from the date of loss of validity, for the next 12 months. In such a situation, a commune's executive authority must judge whether a later confirmation of the validity of the valuation report after cessation of reasons for it being impossible to be confirmed immediately after the lapse of the first 12 months will still allow it to finalise the procedure. Such a situation raises further doubts because a valuation report is to be attached to the resolution, which is a normative act. Amending the attachment – to confirm its validity – will require an amendment in the resolution itself by adding a new, second, attachment next to the existing one or a change in the original attachment. Pursuant to Article 156 (4) of the REM, the validity of a valuation report shall be confirmed by placing a relevant clause in this valuation report. Because this resolution is a foundation of the entire procedure related to disposing of real estate under the "premises in exchange for land" programme, the executive authority cannot put the matter in motion because it does not have an adopted and up-to-date version of this legal act. It must also be pointed out that confirming the valuation report is not an automatic process. A property valuator must take account of the changes in the legal determinants or essential changes in factors such as, e.g. purpose in the local zoning plan, the condition of the real estate and available information about the prices, incomes and characteristics of similar real estate. The very fact that the valuator believes that the value of the real estate does not change, cannot be taken as grounds to conclude that members of a competent decision-making authority will not request an assessment of the correctness of the drafting of the valuation report by a professional association of property valuators. The possibility of substantial verification of a valuation report results from Article 157 of the REM. The party's mere dissatisfaction with an expert's opinion or the party's subjective belief that the valuation of the real estate is incorrect is not sufficient to effectively challenge its reliability unless confirmed by objectively verified proof.[12] The content of Arti-

[12] E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz*, 2019 [LEX database], Article 157 [access: 20.10.2023]; see also: judgement of the Provincial Administrative Court in Łodź of 4 August 2016, II SA/Łd 456/16, LEX no. 2105357; judgement of the Provincial Administrative Court in Gorzów Wielkopolski of 12 February 2020, II SA/Go 848/19, LEX no. 2803950; judgement of the Provincial Administrative Court in Łodź of 9 December 2016, II SA/Łd 457/16, LEX no. 2175974; judgement of the Provincial Administrative Court in Warszawa of 11 February 2020, I SA Wa 1781/19, LEX no. 3085679.

cle 157 (1) of the REM does not introduce any personal limitations on requesting that the professional association of valuators assess the questioned report.[13] There is no doubt that the ordering party, like those directly concerned, will be able to raise a challenge on the grounds of an insufficient number of comparable transactions, defective description of the real estate that is the subject of valuation, calculating errors or the report lacking in internal cohesion (logic).[14] Therefore, even without holding specific professional qualifications, it is possible to challenge the valuation report in terms of formal correctness: completeness and usefulness for the purpose that it is to serve, particularly in terms of criteria set for generally applicable rules.[15] To confirm these arguments, one may use the generally proven line of judicial decisions which is most pronouncedly expressed in the judgement of the Supreme Administrative Court of 17 October 2014: "The authority that runs the proceedings, and an administrative court in particular, cannot go beyond substantive validity of the valuator's opinion because it does not have the special information that an expert does. However, it should assess the valuation report from the formal angle, that is examine whether it was prepared and signed by an authorised person, whether it includes elements required by law, whether it does not include ambiguities, errors, or shortcomings that should be corrected or supplemented, so that the document may have evidentiary value."[16]

Questions such as choosing an appropriate approach, method and technique for evaluating real estate, choice of real estate for comparison or setting adequate correction coefficients require specialist knowledge. This is why substantive verification of the content of the valuation report may only be performed by a professional association of property valuators.[17]

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13 E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany*, 2023 [LEX database], Article 157 [access: 20.10.2023]; see also: judgement of the Supreme Administrative Court of 28 April 2020, I OSK 557/19, LEX no. 2978263; judgement of the Supreme Administrative Court of 19 May 2021, I OSK 3148/18, LEX no. 3206234.

14 Judgement of the Provincial Administrative Court in Kraków of 9 March 2021, II SA/Kr 1367/20, LEX no. 3190636.

15 E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany*, 2023 [LEX database], Article 157 [access: 29.10.2023]; judgement of the Supreme Administrative Court of 15 May 2018, II FSK 2970/17, LEX no. 2504605; judgement of the Provincial Administrative Court in Bydgoszcz of 25 February 2020, II SA/Bd 75/20, LEX no. 3065473; judgement of the Supreme Administrative Court of 17 October 2014, I OSK 446/13, LEX no. 1598202.

16 Judgement of the Supreme Administrative Court of 17 October 2014, I OSK 446/13, LEX no. 1598202.

17 Judgement of the Provincial Administrative Court in Kraków of 10 February 2021, II SA/Kr 1319/20, LEX no. 3148517; judgement of the Supreme Administrative Court of 11 December 2020, I OSK 3142/18, LEX no. 3109555; judgement of the Supreme Administrative Court of 10 July 2020, I OSK 2659/19, LEX no. 3058554; judgement of the Provincial Administrative Court in Poznań of 19 February 2021, II SA/Po 378/20, LEX no. 3156540.

The presented valuation is a basis for competent decision-making authorities to set an appropriate price for 1 square metre of usable space for premises or buildings transferred to the commune by the investor as part of a "premises in exchange for land" settlement. The total price of premises or buildings allocated to be transferred by the investor to the commune as part of a "premises in exchange for land" settlement, set based on the content of this resolution, cannot be higher than the value of the transferred real estate. Moreover, the price of 1 square metre of usable space of premises or building allocated for transfer to the commune as part of a "premises in exchange for land" settlement cannot be higher than the value of the mean conversion factor of replacement cost for 1 square metre of usable space of residential buildings within the meaning of Article 2 (14) of the Act of 20 July 2018 on State Assistance in Bearing Housing Expenses in the First Years of Renting a Flat.[18]

Limitations to the values of rates proposed by the commune or district that have their grounding in statutes (Article 4 (8) and (11)) and in the content of the valuation report itself, will allow the commune council to design a maximum compensation algorithm for the due amount to be paid by the investor, expressed by the product of maximum usable space of premises and buildings transferred to the commune and the price for 1 square metre of usable surface area of these premises and buildings (these values are prescribed in the resolution on disposing of real estate). However, it is still worth remembering that in this procedure, one more rate will be applied, over which the commune council will have no influence – the price of the real estate established by the executive authority, which will by default be equal to or greater than the value of the real estate. Because the content of the resolution refers to the value of the real estate and the tendering procedure, and the final settlement with the investor refers to the price of the real estate, the commune council's calculations, especially in terms of proportion of the cash performance to the non-pecuniary performance, must be treated as a preliminary or even projected calculation.

Given the importance of the valuation report to this procedure of disposing of real estate under a "premises in exchange for land" settlement and the probability of the said problems associated with using this report, one must agree with the statement included in the explanatory memorandum that this valuation report will not only constitute a basis for amounts quoted in the resolution analysed but it will also serve as a basis to determine the starting price for tender purposes. For this reason, it is proposed that the objective of the valuation report be defined as broadly as possible by the ordering party, e.g. specification of the value of the real estate for

18 Consolidated text: Journal of Laws 2023 item 1463 as amended.

the purpose of disposing of it under a "premises in exchange for land" settlement. Such a framework will enable both the executive authority and the decision-making authority of the commune to use the valuation report.

The conclusion of the sale agreement in the event of a defect in the resolution due to an erroneously specified purpose in the valuation report or as a result of the outdating of the valuation report results in the application of Article 58 of the Civil Code, as the act performed will be contrary to the law, both in formal terms (breach of the procedure for the establishment of a legal relationship) and in material terms due to a defect in one of the most important components of the content of that legal relationship, i.e. the sale price of the real estate. It should be assumed that the provisions analysed here are *ius cogens* in nature and, therefore, a violation of the principles of sale of local government property regulated in the PFL Act will attract the sanction of absolute nullity indicated in Article 58 § 1 of the Civil Code.[19]

3. Valuation report and copyright of property valuators

As mentioned, a resolution on disposing of the real estate under a "premises in exchange for land" settlement is a normative act with a valuation report attached. However, given that the valuation report may be a work within the meaning of Article 1 of the Copyright Act[20] the moment it is integrated with the content of this resolution, a problem arises about the protection of the copyright of the author of this valuation report at the level not yet recognised in public real estate trading. Valuation reports had been one of the key events for managing real estate belonging to local government units (LGUs) or the State Treasury, which co-modelled how the price of the real estate was set. This price, as a rule, could never be set by competent authorities below the real estate's value resulting from this very valuation report. Also, the time-constrained nature of this document had to be accounted for, i.e. the time in which the entire procedure is supposed to close under the pain of having to obtain a new valuation report. Sometimes authorities that manage the

[19] Judgment of the Court of Appeal in Poznań of 26 March 2009, I ACa 66/09, LEX no. 1641247; judgment of the Supreme Court of 13 September 2001, IV CKN 381/00, OSNC 2002, no. 6, item 75; order of the Provincial Administrative Court in Rzeszów of 30 September 2016, II SA/Rz 225/16, LEX no. 2163910; judgment of the District Court in Gdańsk of 9 February 2016, I C 1751/15, LEX no. 1999410; order of the Supreme Court of 17 February 2004, V CK 86/04, LEX no. 1126892.

[20] Act of 4 February 1994 on copyright and related rights, consolidated text: Journal of Laws 2024 item 1254.

real estate belonging to LGUs or the State Treasury invoke the copyright protection of the person who drafted the valuation report to refuse access to the case file or deny requests for its copies. This problem was part of a broader issue of the use of works for implementing public tasks (such as urban, architectural, or planning documents). The Supreme Administrative Court has pointed out on many occasions that "public information includes documents not only directly written and created by a public authority, but also documents that the authority uses to implement responsibilities legally vested in that authority, even if another entity holds the copyright."[21] This is why in this light it is necessary to distinguish between the problem of qualification of the valuation report as a work in the understanding of the Copyright Act and the obligation to make it available to other entities without violating the interest of the author.[22] What needs only to be signalled here is that in 2007 subsection 1a[23] was added to Article 156 of the REM, under which a person may request that the copies of a valuation report made by them be certified or that certified copies of the valuation report be given to them, as long as it is justified by that person's valid interest. Currently, there are doubts in the established line of judicial decisions as to how to make the valuation report available to the interested person, because two opposing views emerge regarding the legal basis for authorising access to valuation reports.[24] There have been rulings that declared that it is the Freedom of Information Act[25] that solely applies in this matter, but there are also

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21 Judgement of the Supreme Administrative Court of 15 July 2011, I OSK 667/11 [Legalis database]; see also: judgement of the Supreme Administrative Court of 7 December 2010, I OSK 1774/10 [Legalis database] and judgement of the Provincial Administrative Court in Szczecin of 8 January 2015, II SAB/Sz 145/14 [Legalis database].

22 See a commentary by E. Bończak-Kucharczyk, *Ustawa o gospodarce nieruchomościami. Komentarz aktualizowany*, 2023 [LEX database], Article 156, which concludes that "[…] the valuation report is not always equalled with a work within the meaning of the above-mentioned Act on Copyright and Related Rights, and besides, even if it does have features of a work, its character of a document does not allow for it to be treated solely as a work, without taking into consideration its function as evidence. This would be contrary to Article 156 (1a) REM since it would prevent public administration from performing its obligations imposed on them by this provision."

23 Article 156 (1a) was amended by Article 1 (54) of the Act of 24 August 2007 on amending the real estate management act and on amending certain other acts (Journal of Laws 2007 no. 173, item 1218) amending REM as of 22 October 2007, which was amended by Article 1 (26) (a) of the Act of 20 July 2017 on amending the real estate management act and certain other acts (Journal of Laws 2017 item 1509) effective as of 1 September 2017.

24 See C. Chabel, *Operat szacunkowy jako przedmiot udostępnienia w trybie ustawy o dostępie do informacji publicznej*, 2015 [LEX database].

25 Judgement of the Provincial Administrative Court in Kraków of 6 September 2021, II SAB/Kr 134/21, LEX no. 3227856.

those which claim that Article 156 (1a) of the REM lays down different rules and procedures for making information available.[26]

The situation looks entirely different in the issue analysed here because this report will form an integral part of the normative act which will be announced publicly, and thus the conflict over whether Article 156 (1a) of the REM is *lex specialis* towards provisions of the Freedom of Information Act loses its materiality. However, protecting the interests of this report's author remains an open question. One must point to Article 4 of the Copyright Act which excludes certain creative results of human activity from copyright protection. It is worth pointing out that this problem of the valuation report well illustrates one of the concepts expressed by copyright scholars and commentators who argue that the terms "are not subject to copyright" and "are not a work" are not the same.[27] Therefore, after meeting certain requirements, some creations under Article 4 of the Copyright Act, may be qualified as works within the meaning of copyright law;[28] however, "they will not enjoy protection afforded to works"[29] or "cannot become a subject of somebody's excluded rights."[30] In this sense, if a valuation report meets features of individual character and originality, it will be protected under copyright starting from the initiation of the process of adopting the resolution discussed here. After passing this act, in light of Article 4 of the Copyright Act, it loses this attribute and, thus, a valuator, as an author, is no longer entitled to pursue their personal and economic rights. However, it is worth looking from a perspective in which such exclusion is applied only if the creation analysed is to be used for the purpose and in the function defined in Article 4 of the Copyright Act.[31] Therefore, in the case of valuation reports, the focus will be on the methods of estimating the value of the real estate that this act concerns. Whoever wishes to use the content of such a valuation report to make

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26 Judgement of the Provincial Administrative Court in Szczecin of 29 September 2020, II SAB/Sz 89/20, LEX no. 3100139.

27 See more in G. Pacek, in: *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. A. Michalak, Warszawa 2019, Commentary on Article 4 line 4.

28 See the opposing view presented by A. Nowicka, in: *Komentarz do ustawy o prawie autorskim i prawach pokrewnych. Ustawy autorskie. Komentarze*, vol. 1, ed. R. Markiewicz, Warszawa 2021 [LEX database], Article 4 line 5, who claims that such creations "are not works, and thus are not subject to copyright protection, even if they are an expression of creative activity of an individual and have been somehow agreed. As non-works, they are beyond the scope of the statute and their authors are not entitled to personal copyrights or to author's economic rights."

29 Ibidem.

30 J. Barta, R. Markiewicz, A. Matlak, in: *System Prawa Prywatnego*, vol. 13. *Prawo autorskie*, ed. J. Barta, Warszawa 2017, p. 76.

31 See J. Błeszyński, *Ochrona opisów patentowych i ochronnych na gruncie prawa autorskiego*, Kwartalnik UPRP 2013, no. 5, p. 63.

a valuation of neighbouring real estate in terms of selecting an appropriate approach, method and technique for preparing a valuation of real estate and correction coefficients must now respect at least personal copyright.[32] However, this position is different from the one prevailing among copyright scholars, which assumes that this is an overall and definite exclusion.[33] As a result, intellectual creations identified in Article 4 of the Copyright Act are not entitled to copyright protection regardless of whether these materials are used in whole or in part and irrespective of the context of this use.[34]

What also needs to be pointed out is that the copyright protection of a valuation report used to pass a "premises in exchange for land" resolution may be excluded based on the second point of Article 4 of the Copyright Act as a project or as official materials. It will be treated as official material when this act is considered an act of internal law. On the other hand, remaining in the realm of assessment of the resolution is due to the position of copyright scholars who claim that the normative act identified in Article 4 (1) of the Copyright Act is understood materially, pursuant to the Constitutional Court's interpretation of this term,[35] and thus is involved here is a legal act that includes abstract and general norms.[36]

Conclusions

The linguistic wording of Article 4 (2) of the Act on Disposing of Real Estate under a "Premises in Exchange for Land" Settlement (PFL) from the perspective of § 6, § 8, § 29 and § 154 of the Regulation on "Legislative Technique" (LT) and other

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32 See the opposing view presented by A. Nowicka, in: *Komentarz do ustawy o prawie autorskim*…, Article 4 line 5.

33 R.M. Sarbiński, in: *Prawo autorskie i prawa pokrewne. Komentarz*, eds. W. Machała, R.M. Sarbiński, Warszawa 2019 [LEX database], Article 4, line 7; G. Pacek, in: *Ustawa o prawie autorskim*…, ed. A. Michalak, Commentary on Article 4 line 5.

34 See A. Szyszka, *Uwagi o operacie szacunkowym w świetle ustawy o prawie autorskim i prawach pokrewnych*, Przegląd Prawa Publicznego 2015, no. 11, p. 14; judgement of the Supreme Court of 13 January 2006, III CSK 40/05, LEX no. 176385; judgement of the Supreme Court of 31 March 2005, I ACa 83/05, LEX no. 535043.

35 Judgement of the Constitutional Tribunal of 3 December 2009, Kp 8/15, OTK-A 2016, no. 11, item 1.

36 J. Barta, R. Markiewicz, A. Matlak, in: *System Prawa Prywatnego*, vol. 13, p. 76; A. Niewęgłowski, *Prawo autorskie. Komentarz*, Warszawa 2021, Article 4, Nb. 3; A. Nowicka, in: *Komentarz do ustawy o prawie autorskim*…, Article 4, Nb. 15. A different view in: *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. E. Ferenc-Szydełko, 4th ed., Warszawa 2021, Nb. 2, who directly allows acts of internal law to be in this category.

provisions, in particular Article 4 (11) and Article 6 (3) of the PFL Act, leads to a conclusion that the valuation report is a key element of the real estate disposal procedure in the light of the PFL Act, which means that it is a document which does not only supplement the content of the resolution but also confirms the correctness of solutions specified by that resolution. This conclusion highlights doubts associated with the principles of validity of valuation reports resulting from the Act on Real Estate Management (REM). It needs to be highlighted that Article 4 (2) of the PFL Act only identifies the obligation of a specific validity of such a valuation report and its usability in this procedure. The validity of the opinion of a valuator results, however, from REM provisions. Pursuant to Article 156 (3) of the REM, a valuation report may be, as a rule, used for the purpose for which it was created within 12 months from the date of its creation. If one were to assume that the valuation report should be treated as a component of the real estate disposal resolution, there would be a question about the rules for updating this report. This would require an amendment in the main body of the resolution by adding a new, second, attachment next to the existing one or a change in the original attachment. Because this resolution is a foundation of the entire procedure related to disposing of real estate under the "premises in exchange for land" programme, the executive authority cannot put the matter in motion because it does not have an adopted and up-to-date version of this legal act.

Because this valuation report will be an integral part of a normative act, which will be publicly announced, it raises the issues of protection of the interest of the author of this valuation report. One must point to Article 4 of the Copyright Act which excludes certain creative results of human activity from copyright protection. If a valuation report meets features of individual character and originality, it will be the subject of copyright protection from the initiation of the process of adopting the discussed resolution. After passing this act, in the light of Article 4 of the Copyright Act, it loses this attribute and, thus, a valuator, as an author, will no longer be entitled to pursue their personal and economic rights. However, it is worth looking at from the perspective that such exclusion is applied only if the creation analysed will be used for the purpose and in the function defined in Article 4 of the Copyright Act. Ultimately, the resolution, with the valuation report as an annex forming its integral part, constitutes the basis for the entire procedure set out in the PFL Act. The defectiveness of this resolution consisting in an erroneously specified purpose in the valuation report or resulting from the announcement of a tender or the conclusion of a sale agreement after its validity has expired means a violation of the principles of real estate trading, which are regulated by mandatory provisions.

As a result, the legal act (the sale agreement) will be absolutely invalid as having been drawn up contrary to the law.

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STUDIA PRAWNICZE KUL
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Calculation of tax income of entrepreneurs – possible prospects and main problems of implementation of the book-tax conformity concept in the Polish system

Obliczanie dochodu podatkowego przedsiębiorców – możliwe perspektywy i główne problemy implementacji koncepcji zgodności księgowo-podatkowej w polskim systemie

Расчет налогооблагаемого дохода предпринимателей – возможные перспективы и основные проблемы внедрения концепции соответствия между бухгалтерской и налоговой отчетностью в польской системе

Розрахунок податкового доходу підприємців – можливі перспективи та основні проблеми впровадження концепції податкового-бухгалтерської відповідності в польській системі

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Summary: According to book-tax conformity (BTC) concept, financial accounts are authoritative for tax purposes. This concept is used in some countries, while in others (including Poland) – it is not. Currently and among other aspects, due to some EU and OECD projects, this situation most probably will have to change, at least to some extent. It is in this regard that the possible prospects and main problems of implementation of the book-tax conformity concept in the Polish system are analysed in this article.

Key words: book-tax conformity, income taxes, financial accounting, entrepreneurs

Streszczenie: Koncepcja zgodności księgowo-podatkowej (*book-tax conformity*) oznacza, że rachunkowość finansowa jest autorytatywna dla celów podatkowych. Koncepcja ta jest stosowana w niektórych krajach, a w innych (w tym w Polsce) – nie. Obecnie, m.in. w związku z niektórymi projektami unijnymi i OECD, sytuacja ta najprawdopodobniej, przynajmniej w pewnym stopniu, będzie musiała ulec zmianie. W związku z tym w artykule przeanalizowano możliwe perspektywy i główne problemy implementacji koncepcji zgodności księgowo-podatkowej w polskim systemie.

Słowa kluczowe: zgodność księgowo-podatkowa, podatki dochodowe, rachunkowość finansowa, przedsiębiorcy

Резюме: Концепция соответствия между бухгалтерской и налоговой отчетностью (*book-tax conformity*) означает, что финансовый бухгалтерский учет является авторитетным для налоговых целей. Эта концепция применяется в одних странах, а в других (в том числе в Польше) – нет. В настоящее время, в частности, благодаря некоторым проектам ЕС и ОЭСР, эта ситуация, скорее всего, должна измениться, по крайней мере, в некоторой степени. Поэтому в статье анализируются возможные перспективы и основные проблемы внедрения концепции соответствия между бухгалтерской и налоговой отчетностью в польской системе.

Ключевые слова: концепция соответствия между бухгалтерской и налоговой отчетностью, налоги на прибыль, финансовый бухгалтерский учет, предприниматели

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Резюме: Концепція бухгалтерсько-податкової відповідності (*book-tax conformity*) означає, що фінансовий облік є достовірним для цілей оподаткування. У деяких країнах ця концепція застосовується, але не в інших (у тому числі в Польщі) – зовсім не використовується. Сьогодні здається, що, зокрема, завдяки деяким проєктам ЄС та ОЕСР, ця ситуація принаймні до певної міри мусить змінитися. Тому в статті проаналізовано можливі перспективи та основні проблеми впровадження концепції бухгалтерсько-податкової відповідності в польській системі.

Ключові слова: бухгалтерсько-податкова відповідність, податки на прибуток, фінансовий облік, підприємці

Introduction

According to the book-tax conformity (BTC) concept, financial accounts are authoritative for tax purposes, i.e. taxpayers who are obliged to prepare financial statements and to calculate financial result have to use them (at least to some extent) for the purposes of calculation of income taxes as well. The origins of this concept date back to the end of the 19th century, with its beginning in 1891 in Prussia.[1] Currently, this concept is used in some countries (e.g. Spain), while in others (including Poland) – it is not. Moreover, the relationships between financial accounting and tax law have evolved in some countries, in particular in the case of Poland, where there was a significant change from the system of close relationships, transitioning to that of relationships based only on the use of accounting books for tax purposes as recording tools and independent calculation of the tax result from the financial result.

In the period before Poland's political transformation and introduction of the market economy, the model of calculating the tax result based on the financial result was in force and the principles of financial result determination were subordinated to tax purposes. Along with the system transformation, there was a departure from this model of relations. Coordinating the accounting system and tax law proved more difficult in practice than it first seemed. Among the causes of these difficulties, the literature points out the traditions of Roman law deeply rooted in Poland and the inspirations drawn from German commercial law. They have been difficult to reconcile with the approach based on the assumptions of common law and international standards, which have been the main trends in the development of modern financial accounting.[2]

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1 F. Fraberger, M. Petrit, C. Wytrzens, *Maßgeblichkeitsprinzip*, in: *Handbuch der österreichischen Steuerlehre Band II. Steuerliche Gewinnermittlung und Steuerbilanzpolitik*, eds. R. Bertl, K. Hirschler, Wien 2016, p. 91.

2 A. Helin, *Ustawa o rachunkowości 2009*, Warszawa 2009, p. LXXI.

When the Accounting Act[3] was prepared, two approaches were possible: the development of a relatively short legal act of a framework nature, requiring numerous implementing regulations; or the transfer of all relevant provisions to the AAct, i.e. the development of a comprehensive legal act of the character of a code. The latter solution was adopted, thus following the trend present in countries significantly influenced by Roman law. In Poland, moreover, a manifestation of this approach is the low importance of standards developed by professional circles.[4]

Subsequently, in relation to the processes of harmonisation of balance sheet law in the European Union (and also some implementation[5] of International Accounting Standards – IAS, currently International Financial Reporting Standards – IFRS), appropriate adaptations of the balance sheet law regulations have been made, although it did not inspire changes in the system established in the 1990s of the model of relations between financial accounting and tax result – based on the assumption of independent determination of financial result and calculation of tax result.

The rules of tax result calculation are set out by tax law and, as a consequence, the profit or loss determined in accordance with the provisions of the balance sheet law often differs from the result determined for tax purposes. The balance sheet law should be understood as a set of rules resulting primarily from the AAct and its regulations. In addition, certain specific accounting regulations may be included in other legal acts (e.g. certain regulations concerning the accounting of entities operating under the provisions of the Banking Law[6] are specified in relevant regulations of the Minister of Finance). Moreover, the AAct refers directly[7] to accounting standards, which may result in the extension of the rules of financial accounting with international standards (IAS and IFRS) or national standards (issued by the Accounting Standards Committee in Poland).

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3 Accounting Act of 29 September 1994, Journal of Laws [Dziennik Ustaw] 2023 item 120 as amended (hereinafter: AAct).

4 A. Helin, *Ustawa*…, pp. LIII and LIIVIII.

5 According to Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, OJ L 243, 11.09.2002, pp. 1–4.

6 Act of 29 August 1997 – Banking Law, Journal of Laws 2023 item 2488 (hereinafter: Banking Law).

7 See Article 2 (3) of the AAct and Article 10 (3) of the AAct. For more see M. Supera-Markowska, *Rachunkowość – aspekty prawne i podatkowe*, Warszawa 2022, pp. 75–80.

1. Tax and financial results in the Polish system

In Poland, in the regulations of both tax and balance sheet law, although operating a slightly different nomenclature (income in tax law, and profit or surplus of revenues over costs in the balance sheet law and loss in tax law or loss or excess of costs over revenues in balance sheet law), the fundamental concept is the result from activity (economic or other, e.g. public benefit[8]) understood as the difference between revenues and costs (deductible costs in tax law) for the essentially identical tax and financial reporting period (tax year and financial year). Therefore, for all these conceptual categories, the common name "result" can be used.

The category of tax result (income or loss) is a category of tax law, regulated in the provisions of the following income tax acts: the Act of 26 July 1991 on Personal Income Tax[9] and the Act of 15 February 1992 on corporate income tax.[10] The third income tax act, however non-operating in its regulation with income category as it provides for revenue taxation (or taxation based on the characteristics of income/revenue), is the Act of 20 November 1998 on Lump Sum Income Tax on Certain Revenues Earned by Natural Persons.[11] The category of financial result (gain or loss and – in some cases – surplus of revenues over costs or excess of costs over revenues) is a category of balance sheet law, which is regulated by the provisions of the AAct.

Both based on tax law and balance sheet law, the result of the activity is calculated for a certain period, which is primarily the tax year and the financial year. Pursuant to Article 3 (1) (9) of the AAct, the financial year is a calendar year or other period of 12 consecutive full calendar months, also used for tax purposes. The financial year or changes thereto shall be specified in the statutes or agreement under which the entity is established. If an entity commenced operations in the second half of the adopted financial year, the accounting books and financial statement for that period may be combined with the accounts and financial statement for the following year. In the case of a change in the financial year, the first financial year after the change should be longer than 12 consecutive months.

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8 The considerations in this article, in accordance with the adopted assumptions, will be focused on the issues of business taxation (taxation of entrepreneurs).

9 Act of 26 July 1991 on Personal Income Tax, Journal of Laws 2024 item 226 as amended (hereinafter: PITAct).

10 Corporate Income Tax Act of 15 February 1992, Journal of Laws 2023 item 2805 as amended (hereinafter: CITAct).

11 Act of 20 November 1998 on Lump Sum Income Tax on Certain Revenues Earned by Natural Persons, Journal of Laws 2022 item 2540 as amended (hereinafter: LSITAct).

In the case of PIT taxpayers, the tax year is the calendar year.[12] In the case of CIT taxpayers, under Article 8 (1) of the CITAct, the tax year – with certain reservations – is the calendar year, unless the taxpayer decides otherwise in the statutes or articles of association or in another document adequately regulating the constitutional principles of other taxpayers (in such a case, the tax year is the period of the 12 consecutive calendar months). In the case of taking up business activity for the first time, the first tax year starts from the date of commencement of activity and ends at the end of the calendar year or on the last day of the selected tax year, but lasts no longer than 12 consecutive calendar months (Article 8 (2) of the CITAct). In case of taking up business activity for the first time in the second half of the calendar year and choosing the tax year coincides with the calendar year, the first tax year may run from the date of commencement of activity until the end of the calendar year following the year in which the activity began (Article 8 (2a) of the CITAct). In addition, in accordance with Article 8 (6) of the CITAct, when separate provisions result in an obligation of closing the accounting books (drawing up the balance sheet) before the end of the tax year adopted by the taxpayer, the period from the first day of the month following the end of the previous tax year until the date of closure of the financial accounts is considered the tax year. In this case, the next tax year is considered the period from the date of opening the accounting books to the end of the tax year adopted by the taxpayer.

Due to the common essence of the concepts of tax result and financial result – understood as the difference between revenues and costs (deductible costs in tax law) for a certain period (financial and tax year) – a fundamental question arises, namely whether (and, if so, how) the relationship between the rules of determining the financial result and tax result can be established. As it was already mentioned, in Poland, these relations have evolved significantly from the system of close relationships, transitioning to the variant of relationships based only on the use of accounting books for tax purposes as recording devices and independent determination of the tax result from the financial result.

It should be also noted that in addition to accounting books, there are also other books or records (in particular, the tax book of revenues and expenditures[13]), the keeping of which – under certain conditions – exempts from the obligation to keep accounting books. All these books and records fall within the scope of the notion

12 What follows from Article 11 of Act of 29 August 1997 Tax Ordinance, Journal of Laws 2023 item 2383 as amended (hereinafter: TOAct), according to which the tax year is the calendar year, unless the tax act provides otherwise (and the PITAct does not provide otherwise).

13 Regulation of the Minister of Finance of 23 December 2019 on Keeping a Tax Book of Revenues and Expenditures, Journal of Laws 2019 item 2544.

of "tax books," as defined in Article 3 (4) of the TOAct, which covers: accounting books, books of revenues and expenditures and other records and registers that taxpayers (tax remitters or tax collectors) are obliged to keep for tax purposes, on the basis of separate regulations. These tax books, other than the accounting books, serve only to determine the tax result on the basis of tax regulations and – in the case of the subjects conducting them – the category of financial result (and more broadly financial accounting) does not apply to them. It means that not all income tax taxpayers are obliged to keep accounting books and calculate the financial result of their activities. However, even in the case of entities, for which the accounting books are tax books, accounting books are merely technical instruments for recording events, and taxpayers apply tax regulations – not the provisions of the balance sheet law[14] – to determine the tax result. Therefore, the relationship resulting from the aforementioned provisions is only technical-formal, which has been confirmed by many administrative court sentences.[15]

2. Income of entrepreneurs in the Polish system of income taxation – state of play

Both income tax acts indicate that the object of taxation is, in principle,[16] income – each formulating its own definitions. Under Article 7 of the CITAct[17] and Article 9 of the PITAct,[18] "income" is defined as the surplus of the sum of revenues over the costs of obtaining them (deductibles costs) achieved in the tax year. Deciding which of the two income tax acts (PITAct or CITAct) taxpayers are to apply depends on

14 With a few exceptions.

15 Among others see the following sentences of administrative courts: Supreme Administrative Court in Lublin of 24 January 1995, SA/Lu 666/94; Supreme Administrative Court in Lublin of 9 May 1995, SA/Lu 1456/94; Supreme Administrative Court in Poznań of 8 June 1995, SA/Po 3730/94; Supreme Administrative Court in Katowice of 2 April 1996, SA/Ka 1405/95; Voivodeship Administrative Court in Warsaw of 12 May 2004, III SA 11/03; Voivodeship Administrative Court in Warsaw of 26 March 2007, III SA/Wa 2431/06; Voivodeship Administrative Court in Warsaw of 8 December 2009, III SA/Wa 1298/09; Voivodeship Administrative Court in Bydgoszcz of 21 September 2010, I SA/Bd 625/10; Voivodeship Administrative Court in Łódź of 16 November 2010, I SA/Łd 915/10; and Voivodeship Administrative Court in Gliwice of 8 March 2011, I SA/Gl 1137/10.

16 However, they also provide for certain income tax derogations in favour of revenues taxation, e.g. in the case of non-residents.

17 See Article 7 (2) of the CITAct.

18 See Article 9 (2) of the PITAct.

their legal form[19] and not on the professional character of their activity. Taxation on the basis of acts appropriate to the legal form of the taxpayer concerns both entities (with a given legal form) conducting business activity and those obtaining income (revenues) from other sources. However, only natural persons (or enterprises in inheritance) are subject to lump sum income taxation on registered revenues or a tax card specified in the LSITAct.

Pursuant to Article 6 of the LSITAct, the revenues of natural persons or enterprises in inheritance from non-agricultural business activity (including when this activity is carried out in the form of a civil law partnership of natural persons, a civil law partnership of natural persons and an enterprise in inheritance or a general partnership of natural persons) are subject to taxation (optionally, at the taxpayer's choice) in the form of a lump sum income taxation on registered revenues if, in the year preceding the tax year, taxpayers obtained revenues from this activity conducted exclusively independently in an amount not exceeding EUR 2 million (in the case of activities conducted as a partnership, the sum of revenues of the partnership's shareholders from this activity did not exceed EUR 2 million) or commenced their activities in the tax year – regardless of the amount of the revenues – under the condition of not benefiting from taxation in the form of a tax card. As for the taxation in the form of a tax card, it may be paid only by taxpayers who continue to apply taxation in this form after 31 December 2021 and did not give it up or lose the right to tax in this form after that date.

In the case of both these forms of taxation, tax is levied without determining income – based on revenues or only the characteristics of income (revenue). It means that some PIT taxpayers, including those conducting business activity – being subject to taxation on revenues (lump-sum taxation on registered revenues) – are not required to determine their result at all, neither under tax regulations nor for financial reporting purposes (they do not have to keep accounting books at all, but only need to register their revenues), and some may continue to benefit from

[19] In the case of natural persons and enterprises in inheritance, they should apply the provisions of the PITAct (Articles 1–1a of the PITAct) and the CITAct regulations apply to tax capital groups; legal persons; and organisational units without legal personality, with the exception of enterprises in inheritance and companies or partnerships without legal personality, unless they are: capital companies in the organisation; limited partnerships or limited joint-stock partnerships having their registered office or place of management in the territory of the Republic of Poland; certain general partnerships having their registered office or place of management in the territory of the Republic of Poland; or partnerships having their registered office or place of management in another country if, under the tax law of that other country, they are treated as legal persons and are taxed in that country on their worldwide income; and family foundations in organisation (Articles 1–1a of the CITAct).

taxation based on the characteristics of income/revenue (in the form of a tax card), for which they do not even have to register their revenues.

In turn, some CIT taxpayers may choose to be taxed in the form of a lump sum on company income (the so-called Estonian CIT,[20] which was introduced fairly recently, that is 2021, as an exceptional form of taxation accessible only for some CIT taxpayers), in which case the basis for determining their tax result is the financial result (their net financial profit adjusted for tax purposes according to CITAct provisions).[21]

Finally, in the case of shipping entrepreneurs, they may be subject to a special tax in the form of tonnage tax,[22] the amount of which depends on the tonnage of the taxpayer's vessels, and that excludes taxation of their revenues (income) on the basis of the CITAct[23] and PITAct[24] (similarly for revenues taxed on the principles resulting from the Act on the Activation of the Shipbuilding Industry and Complementary Industries,[25] in which case the amount of taxation depends on the revenue due from the sale or conversion of a ship).

Still, as a principle – despite some exceptions – in the current Polish system, the income tax result of entrepreneurs is determined (if the taxpayer is obliged to determine it at all) independently of the calculation of the financial result. In this context, some problems must be analysed in relation to the concept of the common consolidated corporate tax base (CCCTB),[26] proposals for its directives,[27] the *Business in Europe: Framework for Income Taxation* (BEFIT) project[28] and OECD's Base

20 See Articles 28c–28t of the CITAct.

21 See Article 28m of the CITAct.

22 See Act of 24 August 2006 on Tonnage Tax, Journal of Laws 2021 item 985.

23 See Article 2 of the CITAct.

24 See Article 2 of the PITAct.

25 See Act of 6 July 2016 on the Activation of the Shipbuilding Industry and Complementary Industries, Journal of Laws 2021 item 1704.

26 See M. Supera-Markowska, *Wspólna skonsolidowana podstawa opodatkowania jako koncepcja harmonizacji opodatkowania korporacyjnego w UE*, Warszawa 2010, and the literature referred to therein.

27 European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM/2011/121 final; European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM/2016/683 final and European Commission, Proposal for a Council Directive on a Common Corporate Tax Base (CCTB), COM/2016/685 final. In reference to the CCCTB directive project and its potential meaning for Polish taxpayers, see M. Supera-Markowska, *Projekt dyrektywy w sprawie wspólnej skonsolidowanej podstawy opodatkowania osób prawnych (CCCTB) – analiza zaproponowanych regulacji i ich znaczenie dla polskiego podatnika*, Przegląd Podatkowy 2011–2012, no. 1–5, and the literature referred to therein.

28 European Commission, Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century, COM (2021) 251 final. See M. Supera-Markowska, *Możliwości zbliżenia zasad ustalania wyniku podatkowego i bilansowego*, in: *Prawo podatkowe w systemie*

Erosion and Profit Shifting (BEPS) Two-Pillar Solution[29] project, since all of them are based – although to some extent only – on the concept of calculation of tax result in relation with the financial result (financial accounting).

3. The BTC concept in EU directives and BEPS project

In recent and upcoming developments in EU and international tax law: minimum taxation (EU directive on minimum taxation[30] and Pillar Two of BEPS) as well as the discussion of reallocation of international taxing rights (Pillar One of BEPS), there might be observed the establishment of some link between income taxation of entrepreneurs and financial accounting. Also BEFIT, which has replaced the CCCTB project and has recently resulted in a directive proposal,[31] to some extent is based on BTC concept implementation.

According to Article 4 (1) of the BEFIT Directive "the preliminary tax result of each BEFIT group member shall be determined, for each fiscal year, based on its financial accounting net income or loss as adjusted in accordance with Article 8 to 41 of this Directive." The relation between financial and tax result and accounting can also be observed in OECD Pillar Two,[32] and Pillar One approach.[33] In both cases, the OECD model rules link the tax burden to the financial result and statements of the taxpayers in question. As it was already mentioned in Statement from 2021[34] in the case of Pillar One, "the relevant measure of profit or loss of the in-scope MNE will be determined by reference to financial accounting income, with a small

prawa. Międzygałęziowe związki norm i instytucji prawnych, eds. A. Kaźmierczyk, A. Franczak, Warszawa 2019, and the literature referred to therein.

29 See OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021*, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm [access: 10.05.2024]. As at 9 of June 2023, 139 member states have agreed on the Inclusive Framework on BEPS, see https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-members-joining-statement-on-two-pillar-solution-to-address-tax-challenges-arising-from-digitalisation-october-2021.pdf [access: 10.05.2024].

30 Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L 328, 22.12.2022, pp. 1–58 (hereinafter: Directive (EU) 2022/2523).

31 European Commission, Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), COM (2023) 532 final (hereinafter: BEFIT Directive).

32 See more https://oecdpillars.com/pillar-two-navigator/ [access: 10.05.2024].

33 See more https://oecdpillars.com/pillar-one-navigator/ [access: 10.05.2024].

34 OECD, *Statement on a Two-Pillar Solution*…

number of adjustments"[35] and in case of Pillar Two "the GloBE rules will operate to impose a top-up tax using an effective tax rate test that is calculated on a jurisdictional basis and that uses a common definition of covered taxes and a tax base determined by reference to financial accounting income (with agreed adjustments consistent with the tax policy objectives of Pillar Two and mechanisms to address timing differences)."[36] Also Directive (EU) 2022/2523 follows this approach declaring that "the qualifying income or loss of a constituent entity shall be computed by making the adjustments set out in Articles 16 to 19 to the financial accounting net income or loss of the constituent entity for the fiscal year before any consolidation adjustments for eliminating intra-group transactions, as determined under the accounting standard used in the preparation of the consolidated financial statements of the ultimate parent entity."[37]

It therefore seems that it is inevitable, at least to some extent,[38] that the BTC will have to be implemented. Hence it seems worthy of attention to try to analyse fundamental issues related to the possible prospects and main problems of its implementation in the Polish tax system (taking into consideration not only the BEFIT project, minimum taxation and other BEPS issues – but more widely).[39] These are the questions of subjective scopes of income taxation and financial accounting, important differences between tax and balance sheet law principles and finally statutory act of law regulation in the case of taxes *versus* the use of standards in financial accounting.

4. Subjective scopes of income taxation and financial accounting in the Polish system

In order to adopt a system of determining the tax result in relation to the financial result (accounting) in Poland, first it should be ensured that income tax taxpayers are covered by the scope of financial accounting. The catalogue of entities obliged

35 Ibidem, p. 2.

36 Ibidem, p. 4.

37 Article 15 (1) of the Council Directive (EU) 2022/2523.

38 However, in accordance with the adopted assumptions, the issue of this extent is not the subject of analysis in this article.

39 Also because the advantages and disadvantages of BTC concept implementation have been widely discussed in the literature for years, these aspects will not be analysed in this text, concentrated on the topic of possible prospects and main problems of its implementation in Polish tax system and not the evaluation of the concept itself.

to apply the provisions on financial accounting is specified in Article 2 of the AAct. It can be indicated that – among the entities obliged to apply the accounting rules and principles set out in the AAct – there are entities to which these rules and principles apply, regardless of the size of their revenues, and entities that are subject to the obligation in question only as a result of the achievement of a certain minimum revenue threshold. The latter group includes natural persons, civil law partnerships of natural persons, civil law partnerships of natural persons and enterprise in inheritance, enterprises in inheritance, general partnerships of natural persons and professional partnerships, which are subject to the obligation to apply the accounting rules and principles set out in the AAct, if their net revenues (from the sale of goods, products and financial operations) for the previous financial year amounted to at least the equivalent (in Polish currency) of EUR 2 million.[40] The regulations in question indicate that the accounting rules and principles set out in the AAct are applied by three groups of entities: entities to which they apply obligatorily, regardless of the size of their revenues; entities to which they apply obligatorily, in connection with the achievement of a certain minimum revenue threshold (EUR 2 million); and entities that apply the accounting rules and principles set out in the AAct optionally, despite not reaching a certain minimal revenue threshold, based on their voluntary decision. This means that the subjective scope of the AAct and of both income tax acts does not always coincide.

Taxpayers keeping accounting books are obliged to keep them also for income tax purposes. Such obligations result primarily from Article 9 (1) of the CITAct and Article 24a (1) of the PITAct:

a) pursuant to Article 9 (1) of the CITAct, taxpayers of this tax are obliged to keep accounting records, under separate regulations, in a way that ensures the determination of the amount of income (loss), the tax base and the amount of tax due for the tax year and to include in the register of fixed assets and intangible assets information necessary to calculate the amount of depreciation charges under the provisions of Articles 16a–16m of the CITAct; such records may consist of:
– accounting books (in the case of the entities referred to in Article 2 of the AAct and on the terms set out therein); or

40 However, if this threshold is not met, pursuant to Article 2 (2) of the AAct, these entities may apply the accounting rules and principles set out in the Act also from the beginning of the following financial year. In this case, they are obliged to notify the tax office competent in matters of income tax or to submit a notification on the basis of the provisions of the Act of 6 March 2018 on Central Registration and Information on Economic Activity and the Information Point for Entrepreneur, Journal of Laws 2022 item 541.

– other records, including in particular certain simplified records of revenues and expenditures (but only in the case of some of the taxpayers);

b) pursuant to Article 24a (1) of the PITAct, natural persons, enterprises in inheritance, civil law partnerships of natural persons, civil law partnerships of natural persons and enterprises in inheritance, general partnerships of natural persons and professional partnerships performing business activity are obliged to maintain:

– books of revenues and expenditures; or
– accounting books, in accordance with separate regulations, in a way that ensures the determination of income (loss), the tax base and the amount of tax due for the tax year (including for the reporting period) and to include in the register of fixed assets and intangible assets information necessary to calculate the amount of depreciation charges in accordance with the provisions of Articles 22a–22o of the PITAct;

b) however, in the following cases, there is an obligation to keep accounting books:

– natural persons, civil law partnerships of natural persons, civil law partnerships of natural persons and enterprise in inheritance, general partnerships of natural persons, professional partnerships, enterprises in inheritance, if their revenues for the previous tax year amounted in Polish currency to at least the equivalent of the amount specified in euros in the accounting regulations (i.e. EUR 2 million);
– in the case of a deceased natural person engaged in business activities if, in the tax year in which the entrepreneur died, the deceased person kept accounting books, the enterprise in the inheritance is obliged to keep these books until the end of that tax year;
– an enterprise in inheritance is obliged to keep accounting books if the revenues of the deceased person and the enterprise in inheritance for the previous tax year amounted (in Polish currency) to at least the equivalent of the amount specified in euros in the accounting regulations (i.e. EUR 2 million);
– in the case of a deceased partner of a civil law partnership of natural persons if, in the tax year in which the entrepreneur died, the civil law partnership kept accounting books, the partnership of natural persons and an enterprise in the inheritance is obliged to keep these books until the end of that tax year; and
– a civil law partnership of natural persons and an enterprise in inheritance is obliged to keep accounting books in the tax year following the year in which the partner of the civil law partnership of natural persons died, if the revenues of the civil law partnership of natural persons and the civil law partnership of natural persons and enterprise in inheritance amounted in total (in Polish currency) to

at least the equivalent of the amount specified in euros in the accounting regulations (i.e. EUR 2 million).[41]

Therefore, in the case of some PIT taxpayers, the role of tax books must be played by accounting books and, in the case of others, could be by books of revenues and expenditures[42] (unless taxpayers can keep only some record of revenues or not keep any records at all as regards taxation in the form of lump sum income tax on registered revenues or a tax card). In the case of CIT taxpayers, in principle, the role of tax books is played by accounting books, unless they can keep simplified records of revenues and expenditures (which does not apply to all entities, and especially not the business entities).

It means that not all income tax taxpayers are covered by the scope of financial accounting. What's more, the observed trend consists of releasing more and more taxpayers from these obligations and an increase in replacing accounting books with tax records and the financial result with tax result (or even completely abandoning the determination of the tax result in favour of revenue taxation or taxation based on the characteristics of income/revenue). Such a situation would constitute an obstacle to implementing a uniform and common methodology for determining the tax result according to the BTC concept. Of course, this methodology could be limited only to entities currently keeping accounting books but, from the point of view of tax system consistency, a uniform approach would be the most desirable (although for small size entities, some simplifications should be maintained, but in the AAct itself).

5. Tax and financial accounting principles – unsolved problem or question of adjustments?

The primary function of financial accounting is the information function, i.e. the provision of information to owners, managers, investors, lenders and public authorities.[43] Therefore, the provisions of the balance sheet law and accounting standards

41 Article 24a (4)–(4f) of the PITAct.

42 That are only a tax record, based on the principle of one-sided entry, subordinated to tax purposes and may not be treated as a simplified form of financial accounting.

43 For more information on financial accounting functions and objectives, see inter alia Z. Messner, J. Pfaff, *Podstawy rachunkowości*, Warszawa 1998, pp. 13–18; I. Olchowicz, *Rachunkowość podatkowa*, Warszawa 2004, pp. 53–54; eadem, *Podstawy rachunkowości. Część 1. Wykład*, Warszawa 2004, pp. 16–18; *Rachunkowość. Zasady prowadzenia w jednostkach gospodarczych według polskiego prawa*

(both international and national) are intended to enable the assessment of the assets and financial position of the entity so as to give its owners and other entities a clear and complete picture (the principle of true and fair view). Tax legislation, in turn, serves to determine the taxable amount in order to determine the tax burden imposed on the taxpayer's income. This is why, in financial accounting, the main emphasis is placed on ensuring that there is no revaluation of the assets or the result of the entity, while tax regulations pay attention primarily to ensuring that the basis of the tax assessment is not underestimated. The purpose of financial accounting is, above all, not to allow the profit to be shown too high in comparison with the actual one, which, inter alia, is served by the principle of prudence. On the other hand, the purpose of tax regulations is to prevent the underestimation of the tax base and the threat to the regularity of the inflow to the budget revenues (in order to fulfil the fundamental tax function, that is fiscal function[44]). This is one of the reasons why while in financial accounting, the costs or revenues resulting from the valuation can be carried over to the financial result, in tax law, as a rule, there is no such possibility. It can be pointed out that while balance sheet law and financial accounting are future-oriented (providing information for making decisions concerning a given entity, and determining its economic potential), tax regulations relate primarily to the past (taxation of income).

Because of these different functions and purposes, financial accounting principles can have very different meanings for tax purposes, ranging from some applicability – through the feasibility of modifying them – to their complete rejection. Almost any of the most important financial accounting principles may pose problems when it comes to their application for tax purposes, namely the principle of substance over form, introducing an element of discretion and uncertainty; the materiality principle, mainly due to the threat of introduction of the subjective element for assessing the significance of the event; the principle of prudence (prudent valuation of assets), which may lead in some situations to an underestimation of profit and, in others, to the reporting of unrealised profit for taxation; or the accrual-based principle, which creates similar problems. It must also be mentioned that

bilansowego od 1995 roku, ed. T. Kiziukiewicz, Wrocław 1995, pp. 12–13 and *Wprowadzenie do rachunkowości. Podręcznik z przykładami, zadaniami i testami*, ed. E. Śnieżek, Kraków 2004, pp. 16–17.

44 Compare with e.g. M. Bitner et al., *Prawo finansowe. Prawo finansów publicznych. Prawo podatkowe. Prawo bankowe*, Warszawa 2017, p. 274; A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2013, p. 259; W. Wójtowicz, *Problem „prorodzinności" podatku dochodowego osób fizycznych*, in: *Konstytucja – ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl*, eds. T. Romanowska-Dębowska, A. Jankiewicz, Warszawa 1999, p. 408; *Wstęp do nauki polskiego prawa podatkowego*, ed. W. Modzelewski, Warszawa 2005, pp. 24–27.

it is indicated in the literature[45] that, apart from the fair value principle (and the recognition of goodwill), there is in fact no irreconcilable conflict between financial accounting principles and tax regulations.

The answer to this challenge is the elaboration of the list of adjustments necessary for the introduction of the BCT concept, i.e. the adjustment of the financial result to the assumptions and objectives of the tax law (up and down adjustments). Such a solution has been used both in Directive (EU) 2022/2523[46] and BEFIT[47] directive. To some extent, such solutions have just been introduced in the so-called Estonian CIT, indicating, among others, its advantages: the simplification of tax calculations and reduction of compliance costs.[48] The possible wide implementation of this methodology might result in that many tax provisions (e.g. most depreciation regulations[49]) could be removed from the income tax acts, which would possibly contribute to their considerable simplification and increased transparency. The introduction of such a systemic change should also encourage a review of the need to maintain very broad catalogues of non-tax-deductible costs and exempt revenues, which are currently included in the income tax acts. At least some limitation of them could result in some approximation of the tax and financial result. With such assumptions, the discussion on BTC should focus on the issues of adjustments: their justification, number and regulation.

6. Statutory act of law regulation in tax law *versus* financial accounting standards

In the case of taxes (and other public levies), the Constitution[50] reserves the exclusive right to their imposition to the statutory acts of law.[51] This applies not only

45 See *The Determination of Corporate Taxable Income in the EU Member States*, eds. D. Enders et al., Alphen aan den Rijn 2007.

46 See Article 15 (1) of the Directive (EU) 2022/2523.

47 See Article 4 (1) of the BEFIT Directive.

48 See for example https://www.podatki.gov.pl/cit/estonski-cit/ [access: 10.05.2024].

49 That is the case in the Spanish system, in which the tax rules on depreciation are primarily concerned with the determination of maximum depreciation periods. Regulations of other issues in the tax law are unnecessary due to the aforementioned reference to the provisions of the balance sheet law.

50 Constitution of Republic of Poland of 2 April 1997, Journal of Laws no. 78, item 483 as amended (hereinafter: Constitution).

51 See Article 84 of the Constitution, according to which "everyone is obliged to bear public burdens and duties, including taxes, specified by statutory tax act" and Article 217 of the Constitution, according to which taxes and other public levies may only be imposed by way of a statutory tax act.

to the imposition of these levies but also to determining their basic structural elements, including subjects and objects of taxation, tax rates, the rules for granting reliefs and redemptions, as well as the categories of entities exempt from taxes.[52] The purpose of the constitutional principle of the imposition of taxes and the determination of their basic structural elements solely by statutory acts of law (principle of legality) is to ensure that interference by public authorities in the private sphere of taxpayer property rights by imposing financial burdens occurs only in cases and to the extent justified by the public interest. The limits of permissible taxation are determined by the state's demand for public funds, which, while linked to the fundamental function of taxes: the fiscal function, also means that the tax burden should not be higher than the public budget needs.[53]

The very determination of the tax burden must implement the principle of its specificity, which applies in particular to the object of taxation.[54] The Constitutional Tribunal derived the principle of specificity and certain other principles applicable in particular to tax law from Article 2 of the Constitution, which states that the Republic of Poland is a democratic state governed by the rule of law. These are the principles of citizens' trust in the state and the rule of law; protection of acquired rights; non-retroactivity; sufficient specificity of legal regulations; making law that is clear and understandable to citizens and resolving doubts in favour of the taxpayer.[55]

The exclusivity of the statutory act of law regulation of taxes and the principle of their specificity are extremely important in the context of calculating taxable income as an object of taxation in income taxes. In particular, defining these issues by standards is therefore not permissible because it must be a statutory regulation. This has excluded the possibility of the potential direct use of IAS and IFRS for the purposes of tax result calculation[56] because of their source: they are issued by

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52 See Article 217 of the Constitution, according to which "the imposition of taxes, other public levies, determination of subjects, objects of taxation and tax rates, as well as the rules for granting reliefs and redemptions and categories of entities exempt from taxes takes place by way of a statutory tax act."

53 W. Nykiel, A. Mariański, *Finanse publiczne*, in: *Konstytucja RP*, vol. 2, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 1491. This, in turn, is connected with the issue of assessing these needs, especially through the prism of constitutional values, which, however, already exceeds the established framework of this text.

54 See T. Dębowska-Romanowska, *Dylematy interpretacyjne artykułu 217 Konstytucji*, in: *Ex iniuria non oritur ius. Księga ku czci Profesora Wojciecha Łączkowskiego*, eds. A. Gomułowicz, J. Małecki, Poznań 2003, p. 220.

55 W. Nykiel, A. Mariański, *Finanse publiczne*, p. 1483.

56 See more, in the context of the Common Consolidated Corporate Tax Base (CCCTB) project (currently replaced by BEFIT project), M. Supera-Markowska, *Wspólna skonsolidowana podstawa opodatkowania*…, and also the literature referred to therein.

a private organisation and even in the case of their adoption at the EU level in the endorsement process, determining the tax result on their basis could be problematic due to the constitutional obligation of only statutory act regulation of the object of taxation.[57]

Conclusions

Analyzing the possible prospects and main problems of implementing the BTC concept in the Polish system, the first issue that would have to be solved is the inconsistency of the scope of entities obliged to keep accounting books and being subject to income taxes. In the current state of the law, the BTC concept could be introduced to apply only to some taxpayers, while equalising the situation of all taxpayers conducting economic activity, irrespective of their legal form, would contribute to implementing the principle of neutrality.[58] In this context assuming that all income tax taxpayers[59] should be obliged to keep accounting books (with some simplifications for smaller entrepreneurs), *de lege ferenda* law changes would refer not only to tax, but also accounting law regulations.

In view of the unification of the subjective scopes of the income tax acts and the AAct (while maintaining some simplifications for smaller entities) there would be a situation in which tax regulations could refer to the financial result as a starting point for determining the tax result, focusing on adjustments necessary due to different objectives and principles of financial accounting and tax law (both in view of the risk of potential tax abuse by taxpayers and over taxation). In this context, it must be kept in mind that a direct reference to accounting standards by tax law – due to the constitutional principle of statutory tax regulation exclusivity would be doubtful as regards fulfilment of the principle of legality.

As a result of BTC concept implementation, the simplification of tax calculations and reduction of compliance costs could occur (in the literature also some other advantages are mentioned, such as, for example, reduction of tax avoidance).

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57 Expressed in Article 217 of the Constitution.

58 According to it, taxes should meet the postulate of neutrality, i.e. they cannot affect the investment decisions of entrepreneurs, which are to be made only on the basis of economic factors. See Common Consolidated Corporate Tax Base Working Group, General Tax Principles, 10.12.2004, p. 4, https://taxation-customs.ec.europa.eu/system/files/2016-09/cctbwp1finalrev1_en.pdf [access: 10.05.2024]; M. Desai, J. Hines Jr., *Economic Foundations of International Tax Rules*, American Tax Policy Institute 2003.

59 In the case of natural persons, these would be, of course, entities conducting business activity.

Also the determination of tax capacity in income taxes through its natural measure in case of economic activity, which is the financial result on the conducted activity (appropriately adjusted for tax purposes), possibly would better reflect the essence of the concept of an economic source of taxation within the framework of the principle of tax capacity as well as the principles of tax equality and neutrality (among others) or – more broadly – of just taxation (principle of justice).[60]

Finally, it must be indicated that BCT concept implementation seems to be no longer only a matter of unilateral decisions taken by the national legislators on their own initiative, but an important issue in the context of the EU law harmonisation and international cooperation on tax matters in the OECD. In the context of possible further processes of income tax law harmonisation and the OECD BEPS Two-Pillar Solution implementation, in which there are references to financial result and accounting, the Polish tax system has to be prepared for BTC concept implementation, at least in some scope.

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[60] See more M. Supera-Markowska, *Principles and Rules for Determining the Tax Capacity of Entrepreneurs in Income Taxes*, Journal of Finance and Financial Law 2022, Special issue.

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Analysis of the right to live in a clean and healthy environment under Vietnamese law and suggestions on how it could be improved

Analiza prawa do życia w czystym i zdrowym środowisku w prawie wietnamskim oraz propozycje zmian

Анализ права на жизнь в чистой и здоровой окружающей среде в законодательстве Вьетнама и предложения изменений

Аналіз права на життя в чистому і здоровому довкіллі у в'єтнамському законодавстві та пропозиції щодо змін

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Summary: In October 2021, in line with previous international treaty obligations, in particular the 1972 Stockholm Declaration, the United Nations Human Rights Council's Resolution 48/13, granted all people the right to live in a clean and healthy environment. Article 43 of the Vietnam Constitution affirms that a clean, healthy, and sustainable environment is a human right for all, not just a privilege for some. Nevertheless, environmental pollution and its devastating impact on local communities throughout Vietnam still generally continue unabated due to the failure of national and local authorities to adequately monitor polluters, enforce environmental protections, and prosecute offenders. The purpose of this article is to outline some of the reasons why problems exist in the implementation of current Vietnamese environmental law and provide some suggestions on how many of these challenges could be overcome.

Key words: human right, healthy environment, environmental protection

Streszczenie: Zgodnie ze zobowiązaniami wynikającymi z traktatów międzynarodowych, począwszy od Deklaracji Sztokholmskiej z 1972 r., aż po rezolucję 48/13 Rady Praw Człowieka przyjętą dnia 8 października 2021 r., prawo do życia w czystym i zdrowym środowisku podlega istotnej ochronie na mocy prawa wietnamskiego. W szczególności art. 43 konstytucji Wietnamu stwierdza, że czyste, zdrowe i zrównoważone środowisko jest prawem człowieka przysługującym wszystkim, a nie tylko przywilejem niektórych. Niemniej zanieczyszczenie środowiska oraz jego niszczycielski wpływ na społeczności lokalne w całym Wietnamie zasadniczo nie ulegają osłabieniu z powodu zaniedbań władz krajowych i lokalnych w zakresie odpowiedniego monitorowania sprawców zanieczyszczeń, egzekwowania ochrony środowiska i ścigania przestępców. W niniejszym opracowaniu przedstawiono problemy występujące przy wdrażaniu prawa ochrony środowiska oraz wysunięto propozycje, które pozwoliłyby na poprawę stosowania tych regulacji w wietnamskim systemie prawnym.

Słowa kluczowe: prawa człowieka, zdrowe środowisko, ochrona środowiska

Резюме: В соответствии с международными договорными обязательствами, начиная со Стокгольмской декларации 1972 года и заканчивая резолюцией 48/13 Совета по правам человека, принятой 8 октября 2021 года, право на жизнь в чистой и здоровой окружающей среде в значительной степени защищено вьетнамским законодательством. В частности, в статье 43 Конституции Вьетнама утверждается, что чистая, здоровая и экологически устойчивая окружающая среда – это право человека, которым пользуются все, а не только привилегия некоторых. Однако загрязнение окружающей среды и его разрушительное

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воздействие на местные сообщества по всему Вьетнаму в целом не ослабевает из-за неспособности национальных и местных властей адекватно контролировать загрязнителей, обеспечивать охрану окружающей среды и преследовать нарушителей. В данной статье излагаются проблемы, возникающие при внедрении законодательства по охране окружающей среды, а также вносятся предложения по улучшению применения этих норм в правовой системе Вьетнама.

Ключевые слова: права человека, здоровая окружающая среда, охрана окружающей среды

Резюме: Відповідно до міжнародних договірних зобов'язань, починаючи від Стокгольмської декларації 1972 року і закінчуючи Резолюцією 48/13 Ради з прав людини, прийнятою 8 жовтня 2021 року, право на життя в чистому і здоровому довкіллі є значною мірою захищене в'єтнамським законодавством. Зокрема, стаття 43 Конституції В'єтнаму стверджує, що чисте, здорове та стале довкілля є правом людини, яким користуються всі, а не лише привілеєм для деяких. Однак забруднення довкілля та його руйнівний вплив на місцеві громади по всьому В'єтнаму, як правило, не зменшується через нездатність національних та місцевих органів влади здійснювати належний моніторинг забруднювачів, забезпечувати охорону довкілля та переслідувати порушників. У цій статті окреслено проблеми, що виникають у процесі імплементації природоохоронного законодавства, та висловлено пропозиції щодо покращення застосування цих норм у в'єтнамській правовій системі.

Ключові слова: права людини, здорове довкілля, охорона середовища

Introduction

On the night of 28 August 2019, a massive fire broke out at the Rang Dong lighting and vacuum flask manufacturing factory in Hanoi, causing extensive damage. Thousands of square meters of the warehouse were destroyed, at the cost of USD 750,000 (VND 150 billion). Although there was no loss of life, afterwards the local population was increasingly concerned about the risk of large-scale mercury poisoning resulting from fire.[1] In the case of the Rang Dong fire, it was reported that 27.2 kg of mercury residue had been released into the environment impacting the air quality and water sources in Thanh Xuan district, Hanoi.[2]

According to the Vietnam Civil Code 2015, specifically Article 602 regarding compensation for damage caused by environmental pollution, "A party responsible for polluting the environment and causing losses and damages shall compensate in accordance with the law, even in cases where the party is not at fault."

Following protracted and difficult negotiations, only some of the households located near the Rang Dong factory that lodged a claim for the damage they suffered

1 Kha Minh, *Có cách nào để đào thải thủy ngân khỏi cơ thể nhanh nhất không?* [*Is There a Quick Method for Eliminating Mercury from the Body?*], VTC News, 6.09.2019, https://vtc.vn/co-cach-nao-de-dao-thai-thuy-ngan-khoi-co-the-nhanh-nhat-khong-ar496845.html [access: 10.03.2023].

2 H.D. Mai, *Air Pollution, Vietnames Legal Finalization for Environmental Protection*, VNU Journal of Science: Legal Studies 2020, vol. 36, no. 1.

did actually receive compensation and it was generally considered to be much less than the amount to which they were entitled. Moreover, those residents who were unaware of their rights and/or unable to submit a written claim because they were poor, uneducated or itinerant workers were not compensated for all the damage the factory caused to them mainly because neither local authorities nor the Rang Dong company provided any support or service to make use of their entitlement to make a compensation claim.[3] This lack of public information and advocacy services related to this disaster made many victims' prospects of receiving fair compensation almost negligible. Indeed, the company's inadequate investment in fire prevention measures, coupled with the delayed response from local government authorities during the fire and their subsequent handling of its consequences, has had a substantial impact on the local population. As a result, the affected individuals have been deprived of their basic human right to live in a clean and healthy environment. This infringement on their rights also constitutes a violation of their entitlement to fair compensation for the damages incurred, as outlined in Article 43 of Vietnam's Constitution of 2013.[4] Unfortunately, this incident is not an isolated case in Vietnam because a great number of similar cases have occurred in the past and have continued until the present time.[5]

From the author's perspective, the damage resulting from the Rang Dong factory fire can be categorised into two fundamental elements: individual harm to specific victims and collective harm to communities, including both groups of individuals and the environment in a broad sense. In this context, the focus of this paper will be directed towards the human aspects and the collective damage inflicted upon the community due to pollution. In general, the awareness of the Vietnamese people of these particular human rights is still very limited and many still tend to accept their misfortune in accordance with the traditional and widespread notion of "fate."[6] This article will firstly define "the human right to live in a clean and healthy environment,"

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3 Doan Thanh, *Xác định mức bồi thường của Công ty Rạng Đông đối với người dân bị ảnh hưởng* [*What Is the Compensation Level That Rang Dong Company Is Offering to Those Affected?*], 16.10.2019, https://kinhtedothi.vn/xac-dinh-muc-boi-thuong-cua-cong-ty-rang-dong-doi-voi-nguoi-dan-bi-anh-huong.html [access: 10.03.2023].

4 Vietnamese Constitution 2013, https://constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf [access: 10.03.2023].

5 Nhat Minh, *Người dân quanh Công ty Rạng Đông tiếp tục đòi bồi thường sau vụ cháy* [*Residents Near Rang Dong Company Are Still Demanding Reparations for the Damage Caused by the Fire*], Baovephapluat.Vn, 8.11.2019, https://baovephapluat.vn/van-hoa-xa-hoi/doi-song-xa-hoi/nguoi-dan-quanh-cong-ty-rang-dong-tiep-tuc-doi-boi-thuong-sau-vu-chay-78296.html [access: 15.03.2023].

6 N. ThiHoa, N.T. Hang, N.T. Giang, D.T.N. Huy, *Human Resource for Schools of Politics and for International Relation during Globalization and EVFTA*, Elementary Education Online 2021, vol. 20, no. 4, pp. 2448–2452.

then analyse the evolution of current legal provisions on these rights that the international community has developed over the past fifty years or so, the extent to which these have been adopted by Vietnam and how effectively these provisions have actually been implemented to positively impact the quality of life of the Vietnamese people.

Finally, the author will make a number of suggestions to ensure that Vietnamese citizens can better access – in practice, not just in theory – these rights that are guaranteed to them under national and international law.

The right to live in a clean and healthy environment can be understood as simply the human right to live in an environment of acceptable quality, to be guaranteed life in conditions of environmental hygiene, to be in harmony with nature, and to meet environmental regulations and standards under the regulation of law. A healthy environment can be understood as a physical environment whose quality allows life to be safe and in harmony with nature.[7] From a legal perspective, a clean and healthy environment is the quality of the surrounding environment that meets acceptable standards.[8]

The right to live in a clean and healthy environment is one aspect of the right to life.[9] The statement means that having the right to live in a clean and healthy environment is a crucial component of the right to life. It recognises that individuals cannot fully enjoy their right to life if they are exposed to harmful environmental conditions. A clean and healthy environment is essential for maintaining good physical and mental health. It is also closely connected to other basic rights such as access to clean water, adequate housing, and nutritious food. Governments and other entities have a responsibility to protect the environment, enforce environmental laws, and ensure that everyone has equal access to a clean environment. Humans cannot live in an environment where successive environmental disasters threaten their existence. Standards of health and well-being will not be sustainable in an environment where natural resources have been exhausted and environmental factors severely damaged.[10] Not stopping there, it is even believed that the right

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7 M. Moran, J. Van Cauwenberg, R. Hercky-Linnewiel, E. Cerin, B. Deforche, P. Plaut, *Understanding the Relationships between the Physical Environment and Physical Activity in Older Adults: A Systematic Review of Qualitative Studies*, International Journal of Behavioral Nutrition and Physical Activity 2014, no. 11, pp. 1–12.

8 W. Li, V. Achal, *Environmental and Health Impacts Due to e-Waste Disposal in China – A Review*, Science of The Total Environment 2020, vol. 737, 139745.

9 B.J. Preston, *The Right to a Clean, Healthy and Sustainable Environment: How to Make It Operational and Effective*, Journal of Energy & Natural Resources Law 2023, vol. 42, no. 1, pp. 1–23.

10 S. Díaz, J. Fargione, F.S. Chapin III, D. Tilman, *Biodiversity Loss Threatens Human Well-Being*, PLoS Biology 2006, vol. 4, no. 8, e277.

to a healthy environment has been affected negatively, resulting in eroding moral, cultural, emotional, and even civilisational values. The right to live in clean and healthy environment is fundamental and inalienable. No one shall be deprived of this right for any reason. This right is everyone's right, the right to own their own life and the aspiration to improve the quality of life.[11] Currently, more than 120 countries have adopted official measures to recognise and enshrine the right to a healthy environment as a legally recognised entitlement. This recognition means that these nations have established comprehensive legal frameworks and mechanisms to safeguard the well-being of their citizens within an ecologically balanced environment. By granting legal status to the right to a healthy environment, these countries underscore the significance of protecting environmental quality and fostering sustainable development practices within their respective jurisdictions.[12]

The discourse surrounding the right to a healthy environment has evolved, leading to a shift in focus towards the UN Resolution on the Recognition of the Human Right to a Clean, Healthy, and Sustainable Environment (RCHSE). This resolution has garnered significant attention and consideration from legislators and the international community. It is widely acknowledged that the right to live in a clean and healthy environment constitutes a fundamental human right, representing a new generation of rights that encompasses both individual and collective dimensions.

In a noteworthy development, the United Nations officially recognised the significance of a clean, healthy, and sustainable environment by welcoming its classification as a human right in July 2022. This recognition builds upon the endorsement of the right by the UN Human Rights Council through Resolution 48/13 in October 2021. These milestones highlight the growing recognition and commitment to protect and uphold the right to a healthy environment at the international level, signifying its crucial role in fostering a sustainable future for all to allow "a dignified and happy life" (Declaration of Stockholm) and provide "an environment adequate for their health and well-being"[13] (Aarhus Convention), all the way to respecting the multiple dimensions of human existence (Malé Declaration of 2007 on the human dimension of climate change).

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11 S. Giorgetta, *The Right to a Healthy Environment, Human Rights and Sustainable Development*, International Environmental Agreements 2002, vol. 2, pp. 171–192.

12 J.P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, in: *International Crimes*, ed. N. Passas, London 2003, pp. 407–453.

13 N. Hartley, C. Wood, *Public Participation in Environmental Impact Assessment – Implementing the Aarhus Convention*, Environmental Impact Assessment Review 2005, vol. 25, no. 4, pp. 319–340.

1. The main points of the principle of the right to live in a clean and healthy environment in Vietnam

1.1. Access to environmental information

Although Vietnam is not a signatory, it has used the Aarhus Convention as a model to enact its environmental laws. This has included ensuring that people have access to information about the environment, the right to participate in decision-making processes and the right to access justice in environmental matters. Vietnam has also committed to promoting public awareness and understanding of environmental issues and providing opportunities for the public to participate in environmental protection activities.

The right to access information (also known as the right to freedom of information or the right of access to information) is recognised as one of the basic human rights and is classified by international legal documents in the group of civil rights.[14] From a legal perspective, the term "right to information" is used to denote a very basic right to which people in all countries are entitled, whether directly or indirectly. Otherwise, it is the right to information of the state required to meet the needs of individual citizens as well as to protect and exercise other rights recognized by law. The right of access to information is given to public authorities and all bodies that perform public functions. In some cases, this right may be suspended such as when public security or national defence is at stake.

Furthermore, authorities must be aware of the importance of keeping the fees associated with requests for documents reasonable so that citizens can exercise their right to access information without incurring excessive expenses.

1.2. Participation in environmental decision-making

Environmental information encompasses data and information regarding environmental components, environmental impacts, environmental protection policies and laws, and environmental protection activities.[15] It can be presented in the form

14 M. Riegner, *Access to Information as a Human Right and Constitutional Guarantee. A Comparative Perspective*, Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 2017, vol. 50, no. 4, pp. 332–366.

15 W. Zhang, G. Li, *Environmental Decentralization, Environmental Protection Investment, and Green Technology Innovation*, Environmental Science and Pollution Research 2022, vol. 24, pp. 1–16.

of symbols, numbers, images, sounds, or other representations. The legal framework governing access to environmental information in Vietnam includes the Law on Environmental Protection (2014), Decree 19/2015/ND-CP (2015) of the Government, the Law on Access to Information (2016), and most recently, the Law on Environmental Protection (2020), which took effect from 1 January 2022.

Capacity-building efforts should focus on providing education, training, and support to individuals and communities, enabling them to effectively engage in environmental decision-making. This includes promoting an understanding of the issues at hand, the decision-making processes involved, and the potential impacts of environmental policies. By enhancing the capacity of individuals to analyse complex environmental problems, policymakers can empower them to contribute meaningfully to discussions and decision-making processes. The impact of public participation on environmental decision-making should not be underestimated. By embracing a participatory approach, policymakers can take advantage of the diversity of perspectives, foster transparency, and build trust among stakeholders. This can lead to better-informed and more legitimate decisions, as well as improved implementation and acceptance of environmental policies.[16]

Information is critical, especially when attempts are made to influence a decision relating to the environment in which people live. "Gaining access to decision-making processes is essential, and the Aarhus Convention provides this through the Public Participation Directive (Directive 2003/35/EC). Unleash the power of public participation with the Aarhus Convention."[17] "In Vietnam, the government is committed to giving the public a voice in environmental decision-making by providing them with multiple avenues for meaningful participation, such as public meetings, citizen assemblies, and other consulting processes. Beyond voting, these formal and conventional approaches promote public participation and ensure that everyone's opinion is heard."[18]

Vietnam is one of the few countries in the world that continues to be a socialist state governed by a ruling Communist Party. One of the consequences of this is that in many cases, people's access to information on environmental as well as other rights-related issues in Vietnam is often restricted.

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16 M.H. Koski, L.F. Galloway, *Geographic Variation in Floral Color and Reflectance Correlates with Temperature and Colonization History*, Frontiers in Plant Science 2020, vol. 11, p. 991.

17 S. Akerboom, R.K. Craig, *How Law Structures Public Participation in Environmental Decision Making: A Comparative Law Approach*, Environmental Policy and Governance 2022, vol. 32, no. 3, pp. 232–246.

18 L. Beckwith et al., *Youth Participation in Environmental Action in Vietnam: Learning Citizenship in Liminal Spaces*, The Geographical Journal 2022, vol. 189, no. 2, pp. 329–341.

Arguably, it is time to consider a process of reviewing a range of Vietnamese laws, and where appropriate, introduce amendments to ensure that, consistently with international Conventions and Agreements to which Vietnam is currently a signatory, the rights of its citizens are being adequately protected.

Although the Vietnamese government has already introduced a number of regulations to address problems and improve human rights, it is generally recognised that the implementation process has encountered many difficulties in law enforcement due to the limited ability and expertise of legislators as well as law enforcers. There is little doubt that overcoming these limitations would improve the access of Vietnamese citizens to universal human rights and, as a consequence, alter the perspective of many – particularly in the Western international community – who view the restrictions on the right to freedom of speech, peaceful assembly, movement and religion as government action to ensure the Communist Party's continued monopoly of power in Vietnam.

There are a number of ways in which the public can participate in environmental decision-making processes in Vietnam. For example, the government must provide information about environmental issues to the potentially impacted public in a timely and transparent manner and must allow the public to participate in environmental impact assessments (EIAs) for major development projects. In addition to these formal channels for participation, the public can also participate in environmental decision-making in Vietnam through non-governmental organisations (NGOs) and community groups, which often work on environmental issues and advocate for the protection of the environment.[19]

The 2013 Constitution of Vietnam has increased people's constitutional rights and has been more successful in increasing the public and people's involvement in the EIA process for socio-economic development projects. These rights include the right to environmental assets, the right of access to information, and the right to express one's views on critical issues concerning one's life and development and one's community,[20] the Constitution also increases the participation of the people in the overall policy process and, specifically, in achieving environmental rights. For instance, through the new regulations on the right to life (Article 19) and the right to live in a healthy environment (Article 43), the Constitution requires that these

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19 Huong Thien, *Vietnam's Environmental NGOs Face Uncertain Status, Shrinking Civic Space*, 13.02.2023, https://news.mongabay.com/2023/02/vietnams-environmental-ngos-face-uncertain-status-shrinking-civic-space/ [access: 15.12.2023].

20 G.C. Vu, K. Tran, *Constitutional Debate and Development on Human Rights in Vietnam*, Asian Journal of Comparative Law 2016, vol. 11, no. 2, pp. 235–262.

regulations be legally institutionalised to ensure the protection of human rights in general and environmental rights in particular.

To guarantee environmental rights, people need to take part in policymaking regarding the environment, including being consulted, having access to sufficient information to offer suggestions, and having the right to directly engage in the Environmental Impact Assessment (EIA). The 1993 Law on Environmental Protection has very few provisions with regard to governance and people's involvement in the enforcement of environmental protection laws. The said law does not contain any clauses on public transparency and access to information. The only form of participation that is encouraged under that law is in the form of education and training, science and technology, dissemination of knowledge and legislation on environmental protection; there are no regulations on the mechanism for implementing the participation of the people and the accountability of state management agencies.

The 2005 Law on Environmental Protection clearly demonstrates the importance of people's involvement in the governance and supervision of law enforcement. People's meetings, the submission of documents, and dialogues at the request of the public, particularly when assessing EIA reports, are all ways in which individuals can take part in the management and oversight of environmental protection. State management agencies are held accountable for responding to opinions expressed during dialogues with the public, as well as EIA reports. However, the Law on Environmental Protection of 2014 still lacks adequate regulatory elements that are necessary to ensure strong environmental protection. While the law outlines general regulations and encourages organisations, households and individuals to participate in environmental protection activities, there are hardly any detailed regulations concerning the participation of the people in environmental planning, EIA or Strategic Environmental Assessment (SEA) reports, or even the mechanism for people's indirect participation in monitoring through the Fatherland Front and member socio-political organisations. The law mainly focuses on promoting the participation responsibility of socio-political and socio-professional organisations.

Consequently, the Law on Environmental Protection of 2020 has introduced improvements as it clearly outlines the project owner's responsibility to consult with the local community from the time of making the EIA report. This outlines their responsibilities for consultation, the consultation topics, the main consultation content and forms of consultation during EIA implementation. The results of this consultation with the local community, relevant agencies and organisations are vital information for the project owner to research and invent solutions to minimise the project's impact on the environment and ultimately complete the project's EIA report. This has highlighted the increasingly important role of the local

community in environmental protection, particularly through the formation of effective models of community participation in protecting the environment. This includes the participation of the community in providing information on environmental protection, participating in the assessment of the enterprise's environmental protection results etc. The State administrative management system, albeit necessary, is not enough to effectively combat environmental pollution. This is due to the lack of resources to enforce and monitor the implementation of regulations, as well as a general lack of belief in their effectiveness. Public Participation in Environmental Management has changed its role from time to time. The future of our planet is in our hands, and we need everyone's help to ensure it is safeguarded. National laws allow for natural persons and legal entities, as well as associations of groups of natural persons and legal entities, to participate in environmental management.

1.3. Access to justice

Access to justice in environmental law is an important concept, as it enables citizens to take action against environmental issues that are affecting their lives or their environment.[21] This concept is based on the idea that individuals should be able to seek legal redress when they feel that their health, safety or well-being has been negatively impacted by environmental issues. In order to ensure that individuals have access to justice, several legal remedies have been developed.

With the right to environmental justice, NGOs and individuals can stand up for their planet in court. Even the most well-crafted environmental laws can be rendered powerless without this access to the courts. For example, environmental justice is essential in the EU for enforcing and implementing EU laws to ensure a healthy and safe environment for all.

The experience of the power of justice, and access to justice in environmental matters in Vietnam provides citizens with the guarantees they need to challenge the legality of decisions, acts, or omissions of public authorities of the provinces before a national judge. They should discover the legal provisions available to protect their rights and ensure that their voice is heard.

For example, the Law on Protection Environment of 2020 contains provisions on the right to bring legal action in cases of environmental harm (Article 159 and

21 J. Kronenberg et al., *Environmental Justice in the Context of Urban Green Space Availability, Accessibility, and Attractiveness in Postsocialist Cities*, Cities 2020, vol. 106, 102862.

Article 162).[22] The Aarhus Convention also provides for the right to access justice in environmental matters, including the right to challenge decisions, acts, or omissions of public authorities that may have a negative impact on the environment.

Many studies by Vietnamese authors lack access to documents that analyse the impact of different perspectives on the interaction between economic development and environmental protection in the course of environmental conflicts in Vietnam. Without this, it is hard for policymakers and practitioners to gain a comprehensive understanding of the views and reactions of the parties involved in environmental conflicts, how environmental conflicts arise, what factors drive environmental conflicts, what effects they have on people, and what are the appropriate solutions. This study, which applies the "society integration" approach to comprehend the perspectives and perceptions of stakeholders in environmental conflict, helps to fill this gap in current knowledge of environmental conflict in Vietnam.[23]

In practice, however, access to justice in environmental matters can be a challenge in Vietnam, due in part to a lack of legal awareness and understanding of environmental rights, as well as limited access to legal representation and other resources. The government has taken steps to improve access to justice in environmental matters, including by providing funding for legal aid programmes and establishing specialised environmental courts in some provinces. However, more needs to be done to ensure that all people in Vietnam have effective access to justice in environmental matters. Access to justice in this area provides a range of guarantees that grants citizens and NGOs the ability to control public authorities with regard to their legal requirements.

2. Suggestions

Based on his research, the author would like to suggest ways to improve the legal system regarding the right to live in a clean and healthy environment in Vietnam.

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22 M.-F. Fan, C.-M. Chiu, L. Mabon, *Environmental Justice and the Politics of Pollution: The Case of the Formosa Ha Tinh Steel Pollution Incident in Vietnam*, Environment and Planning E: Nature and Space 2022, vol. 5, no. 1, pp. 189–206.

23 V.T. Nguyen et al., *What Are the Environmental Conflict, Social Impact and Justice Implications for Vietnam: A Case Study and Analysis of Policies?*, January 2018.

2.1. Enhancing the right to access environmental information

To ensure people's right to access environmental information, legal provisions must be perfected, such as regulations on the procedures and order for requesting environmental information, time limits, fees for providing information, and procedures for complaints and dispute resolution. Furthermore, sanctions for failing to provide environmental information, providing incorrect information to state management agencies and other production, business and service establishments must be clearly defined. In the process of exercising the right to access environmental information, if a state agency or public servant fails to provide information or performs improperly, thereby damaging the legitimate rights and interests of individuals and organisations, regulations must be put in place to address such cases. Moreover, individuals should have the right to complain if they are refused information when such a refusal is not in accordance with the grounds specified in the regulations on establishments for refusing to provide information, or if the information provided is not the information requested by them.[24]

Second, to improve the effectiveness of publicity and dissemination of knowledge surrounding the right to access environmental information, both to the public and specifically to production and business establishments, regarding their responsibility to provide environmental information and comply with regulations, the following should be done: (a) ensuring that production and business establishments are aware of their responsibilities and how to comply with the law, to create a foundation for implementation (b) strengthening the capacity of state agencies in guaranteeing the right to access environmental information. This should be done by providing state agencies with adequate funds, facilities, and human resources to fulfil the responsibility of providing environmental information, as well as to coordinate with other state agencies in dealing with requests. (c) meeting people's demand for access to environmental information in the most effective way possible.

Third, the use of information technology to provide and access environmental information should be encouraged. A specialised database of natural resources and the environment should be developed quickly, and information sources which are not in digital form should be digitised to enable their provision, management, research and integration into a shared database. Additionally, access to environmental information should be enabled online, allowing people to access it quickly and

[24] Bui Van Dung, *The Right to Access Environmental Information in Vietnam*, Journal of Human Studies 2010, vol. 2, no. 47, pp. 15–20.

easily.[25] A unified electronic form should also be established for accessing environmental information.

2.2. Supporting people in improving participation in environmental decision-making processes

The trend in most developing countries is towards reforming their management systems to include governance institutions with public participation. International development organisations have been instrumental in providing research and promoting good governance systems. For instance, Switzerland and Germany are carrying out the "Land Governance of the Mekong River" project in Cambodia, Laos, Myanmar and Vietnam, where public participation in management and oversight is a central component of a successful governance system.[26]

Depending on the level of awareness and approach, public participation can take a variety of forms. At the first level, the public is informed and kept up to date. At the second level, the public is consulted, asked for their opinion and suggestions. At the third level, the public can directly engage with the management agencies to voice their desires and needs. At the fourth level, the public can collaborate and converse directly with the regulatory agencies on an equal footing. At the fifth level, the public has the ultimate authority to make the final decision.

The Government of Vietnam has always upheld the spirit of the slogan "people know, people discuss, people do, people check"[27] and practiced grassroots democracy, and encouraging results have been achieved. However, there are still many limitations when it comes to promoting people's interests in environmental decisions. To address this, the following solutions should be implemented. First, given that people's participation in the enforcement of environmental rights is still limited, especially at the grassroots level, it is necessary to strengthen the practice of democracy at the grassroots and the practice of direct democracy. Additionally, monitoring mechanisms for environmental management should be strengthened,

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25 P.T. Huyen, T.T.P. Thao, *Legal Mechanisms and Solutions to Enhance the Right to Access to Information on Administrative Procedures*, TNU Journal of Science and Technology 2021, vol. 226, no. 3, pp. 86–92.

26 L.J. Jansen, P.P. Kalas, *Improving Governance of Tenure in Policy and Practice: Agrarian and Environmental Transition in the Mekong Region and Its Impacts on Sustainability Analyzed through the 'Tenure-Scape' Approach*, Sustainability 2023, vol. 15, no. 3, p. 1773.

27 Ngoc Lam Nguyen, *Exploring Challenges to Progress in Community Development in Vietnam Through Capacity Building*, Ho Chi Minh City Open University Journal of Science: Social Sciences 2005, https://journalofscience.ou.edu.vn/index.php/soci-vi/article/view/1698 [access: 25.11.2023].

including enhancing the supervisory role of elected bodies, socio-political organisations, and social organisations. Along with the participation in supervision and criticism of the people through Vietnamese Fatherland Front and its member organisations, it is also important to encourage direct participation of the people in monitoring and criticism in the Environmental Impact Assessment (EIA) process, especially at the local scale. To do this, legal regulations regarding the organisation, operation, and role of associations related to environmental protection and EIA should be complemented quickly. Furthermore, mechanisms for coordination and cooperation between the state agencies, socio-political organisations, social organisations, and all classes of people in monitoring and protecting the environment, as well as exercising environmental rights should be introduced.

Second, environmental rights are relatively new in Vietnam and not everyone is aware of them. This is due to the limited understanding and awareness among the general public, as well as cadres and civil servants. Therefore, it is essential to increase education, popularise and widely propagate the 2013 Constitution and the Law on Environmental Protection of 2020, specifically the provisions related to environmental management, the obligations of those responsible for respecting, protecting, and implementing environmental protection, and the roles of socio-political organisations and social organisations in monitoring the implementation of environmental management. Priority should be given to educating cadres and civil servants of all levels and branches, disseminating information among them and communicating with them.

Third, it is necessary to promote education and raise awareness among the people, especially students who are the future owners of the country. Citizen participation enables each citizen to exercise control over socio-political life. As C. Pateman states, "only when individuals are given the opportunity to participate in social policies or to choose their representatives in accordance with their will can they control their lives and personal development."[28] Citizen participation is essential for cultivating civic responsibility. It is a key factor in developing citizens' social awareness, as it involves people in all stages of the decision-making process not only in environmental field and other major issues. It is an educational journey that shapes and reinforces political socialisation. It contributes to the formation of the appropriate attitudes, psychological qualities, as well as knowledge and skills of citizens in democratic activities. According to James Bohman, "the core of the development and revival of civic spirit is to make them [citizens] feel more involved in public

[28] M. Dean, *Pateman's Dilemma: Women and Citizenship*, Theory and Society 1992, vol. 21, no. 1, pp. 121–130.

issues at the grassroots level, giving citizens a greater voice in matters related to their lives."[29]

People must be made aware of the significance of their involvement in environmental management, such as SEA and EIA reports, environmental protection plans, and investment project decisions. Furthermore, they should be able to take part in monitoring the implementation of environmental solutions, spotting environmental issues, and resolving them. Though the existing legal framework in Vietnam has allowed for such participation, it is not comprehensive enough and has been largely neglected. By increasing people's role in environmental decisions, potential environmental disputes that arise from environmental contamination can be minimised.

In order for large projects, such as hydropower and mining, to have a positive impact on people, it is necessary for the government to actively involve people in the decision-making process. For this reason, it is important to hold consultations with people's representatives, to listen to their opinions, views and recommendations and to develop an appropriate policy plan that takes into account the interests of all parties. This approach is essential for policy-making and implementation, as it creates an atmosphere of cooperation, promotes social stability and contributes to achieving political and economic equality for disadvantaged groups. Moreover, it limits corruption in environmental issues and ensures that people can have their voices heard and that resources are allocated fairly. Nevertheless, the most important factor is whether the authorities are willing to listen to and act on the opinions of the people and exercise accountability. Unfortunately, environmental corruption is still a major barrier in Vietnam that prevents people from directly, completely and effectively expressing their views and being involved in the management and supervision of governance institutions.

2.3. Access to justice in environmental law

In order to understand the views and perceptions of the parties involved in environmental disputes from a social constructionist approach, mechanisms and policies should be put in place to encourage people's participation. This could include allowing community organisations and social organisations representing those affected by environmental pollution to file class action lawsuits. Additionally, there

[29] A.K. Cohen, J.R. Dawley-Carr, L. Pappas, A. Staudinger, *Civic Studies: Fundamental Questions, Interdisciplinary Methods*, The Good Society 2013, vol. 22, no. 2, pp. 122–136.

is currently a lack of independent and professional mediators in Vietnam while related laws, such as the Law on Mediation or the Law on Environmental Protection, do not stipulate how to address this issue. As such, the Law on Environmental Protection should provide a framework to guide the participation of independent organisations in environmental dispute mediation. Moreover, with the available expertise, environmental institutes, universities and staff, as well as retired environmental police, can also be potential mediators.[30]

The Vietnamese government needs to strictly implement its environmental laws, starting with the "polluter pays" principle as a central concept because it provides a way for those who have been harmed by environmental degradation to access justice. This principle also constitutes an incentive for businesses and individuals to be more mindful of their environmental impact and to take steps to prevent environmental harm.

Additionally, access to justice in environmental law can also be based on the "precautionary principle." The precautionary principle provides a useful framework for those seeking access to justice in environmental law, as it allows them to pursue legal action to prevent environmental harm that may occur.[31]

To ensure citizens have a better understanding of the law and legal procedures, it is essential to organise legal seminars. Furthermore, to increase access to legal services, more legal aid clinics and pro bono programmes should be established so that those who cannot afford to hire an attorney are still able to obtain legal assistance. In addition, via local workshops the legal system could be made easier to understand and navigate for those who are unfamiliar with it.[32] This could include providing more information and resources online, providing court interpreters, and creating more user-friendly forms.

Finally, the author contends that the following innovations should be introduced: (a) increased funding for legal aid organisations that provide free or low-cost legal services to those in need (b) lower court fees and fines that no longer disproportionately affect low-income individuals.

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30 V.T.T. Phan, *Improving Legal Framework to Implement the Right to Access to Justice in Environmental Matters in Vietnam*, VNUHCM Journal of Science and Technology Development 2015, vol. 18, no. 3, pp. 135–146.

31 T.C. Thiet, *The Polluter Pays Principle in The European Union Law and in Vietnam – Selected Issues*, Journal of Legal, Ethical and Regulatory Issues 2021, vol. 24, no. 6, pp. 1–12.

32 P.T.L. Huong, N.T. Thuy, *Current Issues and Challenges for Legal Education in a Globalized Context: A Case Study from Hanoi Law University, Vietnam*, Asian Journal of Legal Education 2021, vol. 8, no. 2, pp. 158–174.

Conclusion

In this article, the author has traced the history and development of Vietnamese law in relation to the human right to live in a healthy environment. Although this right has been acknowledged by the Constitution and laws of Vietnam, in everyday practice its implementation still needs to be improved through more effective interaction between the authorities and citizens. While continuing economic growth in Vietnam is both inevitable and desirable for the future material wellbeing of its citizens, it needs to be recognised that this "progress" cannot be made at any price, particularly at the cost of degradation to the environment which supports the viability and health of communities which depend on it for their existence.

As Environmental Law has evolved in Vietnam, it has tried to strike a balance between the imperatives of improving the standard of living of Vietnamese citizens and the needs of those same people to live in an environment that is safe, healthy and sustainable for all. It is the contention of the author that this balance can be best achieved through the constant vigilance of a legal system that is attuned to the environmental implications of industrial development, is determined to act accordingly when the necessity arises as well as through extensive consultation, taking into account the opinions of all stakeholders.

Specifically, the author firmly believes that local citizens who are affected by these developments are major stakeholders in the decision-making processes and have the right to participate, to have access to all relevant information and ultimately to receive the justice to which they are entitled.

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The possibility of amending an interpretative decision issued by ZUS – comments *de lege lata* and *de lege ferenda**

О możliwości zmiany decyzji interpretacyjnej wydawanej przez ZUS – uwagi *de lege lata* i *de lege ferenda*

О возможности внесения изменений в интерпретирующее решение, вынесенное Управлением социального страхования – комментарии *de lege lata* и *de lege ferenda*

Про можливість внесення змін до рішення про тлумачення виданого Закладом соціального страхування – зауваження *de lege lata* та *de lege ferenda*

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Summary: This article discusses amending an interpretative decision issued by the Social Insurance Institution (Zakład Ubezpieczeń Społecznych, ZUS). The study aimed to present proposals for legislative changes in interpreting the contribution rules. This article uses the classic research method for legal sciences, that is, the dogmatic legal method. The provisions that currently allow for the amendment of a decision as a result of the resumption of proceedings are analysed. The authors investigated an analogous institution at the level of tax law and, as a result of their research, proposed an amendment to the regulation that makes it possible to change an interpretative decision of the Social Insurance Institution after it has been found to be incorrect. By enabling faulty interpretative decisions to be eliminated from legal circulation, the protective function of interpretations will be strengthened in relation to payers of social security contributions who have the status of entrepreneurs.
Key words: social security contributions, taxes, interpretative decisions, temporal effect of a change in the interpretation of the law

Streszczenie: Artykuł dotyczy problematyki zmiany decyzji interpretacyjnej wydawanej przez ZUS. Analizie zostały poddane przepisy, które aktualnie umożliwiają zmianę decyzji w wyniku wznowienia postępowania. Autorzy zbadali analogiczną instytucję na płaszczyźnie prawa podatkowego i zaproponowali zmianę regulacji, dzięki którym jest możliwa zmiana decyzji interpretacyjnej ZUS po stwierdzeniu jej nieprawidłowości. Wskutek umożliwienia eliminacji z obrotu prawnego wadliwych decyzji interpretacyjnych ulegnie wzmocnieniu funkcja ochronna interpretacji w stosunku do płatników składek na ubezpieczenia społeczne, mających status przedsiębiorców.
Słowa kluczowe: składki na ubezpieczenia społeczne, podatki, decyzje interpretacyjne, skutek czasowy zmiany wykładni prawa

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Резюме: В статье рассматривается вопрос о внесении изменений в интерпретирующее решение, вынесенное Управлением социального страхования. В ней анализируются положения, которые в настоящее время позволяют вносить изменения в решение в результате возобновления производства. Авторы рассмотрели аналогичный институт на уровне налогового права и предложили поправку к нормам, позволяющую изменять интерпретирующее решение, вынесенное Управлением социального страхования, после того как оно было признано неверным. В результате создания условий для исключения из правового оборота ошибочных интерпретирующих решений будет усилена защитная функция интерпретаций в отношении плательщиков взносов на социальное страхование, имеющих статус предпринимателей.

Ключевые слова: взносы на социальное страхование, налоги, интерпретирующие решения, временной результат изменения толкования права

Резюме: Стаття присвячена питанню внесення змін до рішення про тлумачення, прийнятого Закладом соціального страхування. Проаналізовано положення, які наразі дозволяють вносити зміни до рішення в результаті повторного розгляду справи. Автори дослідили аналогічний інститут на рівні податкового права та запропонували внести зміни до нормативних актів, які дозволяють змінювати рішення про тлумачення, видане Закладом соціального страхування, після того, як воно було визнане невірним. У результаті уможливлення усунення з правового обігу невірних інтерпретаційних рішень буде посилено захисну функцію інтерпретацій по відношенню до платників внесків на соціальне страхування, які мають статус підприємців.

Ключові слова: внески на соціальне страхування, податки, рішення про тлумачення, темпоральна дія зміни в тлумаченні норм права

Introduction

Interpretative decisions issued by the Social Insurance Institution (ZUS) under the Act of 6 March 2018 – Entrepreneurs Law,[1] are a good solution for payers who have the status of entrepreneurs. The current content of the legislation allows us to distinguish several principles governing issuance related to the existence of contribution interpretations. In the literature, the most important principles include the following:

1) simplicity (lack of formality),
2) cheapness,
3) speed,
4) protection,
5) stability,
6) openness,
7) the binding force of established interpretative practice.[2]

1 Consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 2029.

2 T. Brzezicki, M. Noga, J. Wantoch-Rekowski, *Wydawanie decyzji interpretacyjnych przedsiębiorcom przez ZUS*, Warszawa 2021, pp. 26 ff.; see also T. Brzezicki, J. Wantoch-Rekowski, *O zasadach decyzji interpretacyjnych wydawanych przez Zakład Ubezpieczeń Społecznych*, in: *Umowy cywilnoprawne*

The principles of protection and stability are related to the fact that interpretative decisions are, in practice, impossible to eliminate from legal turnover. This results in ZUS's only 'defence' of its view that saying an entrepreneur is protected by an incorrect interpretative decision is to assume that the factual situation indicated in the interpretation differs from that found by ZUS in 'reality', for example, during an inspection. As a result, the practical protective power of the interpretative decision is illusory. The payer of social security contributions does not know whether ZUS will recognise the 'actual' state of affairs with that described in the application for the interpretation and, consequently, in the interpretative decision. Such an action also causes additional organisational and formal involvement, as it is necessary to conduct a separate proceeding in which the factual and legal state constituting the basis for issuing the interpretation is challenged. From a theoretical perspective, such an action is not systemically legitimate. This is because it is unacceptable for an authority to seek a way out of a situation 'by force' due to the lack of legal institutions enabling it to bring about a state of compliance with the law.

ZUS should be able to amend interpretative decisions if they are found to be incorrect. There is no need to invent new concepts; solutions operating at the level of tax law should be used.

This article presents the issue of amending interpretative decisions based on existing regulations that have only a theoretical and legal meaning and are, in principle, inapplicable in practice. The solutions for individual tax interpretations are also briefly analysed as a possible inspiration for revising contributory interpretation rules.

The last part of the study included *de lege ferenda* proposals. Importantly, granting certain entities the right to amend an incorrect interpretative decision on social insurance contributions is only an apparent worsening of the legal situation of contribution payers with the status of entrepreneurs. In practice, such a possibility would make the principle of protection and certainty, which characterise the institution of contribution interpretations, real.

Therefore, this study's main objective is to propose legislative changes in the interpretation of the contribution rules to better protect social security payers with entrepreneurial status.

This article primarily uses the classic research method for legal sciences (i.e. the dogmatic legal method) along with literature and case law. This article considers the legal situation as of 31 October 2023 in Poland.

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w ubezpieczeniach społecznych, eds. M. Szabłowska-Juckiewicz, M. Wałachowska, J. Wantoch-Rekowski, Warszawa 2015, pp. 300–309.

1. Contribution interpretations: Basic issues

Article 83d (1) of the Act of 13 October 1998 on the Social Security System[3] provides that ZUS issues individual interpretations referred to in Article 34 of the Act of 6 March 2018, Entrepreneurs Law. These are regarding the obligation to be subject to social insurance, the principles of calculating contributions to social insurance, health insurance, the Labour Fund, the Solidarity Fund, the Guaranteed Employee Benefits Fund and the Bridging Pension Fund, as well as the basis for the assessment of these contributions. Individual interpretations, together with a request for an interpretation after removal of data identifying the applicant and other entities indicated in the content of the interpretation, are immediately published by ZUS in the Public Information Bulletin.

Article 34 (1) of Entrepreneurs Law stipulates that an entrepreneur may submit to a competent authority or a competent state organisational unit a request for an explanation regarding the scope and manner of application of regulations that impose an obligation on the entrepreneur to pay public levies or social or health insurance contributions in their individual case (individual interpretation). A request for an individual interpretation may relate to an existing factual state or future events (Article 34 (2)). It follows from Article 34 (5) that an individual interpretation is granted by way of a decision that may be appealed. The individual interpretation contains an exhaustive description of the actual state of affairs or future events presented in the application and an indication of the correct position, together with a legal justification and instructions on the right to file an appeal.

Under Article 34 (15) of the Entrepreneurs Law, a competent authority and a relevant state organisational unit must promptly post individual interpretations in the Public Information Bulletin on the subject page of the office serving the authority or the state organisational unit after deleting data identifying the entrepreneur and other entities indicated in the content of the individual interpretation. In the case of repealing or annulling an individual interpretation, a competent authority or a competent state organisational unit immediately removes this interpretation from the Public Information Bulletin with a note about the reason for removal. In the case of changing an individual interpretation, a competent authority or a competent state organisational unit immediately places the changed individual interpretation in the Public Information Bulletin and adds a note about the reason for the change.

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3 Consolidated text: Journal of Laws 2023 item 1230 as amended.

Article 35 (1) of the Entrepreneurs Law is important from the entrepreneur's perspective. It states that an individual interpretation is not binding on the entrepreneur, with the reservation that the entrepreneur may not be charged with administrative or financial sanctions or penalties to the extent to which they complied with the obtained individual interpretation or with taxes in an amount higher than that resulting from the obtained individual interpretation. By contrast, it follows from Article 35 (2) of the Entrepreneurs Law that an individual interpretation is binding on the authorities or state organisational units competent for the entrepreneur and may be amended only by the resumption of proceedings. An interpretation that results in irreversible legal consequences must not be changed.

2. Revision of interpretative decisions under the current state of the law

A decision on an individual contributory interpretation is indefinite. This means that an individual contributory interpretation remains in legal circulation as long as it is not formally eliminated from it.[4] The only possibility of changing an erroneous interpretative decision is reopening the proceedings. This has been analysed in detail in the literature.[5]

Because procedure resumption belongs to one of the extraordinary modes of administrative proceedings, the prerequisites for resuming proceedings should be interpreted strictly. Defects in the proceedings that allow for resuming proceedings are regulated in Article 145 (1), Article 145a, Article 145aa and Article 145b of the Act of 14 June 1960 – Code of Administrative Procedure.[6] In a case concluded by a final decision, proceedings are resumed if the following occur:

1) The evidence on the basis of which the relevant facts were established has proved to be false.
2) The decision has been issued as a result of a criminal offence.
3) The decision has been issued by an employee or a public administrative body subject to exclusion under Articles 24, 25 and 27 of the Code of Administrative Procedure.
4) A party has not participated in the proceedings through no fault of its own.

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4 T. Brzezicki, M. Noga, J. Wantoch-Rekowski, *Wydawanie decyzji interpretacyjnych*…, p. 103.

5 T. Brzezicki, J. Wantoch-Rekowski, *O możliwości wyeliminowania z obrotu prawnego interpretacji składkowych*, Przegląd Ustawodawstwa Gospodarczego 2015, no. 1, pp. 26–31.

6 Consolidated text: Journal of Laws 2023 item 803.

5) Relevant evidence on the decision date, unknown to the authority that made the decision, emerges.
6) The decision has been made without obtaining the legally required position of another authority.
7) A competent authority or court has resolved the preliminary issue differently from the assessment adopted when issuing the decision (Article 100 (2) of the Code of Administrative Procedure).
8) The decision was made on the basis of another decision or court ruling that has been subsequently overturned or amended.[7]

It is also possible to demand that proceedings resume when the Constitutional Tribunal has ruled on the inconsistency with the Constitution of the Republic of Poland, an international agreement or the law of the normative act under which the decision was issued (Article 145a of the Code of Administrative Procedure). Additionally, it is possible to do so when a judgment of the Court of Justice of the European Union has been issued that affects the decision's content (Article 145aa of the Code of Administrative Procedure). A final possibility is that a court decision stating a violation of the principle of equal treatment under the Act of 3 December 2010 on the implementation of certain provisions of the European Union on equal treatment[8] has been issued if the violation of this principle affected the resolution of the case completed by the final decision (Article 145b of the Code of Administrative Procedure).

As a rule, the resumption of proceedings refers to defects of a procedural nature. In practice, it is difficult to find cases apart from situations of defects related to subsequent rulings of the Constitutional Tribunal or the Court of Justice of the European Union, in which there is a premise allowing effective resumption of proceedings.

Due to the specific nature of the proceedings on the issuance of an interpretative decision by ZUS, in practice, the occurrence of a premise for the resumption of the proceedings is unrealistic. It should be emphasised that it is the applicant who presents all circumstances relevant to the case, while the action of ZUS (acting in these cases as a public administrative body in the functional sense) is limited to issuing a decision. In principle, it may be said that no explanatory proceedings are conducted in these cases that could constitute grounds for reopening the proceedings (e.g. on the basis of the premise provided for in Article 145 (1) (4) of the Code of Administrative Procedure [a party did not participate in the proceedings through no fault of its own] or Article 145 (1) (5) of the Code of Administrative Procedure [new significant facts or new evidence emerge on the date of issuing the authority

7 T. Brzezicki, M. Noga, J. Wantoch-Rekowski, *Wydawanie decyzji interpretacyjnych*…, p. 106.
8 Consolidated text: Journal of Laws 2020 item 2156 as amended.

decision]). The indicated grounds may be described as typical and most frequently occurring in 'ordinary' resumption proceedings. Consequently, the direct application of the resumption of proceedings does not seem to be an appropriate procedure from a practical standpoint. Although such an institution should exist, it plays the role of a 'safety net' rather than a legal institution of any importance.

Consequently, an erroneously issued interpretative decision cannot be eliminated from legal circulation. Contrary to appearance, this is not advantageous for entrepreneurs, as the principle of protection resulting from an interpretative decision may, in practice, be fiction. ZUS, unable to eliminate an erroneous decision favourable to an entrepreneur (payer of contributions), tries to demonstrate that the decision is not applicable in a given case because the ascertained factual state is different from the one described in the application for the decision and becomes its element. Thus, a situation arises where the entrepreneur is unsure whether they are protected by the obtained individual interpretation, as ZUS may always refer to discrepancies between the actual state of affairs and that described in the interpretation decision.

Notably, the legislator in Poland explicitly limited other possibilities of changing a decision provided for in Article 154 of the Code of Administrative Procedure (concerning the repeal or amendment of a decision not creating acquired rights) and Article 155 of the Code of Administrative Procedure (concerning the repeal or amendment of a decision creating acquired rights). Allowing the above-mentioned modes would also introduce additional practical difficulties and lead to many problems in their application. Still, the procedure limiting the possibility of changing the interpretation was a deliberate action of the legislator. However, this action was not preceded by a deeper reflection of a theoretical or practical nature.

Given the above, it is reasonable to argue that a control mechanism would allow ZUS to amend interpretative decisions. In this way, the principles of protection and certainty related to the essence of interpretative decisions could be real and not merely apparent. The formulation of *de lege ferenda* conclusions in this respect requires an analysis of tax solutions that relate to individual tax interpretations.

3. Amending individual tax interpretations

Under Article 14b (1) of the Act of 29 August 1997 on the Tax Ordinance,[9] the director of the National Revenue Administration Information Centre, at the re-

[9] Consolidated text: Journal of Laws 2022 item 2651 as amended.

quest of an interested party, issues, in their individual case, an interpretation of tax law provisions (individual interpretation). As aptly pointed out by the Voivodship Administrative Court (Wojewódzki Sąd Administracyjny, WSA) in Szczecin in its judgment of 30 January 2020,[10] the institution of individual interpretations of tax law provisions has two functions:

1) It is informative, as it aims to remove possible doubts about the legal and tax consequences of applying a particular tax law provision to a specific factual situation.
2) It provides a guarantee, as it protects an entity that has complied with an individual interpretation issued in its case against possible negative consequences resulting from compliance with its content.

An individual interpretation may be amended, repealed or declared expired. This is regulated by Article 14e of the Tax Ordinance. Under Section 1, the head of the National Revenue Administration may do the following *ex officio*:

1) Amend *ex officio* an individual interpretation, if found to be incorrect, considering, in particular, the case law of the courts, the Constitutional Tribunal or the Court of Justice of the European Union.
2) Revoke the individual interpretation and discontinue the proceedings on issuing an individual interpretation if there were grounds for refusal to initiate proceedings on issuing an individual interpretation at the date of its issuance.
3) Revoke the individual interpretation due to the occurrence of a premise listed in Article 1b (5b) and refuse, with a decision against which a complaint may be lodged, to issue an individual interpretation.

In turn, Article 14e (1a) regulates the competences of the director of the National Revenue Administration Information Centre with regard to amending an individual interpretation, declaring it invalid and revoking it.

It follows from Article 14 (1) of the Tax Ordinance that the head of the National Revenue Administration is entitled to change an issued individual interpretation *ex officio* if they find it to be incorrect. At the same time, they are not bound by any deadline, which allows for changing an individual interpretation at any time. However, they must consider the jurisprudence of courts, the Constitutional Tribunal or the Court of Justice of the European Union.[11]

The basic legal consequence of changing an individual interpretation is the creation of a new individual interpretation. It has the same legal force as the previous

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10 I SA/Sz 695/19, LEX no. 2798808.

11 K. Teszner, *Komentarz do art. 14e*, in: *Ordynacja podatkowa*, vol. 1. *Zobowiązania podatkowe. Art. 1–119zzk. Komentarz aktualizowany*, ed. L. Etel, 2023 [LEX database].

interpretation and is subject to identical requirements regarding its content and the obligatory publication.[12]

In its judgment of 14 April 2023,[13] the Supreme Administrative Court ruled that the legislator did not provide for the possibility of a partial change of interpretation. The provision of Article 14e (1.1) of the Tax Ordinance provides for a change in an individual interpretation. Therefore, the entire interpretation should be assumed to be subject to change. Consequently, a newly issued amended interpretation should concern the entire factual state indicated in the application and all provisions subject to interpretation.

It follows from the wording of Article 14e (1) of the Tax Ordinance that a change in an individual interpretation is possible when the authority has found it to be incorrect, not when this incorrectness is found in a court or Constitutional Tribunal ruling in an identical or similar factual and legal situation. When amending an individual interpretation, the interpreting authority is obliged to consider such rulings as seem obvious if they are issued. The silence of courts or tribunals on a particular legal issue that is the subject of an individual interpretation does not deprive the authorised body of the ability to change the interpretation if it finds it incorrect.[14]

The judgment of the Supreme Administrative Court of 23 October 2018[15] emphasised that the basic premise for changing an individual interpretation is that it is objectively incorrect, which cannot be limited to the scope of irregularities in the interpretation of provisions revealed in judgments of courts or tribunals. In turn, the judgment of the WSA in Szczecin on 25 July 2018[16] indicates that the authority that assesses whether an individual interpretation is incorrect should (using the views of the courts) amend the interpretation. These activities can be described as the process of supervising individual interpretations issued by the authority. The existence of the case law of the administrative courts does not deprive the body of exercising supervisory functions of the right to independently assess events and interpret regulations in cases other than those in which a specific judgment was issued. This authority should intend to assess whether and to what extent certain court rulings are useful in a given case.

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12 Ibidem.

13 I FSK 464/20, LEX no. 3548609.

14 In the judgment of the Supreme Administrative Court of 20 November 2020, II FSK 1913/18, LEX no. 3097800.

15 II FSK 1812/18, LEX no. 2576790.

16 I SA/Sz 377/18, LEX no. 2529850.

The approach to irregularities in tax interpretations indicated in court rulings should be used to address irregularities in contributory interpretations in the context of their revision, as discussed in more detail in the next section of this paper.

4. *De lege ferenda* conclusions

Tax solutions concerning the amendment of individual tax interpretations cannot be directly transferred to the plane of contributory interpretations. However, they may be an inspiration to create solutions appropriate for decisions issued by ZUS or, more broadly, to amend the Entrepreneurs Law with regard to the regulation (Article 35 (2)) concerning the amendment of an individual interpretation, which is currently limited only to the institution of resumption of proceedings. Such a solution is also not alien to the legal system. Indeed, it should be noted that under Article 163 of the Code of Administrative Procedure, a public administrative body may repeal or amend a decision by virtue of which a party has acquired a right, as well as in other cases and on principles other than those specified in this chapter if specific provisions so provide. It is assumed in the literature that:

> […] this provision is, in a way, a development of the exceptions to the principle of durability of a final decision contained in Article 16 (i.e. extraordinary procedures followed by the revocation or amendment of a decision), while its content does not establish such a procedure but only indicates that such a procedure may be introduced by way of specific provisions. It also does not change the nature of these exceptions (i.e. the conditions for their application should be understood narrowly. By virtue of this provision, a decision by which a party has acquired a right may also be annulled or amended on the basis of special provisions. As indicated, the content of the provision under consideration does not allow [us] to treat it as a stand-alone basis for triggering and carrying out an extraordinary procedure.[17]

Therefore, it would not be legal ephemera to introduce a specific legal basis other than the institution of resumption of proceedings, allowing the revocation of an interpretative decision already issued.

In practice, interpretative decisions on contribution issues are issued by two branches of ZUS (i.e. Gdańsk and Lublin) and are signed by the directors of these

[17] K. Klonowski, *Komentarz do art. 163*, in: *Kodeks postępowania administracyjnego. Komentarz*, ed. H. Knysiak-Sudyka, Warszawa 2023, Article 163.

branches. Naturally, interpretative decisions should be identical in identical factual and legal situations. However, it may happen that the same branch issues different decisions, and the interpretation of the legislation may differ between the two branches. It is also clear that any interpretative decision is subject to the possibility that a factual error is made in issuing it. The probability of such an event is not high, but the possibility of it occurring cannot be denied. Once an interpretative decision has been issued, it cannot be amended, except for the theoretical option of an amendment as a result of reopening the proceedings.

Importantly, the president of ZUS should be able to change the interpretation decision. If an individual contributory interpretation is found to be incorrect, considering, in particular, court rulings, the Constitutional Tribunal or the Court of Justice of the European Union, the president of ZUS should amend *ex officio* the decision issued by one of the two heads of the ZUS branches. The ZUS president should be able to amend the decision regardless of the time since the interpretative decision was issued. It is important that the state of the law at the time of the decision's amendment was the same as when the interpretative decision was issued. At the level of tax law, Morawski stated that an amendment to an interpretation must involve a process of interpretation of the law and the formulation, in a substantive sense, of a new view of the authority. It thus replaces the 'old' interpretation with a 'new' one.[18] This view is also accurate regarding contributory interpretations.

The finding of an 'irregularity' that would enable the president of ZUS to amend the interpretative decision may raise doubts as to the definition of the term. If the decision were changed to the detriment of the entrepreneur, the action of the president of ZUS would certainly be contested. Therefore, it is clear that Article 83 (2) of the Act on the Social Security System should apply, according to which an appeal against a decision of ZUS may be lodged with a competent court within the time limit and under the rules set out in the provisions of the Act of 17 November 1964 on the Code of Civil Procedure.[19] The determination of irregularities by the ZUS president would thus be subject to judicial control and prevent unauthorised interference in interpretative decisions issued by this official.

The opportunity for the ZUS president to make changes would have to be treated as an exception and not a rule. The finding of irregularity would have to be so evident that in the event of a judicial review, the ZUS president would be granted the right to make a change. Otherwise, there would be a legitimate risk that the principles of protection and certainty, derived from the essence of individual contribution interpretations, would be fiction.

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18 W. Morawski, *Interpretacje prawa podatkowego i celnego – stabilność i zmiana*, Warszawa 2012, p. 301.

19 Consolidated text: Journal of Laws 2023 item 1550.

The principles deriving from the Entrepreneurs Law that describe individual contributory interpretations – protection and certainty – dictate that the original interpretative decision is valid until it is amended. The amended interpretative decision should take effect from the day after issuance.

Additionally, individual interpretative decisions regarding social insurance contributions are made by two ZUS branches. Therefore, with the advent of the opportunity to issue contribution interpretations, interpretative decisions were issued by all ZUS branches in Poland, of which there were 43. It is obvious that there could be no uniform line of interpretation in such a situation. Reducing the number of branches issuing the decision to two was a desirable and apt solution but not ideal. There are no formal, organisational or substantive obstacles to all interpretative decisions issued by the ZUS president. After all, that official uses specialised legal assistance in the ZUS head office that is unavailable to individual branches. Such a solution would ensure uniformity in the interpretation of contribution regulations.

The consequence of issuing individual interpretative decisions by the ZUS president should include the possibility of amending decisions by the minister in charge of social security in the case of finding irregularities. The decisions of that minister should be subject to appeal under Article 83 (2) of the Act on the Social Security System.

Conclusion

Individual interpretations of contribution regulations issued by ZUS are, by definition, intended to protect social insurance contribution payers with the status of entrepreneurs from uncertainty regarding the interpretation of regulations. The provisions of the Act on the Social Security System and the Entrepreneurs Law regulate the institution of individual interpretations of contribution regulations, which, from the perspective of the contribution payer, perform a primarily protective function. The contribution payer also needs to be certain of the interpretation of the provisions concerning contribution obligations.

An individual interpretation issued by ZUS may be incorrect. The possibilities resulting from the provisions of the Code of Administrative Proceedings (due to the reference contained in the Business Act) to change the decision, using the provisions on the resumption of proceedings with regard to contribution tax interpretations, are not practically applicable. This is due to the specificity of the regulations that govern the interpretations and specificity of the regulated matter.

It is, therefore, necessary to introduce the legal possibility of amending a contributory interpretation when it is incorrect. An irregularity should be objective and evident. The person authorised to issue a 'new' decision should be the president of ZUS or, alternatively, the minister in charge of social security.

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STUDIA PRAWNICZE KUL
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Changes in the rules of taxation of personal income in the light of selected tax principles

Zmiany reguł opodatkowania dochodów osób fizycznych w świetle wybranych zasad podatkowych

Изменения в правилах налогообложения доходов физических лиц в свете избранных принципов налогообложения

Зміни в правилах оподаткування доходів фізичних осіб у світлі окремих принципів оподаткування

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Summary: This study analyses the directions of changes in the rules for taxing personal income introduced in 2021–2022 in the light of selected tax principles. The structure of the personal income tax in force since 1992 has been based on certain assumptions, referred to in the tax law doctrine as tax principles. Over thirty years, the shape of income tax has undergone numerous changes, which have led to a gradual departure from the initially adopted assumptions. The study assesses these changes from the perspective of the principles of equality, certainty, prohibition of retroactive law, protection of fairly acquired rights, statutory basis for taxes, clarity, stability and cheapness. The method used was dogmatic-legal research. As a result of the analysis, it can be stated that the changes introduced in the rules for taxing the income of natural persons, especially those implemented in 2021–2022, significantly violate tax principles, in particular the principle of equality and tax certainty.

Key words: tax principles, personal income tax, Polish Deal

Streszczenie: Przedmiotem opracowania jest analiza kierunków dokonanych w latach 2021–2022 zmian reguł opodatkowania dochodów osób fizycznych w świetle wybranych zasad podatkowych. Konstrukcja obowiązującego od 1992 r. podatku dochodowego od osób fizycznych opierała się na pewnych założeniach, określanych w doktrynie prawa podatkowego mianem zasad podatkowych. Na przestrzeni ponad trzydziestu lat kształt podatku dochodowego ulegał licznym przemianom, które prowadziły do stopniowego odejścia od początkowo przyjętych założeń. W artykule zaprezentowano ocenę dokonywanych zmian z punktu widzenia zasad: równości, pewności, zakazu działania prawa wstecz, ochrony praw sprawiedliwie nabytych, ustawowego umocowania podatków, jasności, stabilności i taniości. W badaniach posłużono się dogmatyczno-prawną metodą badawczą. W wyniku przeprowadzonej analizy można sformułować wniosek głoszący, że wprowadzane zmiany w regułach opodatkowania dochodów osób fizycznych, zwłaszcza te dokonane w latach 2021–2022, w istotny sposób naruszają zasady podatkowe, w tym w szczególności zasadę równości i pewności podatku.

Słowa kluczowe: zasady podatkowe, podatek dochodowy od osób fizycznych, Polski Ład

Резюме: Предметом исследования является анализ направлений изменений, вносимых в 2021–2022 годах в правила налогообложения доходов физических лиц в свете отдельных налоговых принципов. Действующая с 1992 года конструкция налога на доходы физических лиц базировалась на определенных исходных положениях, именуемых в доктрине налогового права налоговыми принципами. За более чем тридцатилетний период форма подоходного налога претерпела многочисленные трансформации, которые привели к постепенному отходу от первоначально принятых предпосылок. В статье представлена оценка произошедших изменений с точки зрения принципов: равенства, определенности, запрета

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применения обратной силы закона, защиты справедливо приобретенных прав, законодательного закрепления налоговых прав, ясности, стабильности и дешевизны взимания. В исследовании использовался догматико-правовой метод исследования. В результате проведенного анализа можно сформулировать вывод о том, что внесенные изменения в правила налогообложения доходов физических лиц, особенно в 2021–2022 годах, существенно нарушают налоговые принципы, в частности принцип равенства и налоговой определенности.

Ключевые слова: налоговые принципы, налог на доходы физических лиц, программа «Польский Лад»

Резюме: Предметом дослідження є аналіз напрямів змін правил оподаткування доходів фізичних осіб у 2021–2022 роках у світлі обраних принципів оподаткування. Чинна з 1992 року конструкція податку на доходи фізичних осіб ґрунтувалася на певних вихідних положеннях, які в доктрині податкового права отримали назву принципів оподаткування. Протягом понад тридцяти років форма прибуткового податку зазнала численних трансформацій, які призвели до поступового відходу від початкових припущень. У статті представлено оцінку внесених змін з точки зору принципів рівності, визначеності, заборони зворотної сили, захисту справедливо набутих прав, законодавчого закріплення податків, зрозумілості, стабільності та дешевизни. У дослідженні використано догматико-юридичний метод дослідження. У результаті проведеного аналізу можна сформулювати висновок про те, що зміни, внесені до правил оподаткування доходів фізичних осіб, особливо у 2021–2022 роках, суттєво порушують принципи оподаткування, зокрема принцип податкової рівності та визначеності.

Ключові слова: правила оподаткування, прибутковий податок з фізичних осіб, Польський порядок

1. Rules of taxation of personal income – introductory remarks

Income earned by natural persons is subject to personal income tax, which is paid in accordance with the general rules, i.e., based on a progressive tier scale, or which may be subject to taxation based on simplified rules – in other words, covered by simplified forms of taxation.[1]

Personal income tax, including its simplified forms, has undergone numerous transformations over the years. Changes pertained to the scope of the taxation object, tax rates, reliefs and exemptions. Simplified forms of income tax have also been subject to constant changes.

The changes have increasingly violated certain rules underlying the construction of personal income tax.

These rules may be defined as the principles of taxation which are understood, on the one hand, as postulates of representatives of the tax law doctrine constituting certain models for the normative solutions being developed and, on the other, as

[1] See the Act of 26 July 1991 on Personal Income Tax, consolidated text: Journal of Laws [Dziennik Ustaw] 2023 item 2760 as amended (hereinafter: the Income Tax Act) and the Act of 20 November 1998 on Lump-Sum Income Tax on Certain Revenues Earned by Natural Persons, consolidated text: Journal of Laws 2023 item 1414 as amended (hereinafter: the Lump-Sum Act).

features of these solutions that may be derived from the content of the regulations in force.[2]

This article aims to evaluate changes in the rules of taxation of personal income introduced mainly in 2021–2022 in the light of selected tax principles, especially tax equality, cheapness, certainty and convenience.

The article draws on an analysis of the content of normative acts, jurisprudence and literature. The dominant research method used in conducting the study, the results of which are described in the article, was the dogmatic method related to logical-language analysis and interpretation of the legal text.

The article puts forward the thesis that the changes introduced in the rules of taxation of personal income, especially those introduced in 2021–2022, materially infringe tax principles, in particular, tax equality and certainty.

2. Provisions of the Act on Personal Income Tax and the Act on Lump-Sum Income Tax in the light of selected tax principles

Personal income tax adopted in 1991 was based on the **general global tax** concept with few exceptions displaying the features of "schedular" tax. At present, the range of income not subject to aggregation is steadily growing. Hence, the model of general income tax is being gradually abandoned in favour of the concept of "schedular" tax, in which separate methods of determining the tax base and different tax rates apply to individual sources of income.[3]

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2 See in more detail: A. Gomułowicz, *Zasady podatkowe wczoraj i dziś*, Warszawa 2001; R. Kowalczyk, in: *Prawo finansowe*, eds. R. Mastalski, E. Fojcik-Mastalska, Warszawa 2013, p. 62; A. Gomułowicz, *Zasady podatkowe*, in: *System Prawa Finansowego*, vol. 3. *Prawo daninowe*, ed. L. Etel, Warszawa 2010, pp. 99–130; R. Zieliński, *Personalizacja w systemie obciążeń dochodów osób fizycznych w Polsce*, Warszawa 2019, pp. 27–66.

3 For more details on the two taxation models, refer to: R. Mastalski, *Prawo podatkowe II – część szczegółowa*, Warszawa 1996, pp. 45–46 and J. Szołno-Koguc, *Reforma polskiego systemu podatkowego w latach 1990–1995 (założenia a realizacja)*, Lublin 2000, pp. 79 ff., as well as W. Wójtowicz, *Podstawowe założenia nowych podatków dochodowych*, Przegląd Sądowy 1992, no. 9, pp. 3–4; P. Smoleń, in: W. Wójtowicz, P. Smoleń, *Podatek dochodowy od osób fizycznych – prorodzinny czy neutralny?*, Warszawa 1999, p. 26–27 and H. Radziszewski, *Nauka skarbowości*, Warszawa 1919, pp. 303–318, as well as S. Głąbiński, *Wykład nauki skarbowej*, Lwów 1894, p. 346, and R. Rybarski, *Nauka skarbowości*, Warszawa 1935, pp. 266–268; E. Małecka-Ziembińska, *Podatek dochodowy jako regulator dochodów osób fizycznych w Polsce okresu transformacji ustrojowej*, Poznań 2006, pp. 48–50; J. Małecki, in: A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2010, pp. 608–610.

The most recent examples illustrating the gradual abandonment of the concept of global tax include the coverage, from 2023, of rental income generated outside the taxpayer's business activities by a lump-sum tax on registered income[4] or the constant expansion of the range of earnings from capital gains.[5]

Another principle which provides the perspective for assessing the changes introduced in the taxation of personal income is **the principle of equality.** It may be understood in a number of ways. It can be regarded as a rule according to which entities in the same situation should be treated equally by the provisions of tax law. More specifically, the principle allows for the differentiation of tax law situations between taxpayers in different circumstances but it prohibits any unjustified differentiation between taxpayers that would lead to a preference for or discrimination against any taxpayer group. Differential treatment, therefore, requires the existence of a relevant differentiating characteristic.[6]

Reasonable doubts may arise as to whether the absolute inability to deduct health insurance contributions paid by a taxpayer as part of a settlement in accordance with the general principles from the tax base, when there is a possibility to deduct part of those contributions by taxpayers paying income tax in different forms (a flat tax, a lump-sum tax on registered income, a tax card),[7] is consistent with the principle of equality of taxation. In other words, whether the choice of the form of taxation is a sufficient differentiating characteristic for the introduction of different principles for calculating the health insurance contribution and for the possibility of deducting part of it from the tax base. By the end of 2021, the principles for deducting the health insurance contribution had been identical for all taxpayers who were natural persons paying the contribution, regardless of their sources of income and form of taxation.[8] Given the above, the argument that the inability to

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4 Article 2 (1a) of the Lump-sum Act, in the version provided in Article 9 (2) of the Act of 29 October 2021 amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts, Journal of Laws 2021 item 2105.

5 Article 30b of the Income Tax Act, added by Article 1 (27) of the Act of 12 November 2003 amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts (Journal of Laws 2003 no. 202, item 1956), amended, *inter alia*, by Article 1 (23) of the Act of 23 October 2018 amending the Act on Personal Income Tax, the Act on Corporate Income Tax, the Tax Ordinance and certain others acts, Journal of Laws 2018 item 2193.

6 A. Gomułowicz, *Zasady podatkowe wczoraj*…, pp. 27–33 and W. Łączkowski, in: *System finansów publicznych. Prawo finansowe wobec wyzwań XXI wieku*, eds. A. Dobaczewska, E. Juchniewicz, T. Sowiński, Warszawa 2010, pp. 19–26.

7 Article 26, Article 30c (2) (2) of the Income Tax Act, Article 11 (1a) of the Lump-Sum Act, Article 13, 31 (1) of the Lump-Sum Act.

8 With the exception of the tonnage tax (see the Act of 26 August 2006 on Tonnage Tax, consolidated text: Journal of Laws 2021 item 985 as amended; the deductibility of the health insurance contribution

deduct the contribution by those taxpayers who are taxed according to the progressive scale is compensated by the low tax rate in the first tier does not seem entirely legitimate. Moreover, a taxpayer paying personal income tax in accordance with the general principles, in addition to the inability to deduct the health insurance contribution from the tax base, applies a higher rate (than the taxpayers subject to a lump-sum tax on registered income) in its calculation.[9] It is worth noting that the tax paid based on a tax card is often lower for taxpayers than the tax calculated using other forms of taxation, and still, those taxpayers are entitled to reduce the tax card amount by the part of the health insurance contributions that they have already paid.

Undoubtedly, 2022 was the year that brought the most severe **crisis of the principle of certainty in tax law.** In fact, one may argue that this principle is currently not a feature of taxation of personal income but merely a postulate of representatives of science and practice of tax law, intended for statutory solutions. Indeed, this principle has been violated in all possible aspects, i.e., in terms of:

- the prohibition of retroactive application of the law;
- the principle of protection of acquired rights;
- the order of statutory regulation of the content of tax obligations;
- the transparency of tax law;
- the postulate of stability of legal provisions.

Obviously, **the prohibition of retroactive application of law** is not absolute. In 2022, the solutions introduced with a retroactive effect, with regard to taxation of personal income, were designed to remedy the legislative errors of the Polish Deal (*Polski Ład*).[10] Indeed, in this case, a better remedy could hardly be indicated, especially as the introduced solutions only seem to provide taxpayers with tax benefits. Nevertheless, the revolutionary nature of changes resulting from the Polish Deal, when combined with the relatively short *vacatio legis*, have made it significantly

from the tonnage tax was abolished as of 1 December 2008; more broadly: K. Wojewoda-Buraczyńska, *Zmiany w podatku tonażowym*, Przegląd Prawa Publicznego 2015, no. 3, pp. 74–84), see Article 27b of the Income Tax Act, Articles 13, 27 (1) and (2) in the version in force until the end of 2021.

9 Articles 79 (1), 79a (1), 81 (2e) and 2z of the Act of 27 August 2004 on Healthcare Services Financed from Public Funds, consolidated text: Journal of Laws 2022 item 2561 as amended.

10 *Polski Ład* (the Polish Deal) was a political plan aimed at rebuilding the Polish economy after the COVID-19 pandemic and reducing social inequalities, as well as creating better living conditions for all citizens. The programme assumed legislative changes in the area of tax law, healthcare services, housing policy, pension security, infrastructure etc., https://www.gov.pl/web/polski-lad/o-programie [access: 19.02.2024]. As part of the plan, a significant amendment to the Act on Personal Income Tax was enacted (Act of 29 October 2021 amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts, Journal of Laws 2021 item 2105 as amended).

more difficult for taxpayers to adjust their business activities to the changing tax rules. In addition, the subsequent amendments to these rules introduced in the course of the tax year, but effective from the beginning of the tax year, have frustrated the initial effort. The remedy was to allow self-employed taxpayers or taxpayers generating income from rental outside their business activities to change the form of taxation during or even after the end of the tax year.[11] This solution may appear to fully meet the taxpayers' expectations – after all, they can decide on the form of taxation (and, consequently, on the principles for calculating social and health insurance contributions) after the end of the tax year, already having all the data necessary to select the most favourable form. Unfortunately, the possibility of changing the form of taxation does not entail the possibility of modifying the business activities undertaken by the taxpayer. In addition, certain legal actions performed for tax purposes are also not subject to modification. For example, a taxpayer earning income from a rental agreement regarding an asset covered by matrimonial joint property may not, during the tax year, change the declaration indicating which of the spouses will be subject to taxation of the generated rental income.[12]

The tax card has fallen victim to the ongoing revolution in the taxation of personal income. In its jurisprudence, the Polish Constitutional Tribunal has emphasised the importance of **the principle of protection of equitably acquired rights,** considering it a fundamental principle, from the point of view of taxpayers, which gives them certainty that their rights will not be abolished or restricted unexpectedly, abruptly and without good reason.[13] Under the applicable regulations, since the beginning of 2022, taxpayers have no longer been allowed to opt for the tax card. However, it can still be used by those who paid tax in this form in 2021.[14] It seems that, in order to maintain the principle of certainty of tax law and to protect the acquired rights, information about the inability to opt for the tax card should have been provided to taxpayers before the expiry of the deadline for choosing this form of taxation for 2021. This is, by no means, the only shortcoming of the provisions on the tax card. The prerequisites for taxation in the form of tax card, for taxpayers earning income from services in the field of protection of human health, have also been changed (more specifically, the taxation conditions applying before 2021, which were stricter, have been reintroduced). This implies that those taxpayers no

11 Articles 14 and 15 of the Act of 9 June 2022 amending the Act on Personal Income Tax and certain other acts, Journal of Laws 2022 item 2180 as amended.

12 Article 12 (6) to (8) of the Act on Lump-Sum Tax.

13 A. Gomułowicz, *Zasada sprawiedliwości podatkowej w orzecznictwie Trybunału Konstytucyjnego. Aspekt materialny*, Warszawa 2003, pp. 51–56.

14 Article 25 (1) (1) of the Lump-Sum Act.

longer have the right to apply for taxation in the form of a tax card.[15] As stated in the justification for the draft amendment, the extension of the scope of the tax card in 2021 – according to the author of the draft – has become inadequate for this form of taxation. According to the originator of the amendment, this form of a flat-rate income tax should be addressed to taxpayers carrying out small-scale business activities, while maintaining the possibility for doctors to continue taxation in the form of a tax card, under the current principles, was considered unjustified.[16] Bearing in mind that both the extension of the scope of the tax card and the reintroduction of the previous legal status were approved by the Prime Minister, such a rationale suggests that the reconstruction of the tax system is not the result of a conscious implementation of the adopted fiscal policy but merely a chaotic reaction to previous legislative actions that seem to have not been fully thought-out.

Given the justification for introducing the amendment, an allegation that the amendment is arbitrary in nature and violates the principle of protection of acquired rights seems justified.[17]

Establishing the tax obligation based on statutory provisions is a well-known principle.[18] The changes to taxation of personal income introduced in the 2022 tax year were based on statutory provisions. Therefore, from the formal point of view,

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15 Part VIII of Annex 3 to the Lump-Sum Tax Act in the version given by the Act of 29 October 2021 amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts, Journal of Laws 2021 item 2105 as amended.

16 Explanatory Memorandum to the Act amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts, 9th Sejm, Sejm paper no. 1532, 8.09.2021, p. 396.

17 See judgements of the Polish Constitutional Tribunal: of 4 June 2013, P 43/11, OTK ZU 2013, no. 5A, item 55; of 14 June 2000, P 3/00, OTK ZU 2000, no. 5, item 138; of 13 March 2006, P 8/05, OTK ZU 2006, no. 3A, item 28; of 25 June 2002, K 45/01, OTK ZU 2002, no. 4A, item 46; of 7 February 2001, K 27/00, OTK ZU 2001, no. 2, item 29; of 29 January 1992, K 15/91, OTK ZU 1992, item 8; of 24 October 2000, SK 7/00, OTK ZU 2000, no. 7, item 256; of 4 January 2000, K 18/99, OTK ZU 2000, no. 1, item 1; of 15 July 1996, K 5/96, OTK ZU 1996, no. 4, item 30; of 13 March 2000, K 1/99, OTK ZU 2000, no. 2, item 59; of 28 April 1999, 3/99, OTK ZU 1999, no. 4, item 73; of 22 June 1999, K 5/99, OTK ZU 1999, no. 5, item 100; of 15 September 1998, K 10/98, OTK ZU 1998, no. 5, item 64; of 15 February 2005, K 48/04, OTK ZU 2005, no. 2A, item 15; of 8 April 1998, K 10/97, OTK ZU 1998, no. 3, item 29; of 25 November 1997, K 26/97, OTK ZU 1997, no. 5, item 64; of 9 May 2006, K 4/05, OTK ZU 2006, no. 5A, item 55; of 16 September 2003, K 55/02, OTK ZU 2003, no. 7A, item 75; of 25 April 2001, K 13/01, OTK ZU 2001, no. 4, item 81, see also *Studia i materiały Trybunału Konstytucyjnego*, vol. 20. *Zgromadzenie Ogólne Sędziów Trybunału Konstytucyjnego*, Warszawa 2004, pp. 263–265, see in more detail: T. Zalasiński, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warszawa 2008, pp. 106–149.

18 Article 217 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws no. 78, item 483 as amended; A. Gomułowicz, *Zasady podatkowe*, in: *System Prawa Finansowego*, vol. 3, pp. 108–110; Z. Ofiarski, *Źródła prawa finansowego i problemy legislacji finansowej*, in: *System Prawa Finansowego*, vol. 1. *Teoria i nauka prawa finansowego*, ed. C. Kosikowski, Warszawa 2010, pp. 175–238.

this principle now appears to be fully respected. However, when reading the current legislation, one may draw the conclusion that the actual taxpayers' obligations and rights appear somewhat ambiguous in light of the provisions of the tax acts. It is a common practice to apply new tax solutions only after they have become the subject of individual tax law interpretations. However, it is important to note that, while tax interpretations obviously perform a very important protective function for taxpayers, they should not be considered an indispensable element in the process of tax law implementation. Meanwhile, where the taxpayer's activity is not subject to a statutory deadline, it has become a rule not to apply the new tax provisions before the corresponding tax interpretations appear. This was the case at the beginning of 2021 when doctors opted for the tax card. Some taxpayers did so bearing in mind the possibility of withdrawing their decision in the event of an unfavourable interpretation. Others, in turn, postponed their decision in this regard to the following tax year when, as is known, opting for the tax card was no longer possible due to legislative amendments.[19]

The need to await tax law interpretations in almost every case, before implementing a newly introduced tax rule, seems to violate the principle of statutory regulation of the content of tax obligations and **the principle of clarity**, and thus also transparency of tax law. At the same time, the principle of tax certainty, understood as the postulate of creating the content of tax law obligations and rights in a manner predictable for the taxpayer, is also undermined.[20]

It seems rather self-explanatory that **the principle of stability of tax law,** with regard to personal income tax, is now merely a postulate of representatives of science and practice of tax law, intended for statutory solutions. Instability has indeed become a feature of personal income tax, including its simplified forms. This is not a new feature, though. Personal income tax is one of the most frequently amended taxes (along with corporate income tax, and goods and services tax). Since 1991, the Act on Personal Income Tax has been amended almost 400 times.[21]

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19 Part VIII of Annex 3 to the Lump-Sum Act in the version given by the Act of 29 October 2021 amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts.

20 A. Gomułowicz, *Zasady podatkowe wczoraj*…, pp. 13–39; T. Dębowska-Romanowska, *Uwagi o sposobie definiowania przedmiotu i podstawy opodatkowania z punktu widzenia obliczenia prawidłowej (jednej i jedynej) kwoty podatku*, in: *Księga pamiątkowa ku czci profesora Apoloniusza Kosteckiego*, eds. B. Brzeziński et al., Toruń 1998, pp. 44–45 and A. Gomułowicz, *Sprawiedliwość opodatkowania jako przesłanka prawodawcza i orzecznicza*, Zeszyty Naukowe Sądownictwa Administracyjnego 2008, no. 1, p. 26.

21 P. Polański, *Dynamika częstotliwości zmian prawa podatkowego w latach 2006–2016*, Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych 2016, no. 9, pp. 18–20.

In contrast, a principle that seems to be applied much better over time is **the principle of cheapness of tax**. Undoubtedly, the advancing computerisation of contacts between taxpayers and tax authorities is conducive to lowering the costs of collecting income tax, including its simplified forms. Reduced tax collection costs result, *inter alia*, from the automated processing of information on the income or revenue earned by taxpayers through payers. This means that, using the appropriate software, it is possible to calculate the amount of tax without the involvement of the tax authority and the taxpayer. This reduces the time that both the authority and the taxpayer spend calculating the applicable tax liability. It also minimises the risk of errors in this regard. Even in the absence of any activity on the part of the taxpayer, they are able to meet the obligation to submit a tax return on time.[22] It is worth emphasising that the software available on government websites, which is necessary for the correct fulfilment of taxpayers' obligations, is free of charge for users, which strongly favours the cheapness of tax from the taxpayer's point of view. Creating a solution that enables the automation of tax settlements, data storage and electronic correspondence with the tax authority has obviously entailed substantial financial outlays on the part of active entities. It seems, however, that the incurred costs are compensated by the benefits resulting, for instance, from the automatic elimination of accounting errors and self-sending of tax returns within the statutory deadline, even in the case of the taxpayer's passivity in this respect.

In the case of taxpayers who do not receive income through a payer, more and more solutions are being introduced to speed up the process of submitting annual income tax returns. The automatic mathematical calculations performed by tax return processing programmes have undoubtedly facilitated the entire procedure. It is not even required to have the necessary hardware and software to make use of these facilities. Taxpayers who do not have access to a computer (or to any other device connected to the Internet) can file their tax returns online at their tax office.[23] From a technical point of view, it is indeed becoming easier for taxpayers to contact the tax authority.

Unfortunately, the previously mentioned shortcomings of the tax law regarding personal income tax may be a source of additional expenses on the part of the taxpayers, increasing the costs related to tax payments. Due to numerous changes in the applicable regulations and their complexity, an increasing number of taxpayers

22 Article 45 cd (4) of the Income Tax Act.

23 Such a possibility is a form of fulfilment of the obligation to provide taxpayer service and support to ensure the proper performance of tax obligations by heads of tax offices, resulting from the Act on the National Revenue Administration, Article 28 (1) (5) of the Act of 16 November 2016 on the National Revenue Administration, consolidated text: Journal of Laws of 2023 item 615 as amended.

are unable to cope with the correct fulfilment of their tax obligations on their own. Consequently, they are forced to use the services of tax advisers, accountants, legal advisers or other professional assistants. Given the above-mentioned circumstances, the cost of these services is constantly increasing, more time is spent on reading the regulations in force and searching for the corresponding tax interpretations, and the unpredictability of decisions made by tax authorities further increases the risk related to the advisory activity. The taxpayers who until recently have managed to independently handle their profit and loss accounting and taxes are often no longer able to choose the best form of taxation, especially when this needs to be done twice a year, as was the case in the 2022 tax year. From this point of view, the costs of tax collection have not decreased at all.

The last principle to be discussed in this article is **the principle of tax convenience**. As has already been mentioned, it is probably for the first time in the history of personal income tax that a taxpayer running a non-agricultural business activity or earning income from a rental agreement could choose the form of taxation after the end of the tax year. It would, therefore, seem that the postulate of tax convenience is now fully implemented. Unfortunately, this is not the case as there are three main drawbacks of the current solutions, significantly affecting their overall assessment.

First, the right to change the form of taxation was granted to taxpayers in the middle of the tax year. Taxpayers, starting the tax year under the Polish Deal regime, could take a number of actions, for example, as to the form of cooperation with contractors, as to business activity, the profile of activity or even the organisational form of activity. For some taxpayers, in view of the measures taken, the right to change the form of taxation appears illusory.

Second, together with the choice of the form of taxation, taxpayers choose the rules for calculating social security and health insurance contributions, including tax preferences in this respect. There is a serious concern that the average taxpayer will not be able to choose the most favourable form of taxation in view of the numerous variables affecting their fiscal burden.

Third, the possibility of changing the form of taxation does not extend to other actions that the taxpayer takes solely for tax purposes. It is clear that the legislation cannot grant taxpayers the right to evade agreements concluded with their contractors. What seems incomprehensible is that the possibility of modifying, together with the form of taxation, declarations made for tax purposes is not granted, as in the case already mentioned concerning the indication of the spouse subject to taxation with respect to rental income.

Conclusion

In conclusion, it can be seen that many of the directions of changes in the rules of taxation of personal income deserve criticism. Therefore, it is worth seeking ways to limit the described phenomena. Many shortcomings could be avoided if social consultations played a greater role in law-making. Undoubtedly, haste in the legislative process is not conducive to the quality of legislation either. It is also worth considering efforts to reduce the influence of current political needs on the shape of tax regulations.[24]

The year 2023 brought relative stability in terms of personal income tax. Although the Act on Personal Income Tax was amended more than 20 times, the changes introduced were not revolutionary. In connection with the parliamentary elections and the preceding election campaign, there were many different proposals for changes to the tax law. It would seem reasonable to infer that taxpayers, in anticipation of the fulfilment of these election promises, have switched – so to speak – to the standby mode and postponed any significant modifications to their business activities until specific legislative proposals are announced. Unfortunately, this does not seem to be optimal for the economy, as these actions on the part of taxpayers are hardly dictated by the economic situation. They rather indicate that taxpayers are awaiting the subsequent tax changes. The increasing use by the Ministry of Finance of consultation meetings devoted to the introduced changes should be considered a positive direction. One can only hope that, on the one hand, the parties concerned will decide to actively participate in the tax law-making process and, on the other, that the postulates raised will be taken into account in the legislative process.

At present, there seems to be no coherent, unified concept regarding tax policy.[25] Admittedly, the trend towards computerisation of the tax calculation and collection process, which is dictated by the desire to tighten up the tax system, can be observed quite clearly. The proper fulfilment of tax obligations is in the interest of both

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24 W. Modzelewski, *Co zrobić z chaosem legislacyjnym w prawie podatkowym?*, Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych 2024, no. 2, p. 50; B. Brzeziński, *Zagadnienie reformy prawa podatkowego*, in: *System Prawa Finansowego*, vol. 3, pp. 479–491; J. Malecki, *Formy prawne stosowania prawa finansowego*, in: *System Prawa Finansowego*, vol. 1, pp. 329–385; W. Modzelewski, *List otwarty*, Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych 2023, no. 9, p. 69; K. Nizioł, *Polski Ład z perspektywy zasad poprawnej legislacji*, in: *Polski Ład a opodatkowanie dochodów. Ujęcie prawne, finansowe i ekonomiczne*, ed. E. Małecka-Ziembińska, Poznań 2023, pp. 17–30.

25 A. Pomorska, *Potrzeba zmian w systemie podatków dochodowych w Polsce oraz dotychczasowe próby ich reformowania*, in: *Potrzeba i kierunki reformy podatków dochodowych w Polsce*, ed. A. Pomorska, Lublin 2016, pp. 15–20; B. Brzeziński, *Reformy podatkowe – teoria i doświadczenie polskie*, in: *Systemowa reforma podatków dochodowych*, eds. B. Brzeziński, W. Nykiel, Warszawa 2009, pp. 3–11.

the State Treasury and taxpayers. Stable budget revenues guarantee the continuity of financing public tasks, which may be conducive to maintaining public burdens at an unchanged level.

Presumably, the formulation of tax policy assumptions and directions, followed by their consistent implementation, would increase the predictability of tax law, and thus its instability would cease to be an unintentional, albeit strongly influential, legal and financial stimulus,[26] often determining taxpayers' behaviours.

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[26] H. Reniger, in: *System instytucji prawno-finansowych PRL*, vol. 1. *Instytucje ogólne*, ed. M. Weralski, Wrocław 1982, pp. 319–347; M. Weralski, in: ibidem, pp. 522–526; N. Gajl, *Teorie podatkowe w świecie*, Warszawa 1992, pp. 198–200; M. Weralski, *Kierunki reformy polskiego systemu podatkowego*, Warszawa 1960, pp. 32–36; J. Głuchowski, *Wstęp do skarbowości*, Poznań 1997, pp. 55–60; idem, *Polskie prawo podatkowe*, Warszawa 1998, pp. 16–20; W. Wójtowicz, *Problem „prorodzinności" podatku dochodowego od osób fizycznych*, in: *Konstytucja, ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl*, eds. T. Dębowska-Romanowska, A. Jankiewicz, Warszawa 1999, pp. 407–422; W. Nykiel, *Normy prawa finansowego*, in: *System Prawa Finansowego*, vol. 1, pp. 45–46.

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Growing impact of third-parties in VAT taxation – insights from digital platforms

Rosnące znaczenie podmiotów trzecich w opodatkowaniu VAT – spostrzeżenia na przykładzie platform cyfrowych

Растущее значение третьих субъектов в налогообложении НДС – выводы на примере цифровых платформ

Зростаюче значення третіх осіб в оподаткуванні ПДВ – висновки на прикладі цифрових платформ

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Summary: This article examines the increasing involvement of third parties, particularly digital platforms, in VAT taxation. It discusses the shift from traditional state-centric tax collection to a model where private entities play a crucial role in ensuring tax compliance. It highlights the EU VAT's "deemed supplier" regimes, which impose increased liability on digital platforms facilitating transactions, and explores the potential advantages and disadvantages of this approach.

Key words: VAT taxation, digital platforms, tax compliance, deemed supplier regime

Streszczenie: Niniejszy artykuł poświęcono problematyce rosnącego zaangażowania stron trzecich, szczególnie platform cyfrowych, w opodatkowanie VAT. Omówione zostało przesunięcie od tradycyjnego, skoncentrowanego na państwie modelu poboru podatków do modelu, w którym prywatne podmioty odgrywają kluczową rolę w zapewnieniu zgodności z prawem podatkowym. W tym kontekście podkreśla się znaczenie reżimu uznanego dostawcy na gruncie unijnego podatku VAT, który nakłada zwiększoną odpowiedzialność na platformy cyfrowe ułatwiające transakcje. W artykule podjęto próbę sformułowania potencjalnych zalet i wad tego podejścia.

Słowa kluczowe: opodatkowanie VAT, platformy cyfrowe, zgodność z prawem podatkowym, reżim uznanego dostawcy

Резюме: В данной статье рассматривается растущее участие третьих сторон, в частности цифровых платформ, в налогообложении НДС. В ней обсуждается переход от традиционной модели сбора налогов, ориентированной на государство, к модели, в которой частные субъекты играют ключевую роль в обеспечении соблюдения налогового законодательства. В этом контексте подчеркивается важность режима предполагаемого поставщика (*deemed supplier*) в рамках НДС ЕС, который возлагает повышенную ответственность на цифровые платформы, способствующие осуществлению сделок. В статье предпринята попытка сформулировать потенциальные преимущества и недостатки такого подхода.

Ключевые слова: налогообложение НДС, цифровые платформы, соответствие с налоговым законодательством, налоговый режим предполагаемого поставщика (*deemed supplier*)

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Резюме: Ця стаття присвячена зростаючому залученню третіх сторін, зокрема цифрових платформ, до оподаткування ПДВ. У ній обговорюється перехід від традиційної моделі збору податків, орієнтованої на державу, до моделі, в якій приватні суб'єкти відіграють ключову роль у забезпеченні дотримання податкового законодавства. У цьому контексті підкреслюється важливість режиму умовного постачальника на підставі ПДВ Європейського Союзу, який покладає підвищену відповідальність на цифрові платформи, що сприяють здійсненню транзакцій. У статті зроблено спробу сформулювати потенційні переваги та недоліки такого підходу.

Ключові слова: оподаткування ПДВ, цифрові платформи, згідність з податковим правом, режим умовного постачальника

Introduction

The evolving role of third parties in VAT taxation, particularly within digital platforms, has become increasingly significant. This paper explores the shift from traditional state-centric tax collection to a model where private entities, such as digital platforms, are becoming pivotal in ensuring tax compliance.

The trend of delegating tax collection duties to third parties is explained through examples of two trends: "privatization" and "responsibilization." Privatization refers to the transfer of some government functions, as tax collection, to private entities. Responsibilization, on the other hand, refers to situation where private organizations and individuals share with governments the responsibility for effective reducing opportunities for tax evasion.

Delegating tax compliance duties to third parties is particularly evident in the context of the EU VAT.

An example analyzed in the paper is the trend of imposing increased liability on digital platforms facilitating underlying transactions through the "deemed supplier" regimes. The first such regime for digital platforms was introduced in 2015 and covered platforms involved in the provision of electronic services. In 2021, another regime of this kind was introduced for e-commerce sector platforms. Currently, the European Commission is planning to introduce another deemed supplier regime for accommodation and passenger transport sector platforms, which is expected to come into effect as early as 2025.

The goal of this paper is not an exhaustive discussion of these solutions but rather to illustrate the trend of expanding third-party role in VAT collection and, on example of deemed supplier regime, analyze its potential advantages and disadvantages. The article was prepared based on the dogmatic-legal method. The study pertains to European Union VAT solutions, and since it is a harmonized tax, the described observations will also apply to the Polish tax system.

1. Role of third parties in tax collection

Ensuring payment of taxes to the appropriate authorities is essential for the effective operation of any tax system. The literature on this subject suggests that efficiency of tax collection requires significant investment in developing the administrative competencies of the tax system and enforcing compliance with existing rules.[1]

At times, this burden is partially shifted onto entities outside of the tax administration, involving third parties to enhance tax collection efforts. The imposition of obligations on third parties is a common feature of tax systems[2] and does not represent a penalty or sanction. Rather, it is a standard method integrated into the tax system for collection purposes.[3] Imposing the obligation to pay tax on an entity other than the taxable person aims to enhance the likelihood of actual tax collection.[4]

For example, when the obligation to pay transaction tax is imposed on intermediaries involved in the transaction, such as digital platforms, tax compliance may increase because firstly intermediaries tend to be fewer in number and thus easier to monitor than their clients, especially if the latter are end consumers,[5] and secondly targeting legal enforcement efforts towards a concentrated group of larger and wealthier actors is a much simpler task than monitoring a dispersed group of low-income individuals.[6]

It's worth noting that this approach aligns with the fundamental structure of indirect taxes, such as VAT. In the realm of VAT, the individuals who bear the economic burden of the tax are not the same entities that ultimately settle the tax. The basic structure of VAT is designed such that although the consumer bears the economic burden of the tax, VAT is accounted for and paid by the entrepreneur, who acts as the "intermediary" between the consumer and the State. Consequently, entrepreneurs (referred to as taxable persons) bear the responsibility for VAT settlement – they collect the tax from consumers and, after deducting the input VAT, remit it to the tax authorities. This is a logical solution, because in practice, it seems impossible to impose VAT compliance obligations on numerous and mostly

1 J.A. Mirrlees, *The Economic Approach to Tax Design*, in: *Tax by Designed*, eds. S. Adam et al., New York 2011, p. 43.

2 P. Baker, P. Pistone, K. Perrou, *Third-Party Liability for the Payment of Taxes and Their Fundamental Rights*, World Tax Journal 2023, vol. 15, no. 1, p. 86.

3 Ibidem.

4 Ibidem, p. 87.

5 G. Beretta, *European VAT and the Sharing Economy*, Alphen aan den Rijn 2019, pp. 273–275.

6 M. Viswanathan, *Tax Compliance and the Sharing Economy*, in: *The Cambridge Handbook of the Law of the Sharing Economy*, eds. N.M. Davidson, M. Finck, J.J. Infranca, Cambridge 2018, p. 362.

individual consumers. Instead, these obligations are placed on fewer, but better-prepared taxable persons – businesses engaged in VAT – taxable activities.

Currently, there is a trend towards shifting an increased burden of tax collection from states to private entities. One such trend is "privatization," where specific administrative tasks within the tax system are outsourced to the private sector if doing so enhances efficiency or effectiveness.[7] However, when delegating certain administrative activities, the state retains its autonomy, as private entities do not have the authority to set taxes resulting from laws or government decisions.[8] As indicated by doctrine, one of the crucial lessons learned in recent years is that a strong state does not necessarily equate to a large state. Therefore, in the realm of tax administration, entrusting certain tasks to the private sector instead of directly handling them may lead to higher efficiency, contributing to building a smaller but stronger tax administration.[9] This trend is exemplified in "withholding at source" practices, where agents (third-parties) in the private sector are responsible for withholding taxes and remitting them to the government. The advantages of this solutions are numerous. It is essential to note, for example, the simplification resulting from reducing the number of individuals filing taxes without decreasing the number of taxpayers (in some countries, the adoption of withholding at source led to a significant decrease in the number of tax returns to be processed). Moreover, this solution has proven effective in reducing tax evasion. Nevertheless, some concerns have been raised that this tool requires monitoring withholding agents in a widespread system of withholding at source.[10]

The second interesting trend is the phenomenon of "responsibilization." This trend, which emerged as a new method of governing crime, involves private parties who are not part of the criminal justice system being legally or administratively held responsible for crime prevention. So instead of the state alone bearing the responsibility for crime control, the new strategy involves identifying private organizations and individuals who should share the responsibility for effectively reducing opportunities for crime.[11]

The literature suggests that this phenomenon can be observed in the context of VAT – there is an increase in responsibility on third parties with certain business

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7 L. Fernando, R. Acuna, *Privatization of Tax Administration*, in: *Improving Tax Administration in Developing Countries*, ed. R.M. Bird, M. Casanegra de Jantscher, Washington, D.C. 1992, p. 377.

8 Ibidem.

9 Ibidem, pp. 377–378.

10 See more: ibidem, pp. 384–385.

11 R. de la Feria, *Tax Fraud and Selective Law Enforcement*, Journal of Law and Society 2020, vol. 47, no. 2, p. 261.

connections to VAT fraudsters (including the seller of the goods to the alleged fraudster, the purchaser of those goods, an intermediary, or even a warehouse keeper) in this regard.[12] Entrepreneurs are often required to conduct due diligence to ensure that their business partners are not involved in fraud, as failure to do so may result in some liability when tax authorities provide objective evidence of the businesses' knowledge of the fraud.[13]

Responsibilization strategies offer certain advantages. It is emphasized that it can serve to generate additional revenue from businesses that do not engage in fraud, in order to compensate for losses incurred as a result of fraud.[14] However, it is also pointed out that while states are increasingly outsourcing policing tasks to private actors, significant risks persist regarding the proper engagement of the private sector in combating fiscal corruption.[15] Additionally, such actions may lead governments to focus not solely on combating tax fraud, but rather on minimizing their losses. In the literature, it is suggested that the reduction in the VAT gap may be partially attributed not solely to the reduction of fraud itself, but also to the implementation of measures aimed at maximizing revenue collection.[16]

Among the new trends in increasing third-party liability, there is also a strategy of greater involvement of intermediaries in VAT tax collection. Although, as noted above, the very structure of this tax inherently entails the responsibility of "third-parties" for its settlement, namely entrepreneurs acting "on behalf of" consumers who bear the economic cost of the tax, it is now possible to observe the phenomenon of imposing on certain VAT taxable persons (such as digital platforms, intermediating in transaction) the obligation to account for VAT "on behalf of" other VAT taxable persons. In specific situations, digital platforms will account for VAT "on behalf of" their underlying suppliers. This leads to further "narrowing" of the number of entities responsible for VAT settlement. This phenomenon, illustrated by the deemed supplier regime, is discussed below.

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12 Ibidem, p. 258.

13 A taxable persons are denied the right to deduct not only when they themselves commit fraud, but also when it is proven that they, to whom goods or services which served as the basis on which to substantiate the right to deduct were supplied, knew or should have known that their acquisition was connected to VAT fraud (see, for instance, the CJEU's ruling of 24 November 2022, Finanzamt M., C-596/21, EU:C:2022:921, § 25).

14 R. de la Feria, *Tax Fraud*…, p. 242.

15 B. Hock, *Policing Fiscal Corruption: Tax Crime and Legally Corrupt Institutions in the United Kingdom*, Journal Law and Contemporary Problems 2022, vol. 85, no. 4, p. 182.

16 R. de la Feria, *Tax Fraud*…, p. 242.

2. Increasing role of digital platforms in VAT collection – deemed supplier regime

Over recent years, the platform economy has transformed from a community-driven practice, primarily focused on sharing private resources, into lucrative business models, with participants becoming more professionalized. Consequently, legal interventions, including those within the EU VAT framework, have become necessary.

The platform economy introduces novel pathways for addressing tax obligations. Digital platform operators inherently possess detailed transactional data, allowing tax authorities to capitalize on this advantage. Moreover, by concentrating regulatory efforts on singular entity (digital platform), the costs associated with legal enforcement can be reduced.[17] Collecting VAT through digital platforms, rather than from numerous individual suppliers, seems to be an efficient method.[18]

To engage platforms in VAT collection, the EU legislator decided to introduce the deemed supplier regime (DSR) into the EU VAT system.

DSR is the most far-reaching legislative solution imposing liability on the digital platform for the VAT collection. This solution introducing a mechanism into the VAT system where a platform in certain circumstances, be deemed fully liable for accounting for VAT on the underlying transaction, as if it were the underlying supplier itself. The platform will, as it were, step into the tax role of the underlying supplier.

The first such regime for digital platforms was introduced in 2015 and basically covered platforms taking part in the supply of electronic services. This DSR will hereafter be referred to as the digital model. In 2021, another regime of this kind was introduced for digital platforms facilitating some e-commerce transactions. This DSR will be referred to as the e-commerce model. Currently, the European Commission (EC) is planning to introduce another DSR for platforms facilitating the supply some tangible services (accommodation and passenger transport), which is expected to come into effect as early as 2025. This DSR will be referred to as the service model.[19]

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17 B. Kuijper, T. Cameron, Z. Szatmári, *Technology-Enabled Tax Compliance*, Bulletin for International Taxation 2020, vol. 74, no. 10, p. 589; K. Zale, *Scale and the Sharing Economy*, in: *The Cambridge Handbook*…

18 L. Scarcella, *E-Commerce and Effective VAT/GST Enforcement: Can Online Platforms Play a Valuable Role?*, Computer Law & Security Review 2020, vol. 36, 105371, p. 15.

19 Such terminology is used, for example by: E.T. Sroka, *Comparing Deemed Supplier Regimes: E-Commerce and Short-Term Rental/Passenger Transport Platforms in the EU VAT System*, Lisboa 2024 (The Lisbon International & European Tax Law Seminars, no. 9).

2.1. Digital model

The main principles behind the digital model are regulated in Article 9a of Implementing Regulation (IR).[20] According to this provision, where electronically supplied services or internet telephone services (telephone services provided over the Internet) are supplied through a telecommunications network, interface or portal, e.g. an app shop, it is presumed for the purposes of applying Article 28 of the VAT Directive that the taxable person involved in the supply of those services is acting in his own name but on behalf of the supplier of those services, unless the taxable person explicitly designates that supplier as the person supplying the service and this is reflected in the contractual arrangements between the parties. The provision of Article 9a IR therefore introduces a rebuttable presumption[21] that in certain situations the tax liability will rest with the intermediary.

This provision was introduced by Implementing Regulation 1042/2013.[22] According to recital 4 of this regulation, it was necessary to specify who is the supplier for VAT purposes where electronically supplied services, or telephone services provided through the internet, are supplied to a customer through telecommunications networks or via an interface or a portal.

2.2. E-commerce model

The main principles behind the e-commerce model are regulated in Article 14a of the VAT Directive.[23] According to the first paragraph of this provision, if a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the distance sale of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding

20 Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 Laying down Implementing Measures for Directive 2006/112/EC on the Common System of Value Added Tax, OJ L 77, 23.03.2011, pp. 1–22.

21 According to some authors, Article 9a IR does not shift the burden of the proof but rather clarifies which specific proof must be provided in order to make a distinction between a disclosed and an undisclosed agent, therefore the use of the word "presumption" is probably confusing. Ch. Amand, *Disclosed/Undisclosed Agent in EU VAT: When Is an Intermediary Acting in Its Own Name?*, International VAT Monitor 2021, vol. 32, no. 5, p. 244.

22 Council Implementing Regulation (EU) No. 1042/2013 of 7 October 2013 Amending Implementing Regulation (EU) No. 282/2011 as Regards the Place of Supply of Services, OJ L 284, 26.10.2013, pp. 1–9.

23 Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L 347, 11.12.2006, pp. 1–118.

EUR 150, that taxable person is deemed to have received and supplied those goods himself. The second paragraph states, in turn, that where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established in the Community to a non-taxable person, the taxable person who facilitates that supply is deemed to have received and supplied those goods himself.

This provision was introduced by Council Directive (EU) 2017/2455. According to recital 7 of this directive, its main objective is to ensure the effective and efficient collection of VAT and to reduce the administrative burden for vendors, tax administrations and consumers. Recital 7 highlights that a major share of distance sales of goods, both supplied from one Member State to another and from third territories or third countries to the Community, are facilitated through the use of an electronic interface such as a platforms. It was considered necessary to involve such entities in the VAT collection process by introducing a provision stating that they are the persons who are deemed to make those sales.

Thus, in the situations described above, the platforms will be deemed to be the supplier and obliged to collect VAT on the sales they facilitate.

2.3. Service model

In 2020 the EC announced the strategy for taxation supporting the economic recovery.[24] Among the actions listed there was the adaptation of the VAT framework to the platform economy by examining the role platforms can play in securing the collection of VAT. The EC's analysis resulted in the publication of "VAT in the Digital Age" (VIDA) legislative package on 8 December 2022, which consists of drafts of three pieces of legislation introducing amendments to the EU VAT system: proposal amending the VAT Directive,[25] proposal amending Regulation 282/2011,[26] and proposal amending Regulation 904/2010.[27] The VIDA package for platform

[24] European Commission, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM/2020/312 final, 15.07.2020.

[25] Proposal for a Council Directive Amending Directive 2006/112/EC as Regards VAT Rules for the Digital Age, COM/2022/701 final, 8.12.2022.

[26] Proposal for a Council Implementing Regulation Amending Implementing Regulation (EU) No. 282/2011 as Regards Information Requirements for Certain VAT Schemes, COM/2022/704 final, 8.12.2022.

[27] Proposal for a Council Regulation Amending Regulation (EU) No. 904/2010 as Regards the VAT Administrative Cooperation Arrangements Needed for the Digital Age, COM/2022/703 final, 8.12.2022.

economy is expected to come into effect on 1 January 2025, but this date is subject to change as legislative work on the proposal is still ongoing.

The main principles behind the service model are regulated in the proposed Article 28a of the VAT Directive. According to this provision, notwithstanding Article 28 of the VAT Directive, a taxable person who facilitates, through the use of an electronic interface such as a platform, portal, or similar means, the supply of short-term accommodation rental services, as referred to in Article 135 (3) of the VAT Directive, or passenger transport, will be deemed to have received and supplied those services themselves where the person providing those services is one of the following:

(a) a non-established person who is not identified for VAT purposes in a Member State;
(b) a non-taxable person;
(c) a taxable person carrying out only supplies of goods or services in respect of which VAT is not deductible;
(d) a non-taxable legal person;
(e) a taxable person subject to the common flat-rate scheme for farmers;
(f) a taxable person subject to the special scheme for small enterprises.

The above means that when the underlying supplier does not charge VAT because it is one of the persons listed in a–f, the digital platform will charge this tax to the consumer and will account for this tax. The digital platforms will be deemed to be the supplier and obliged to collect VAT on the supplies they facilitate. Therefore, this solution will not simultaneously impose a burden on the listed underlying suppliers, as they will still not be required to register and account for VAT themselves.

The main goal of the VIDA package is to address the challenges of platform economies by ensuring equal treatment of digital and offline sectors in short-term accommodation and passenger transport, as well as enhancing the role of platforms in VAT collection when they facilitate short-term accommodation or passenger transport services.[28]

3. Potential advantages and disadvantages of deemed supplier regime

The introduction of DSR could bring many benefits, especially from the perspective of tax administration. Firstly, this solution transfers the responsibility for tax

[28] Proposal for a Council Directive Amending Directive 2006/112/EC as Regards VAT Rules for the Digital Age, COM/2022/701 final, 8.12.2022.

accounting and collection from numerous, typically small entities (the underlying suppliers) to a smaller number of generally much larger entities (the platforms facilitating transactions). This shift makes it simpler for tax authorities to monitor and enforce the accurate accounting of underlying transactions. Investigating fewer, larger platforms appears to be less burdensome than auditing numerous small underlying suppliers.[29] Furthermore, it seems that digital platforms have a greater ability to make appropriate tax decisions and correctly account for transactions than a wide range of, usually small, traders.[30]

Shifting the liability for tax accounting to platforms thus also reduces the tax compliance burden on the underlying suppliers. This is because suppliers do not have to deal with charging the correct amount of VAT to the customer and remitting it to the tax office.[31]

However, it should be noted that although DSR is generally considered a proportionate solution, there are doubts about the potential negative effects of placing the responsibility for VAT collection on platforms instead of individual suppliers.

Firstly, implementing DSR could result in additional administrative burdens and compliance difficulties for platforms. To introduce the DSR into the tax system, platforms must have the ability to exert a certain level of influence and control over the underlying transaction. If they lack access to information about underlying transactions or if obtaining it would require radical changes to their business model, then the liability for VAT collection should not be shifted to them[32]. Additionally, for many platforms, adopting DSR would necessitate significant IT system changes to ensure the efficiency of the new regulations.[33] It is rightly pointed out that with DSR, platform operators essentially become unpaid tax collectors.[34] While they assist governments in collecting significant tax revenue, they also incur substantial costs.[35] Therefore, when introducing DSR, the financial capability of platforms to collect VAT on such transactions should also be taken into account.

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29 By placing the burden of tax accounting on platforms that have 'more to lose' than individual hosts, tax administrations increase the likelihood of tax compliance of these transactions. M. Viswanathan, *Tax Compliance...*, pp. 363–364.

30 OECD, *Mechanisms for the Effective Collection of VAT/GST*, Paris 2017, pp. 26–27.

31 M. Merkx, *Platform Liability: An Efficient and Fair Collection Model for VAT?*, in: *VAT Challenges and Opportunities in the New Digital Economy*, eds. Ch. Amand et al., Madrid 2022, p. 15.

32 G. Beretta, *European VAT…*, pp. 298–301.

33 OECD, *The Role of Digital Platforms in the Collection of VAT/GST on Online Sales*, 20.06.2019, pp. 36–37.

34 A. Bal, *Platform Economy: Will The Real Tax Collector Please Stand Up?*, Forbes, 15.03.2023, https://www.forbes.com/sites/aleksandrabal/2023/03/15/platform-economy-will-the-real-tax-collector-please-stand-up/ [access: 4.04.2023].

35 Ibidem.

Secondly, if the cost of compliance associated with the DSR regime is considered high, smaller platforms may struggle to meet their obligations.[36] As noted in the literature, increasing complexity tends to favor larger entrepreneurs. Small or new operators in the market may choose not to start an online business, terminate it, or operate in the grey zone due to the complexity of compliance.[37]

This measure thus disadvantages smaller platforms and new market entrants, potentially strengthening platform monopolies. Larger platforms are better equipped to handle the complexity and regulatory burden, while smaller intermediaries may be driven out of the market. This could have a detrimental effect on market competitiveness.

Conclusions

Currently, there is a noticeable trend of increasingly involving third parties in tax collection. This trend is also evident in the context of the EU VAT system. An example of such action is involving specific digital platforms in the VAT collection process, applying the deemed supplier regime to them. This process has unfolded gradually. Initially, in 2015, the EU legislator decided to introduce a rebuttable presumption, whereby certain platforms became responsible for collecting VAT "on behalf of" their actual suppliers under certain circumstances (the digital model of DSR). In 2021, the EU legislator further mandated platforms facilitating some supply of goods to bear full liability for collecting VAT on the underlying supplies (the e-commerce model of DSR). In 2025, there are plans to introduce another measure, imposing full liability on platforms for collecting VAT on underlying transactions when their hosts are not obligated to do so (the service model of DSR).

The introduction of DSR has sparked differing opinions. On one hand, this arrangement could yield several benefits, offering clarity regarding a platform's VAT obligations on underlying supplies and enhancing the efficiency of tax collection. Shifting VAT obligations from smaller suppliers to larger platforms may reduce costs and risks associated with VAT control, while potentially lowering compliance costs for underlying suppliers.

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36 As indicated by the OECD, not all platforms that meet the deemed supplier criteria will be able to meet the requirements imposed by this regime, particularly start-up businesses and small platforms. OECD, *The Impact of the Growth of the Sharing and Gig Economy on VAT/GST Policy and Administration*, 19.04.2021, pp. 77–79.

37 R. Barr et al., *E-Commerce and EU VAT: Theory and Practice*, Alphen aan den Rijn 2021, p. 2.

However, concerns arise regarding the negative repercussions of burdening platforms with VAT collection responsibilities. Implementing DSR could escalate bureaucratic burdens and costs for platforms, possibly leading to the exclusion of smaller operators from the market, thus harming EU competitiveness.

Therefore, it is crucial to carefully evaluate and justify the shift of excessive liability for overseeing the VAT system to private entities, such as digital platforms. Any implementation of DSR should be proportionate to its intended purpose, ensuring a balanced approach to tax collection and regulatory compliance.

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Meterials and commentaries / Materiały i komentarze

STUDIA PRAWNICZE KUL
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A theoretical model for the use of participatory budgeting in implementing an environmental policy and combating climate change

Teoretyczny model wykorzystania budżetu partycypacyjnego we wdrażaniu polityki środowiskowej i przeciwdziałaniu zmianom klimatu

Теоретическая модель использования партисипативного бюджета при реализации политики в области охраны окружающей среды и предотвращения климатических изменений

Теоретична модель використання бюджету участі в реалізації екологічної політики та протидії зміні клімату

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Summary: Modern states have a responsibility to run an effective climate policy by adapting solutions that will have a long-term positive impact on the surrounding environment. This also applies to the state of the law, which must respond to the changing reality. An important research problem addressed in this study is whether there is a regulation in Polish legislation that allows the functioning of so-called green participatory budgeting. With this in mind, I present the following research questions: Can participatory budgeting as a public participation tool be a basis for an effective model of engaging residents in the fight against climate change? Does the Polish legal system stipulate the creation of climate-related participatory budgeting? Does the Polish legislation need a new regulation on green participatory budgeting, through which only pro-climate projects will be created? Providing answers to these research questions was possible after conducting an analysis based on the following research methods: interpretation of the law in force and an analysis of the evolution of law in time. This allowed the following conclusions: participatory budgeting (PB) is an appropriate form of public participation, thanks to which pro-climate tasks can be developed. The current legal regulations in Poland relating to participatory budgeting should be described as general, which, based on the analysis carried out here, was found to be insufficient and incompatible with the social reality, which aims to have pro-climate proposals and to implement them. Therefore, the legislator must intervene and allow citizens to submit such projects under a separate procedure for climate participatory budgeting.

Key words: participatory budgeting; green participatory budgeting; public participation; environmental policy

Streszczenie: Współczesne państwa mają obowiązek prowadzenia skutecznej polityki klimatycznej poprzez adaptację rozwiązań, które będą miały długofalowy i pozytywny wpływ na środowisko. Dotyczy to również porządku prawnego, który musi reagować na zmieniającą się rzeczywistość. Istotnym problemem badawczym podjętym w niniejszym opracowaniu jest pytanie, czy w polskim ustawodawstwie istnieje regulacja prawna umożliwiająca funkcjonowanie tzw. zielonego budżetu partycypacyjnego. Mając to na uwadze, przedstawiam następujące pytania badawcze: Czy budżet partycypacyjny jako narzędzie partycypacji społecznej może być podstawą skutecznego modelu angażowania mieszkańców w walkę ze zmianami klimatu? Czy polski system prawny przewiduje tworzenie budżetów partycypacyjnych związanych z klimatem? Czy polskie prawodawstwo potrzebuje nowej legislacji w zakresie tzw. zielonego budżetu partycypacyjnego, dzięki któremu powstawać będą wyłącznie projekty proklimatyczne? Udzielenie odpowiedzi na postawione pytania badawcze było

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możliwe dzięki przeprowadzonej analizie opartej na następującej metodzie badawczej – interpretacji obowiązującego prawa oraz analizie ewolucji prawa w czasie. Pozwoliło to na sformułowanie następujących wniosków: budżet partycypacyjny jest odpowiednią formą partycypacji społecznej, dzięki której mogą powstawać projekty proklimatyczne, zmieniające naszą rzeczywistość. Ponadto obecne regulacje prawne w polskim ustawodawstwie odnoszące się do budżetu partycypacyjnego należy określić jako ogólne, co na podstawie przeprowadzonej analizy uznano za niewystarczające i niedostosowane do obecnych realiów społecznych, których celem jest realizacja propozycji proklimatycznych. Niniejsze studium wieńczy konkluzja, iż polski ustawodawca musi interweniować i umożliwić obywatelom składanie takich projektów w ramach odrębnej procedury klimatycznego budżetu partycypacyjnego.

Słowa kluczowe: budżet partycypacyjny, zielony budżet partycypacyjny, partycypacja społeczna, polityka środowiskowa

Резюме: Современные государства обязаны проводить эффективную климатическую политику, адаптируя решения, которые окажут долгосрочное и положительное воздействие на окружающую среду. Это касается и правового порядка, который должен реагировать на меняющуюся реальность. Важной исследовательской проблемой, рассматриваемой в данной статье, является вопрос о том, существует ли в польском законодательстве правовая норма, позволяющая функционировать так называемому зеленому партисипативному бюджету. Исходя из этого, выносятся на обсуждение следующие вопросы: Может ли партисипативный бюджет как инструмент общественного участия стать основой для эффективной модели вовлечения граждан в борьбу с изменением климата? Предусматривает ли польская правовая система создание партисипативных бюджетов, связанных с климатом? Нужен ли польскому законодательству новый закон о так называемом зеленом партисипативном бюджете, благодаря которому будут создаваться только проекты, направленные на защиту климата? Ответить на поставленные исследовательские вопросы стало возможным благодаря анализу, основанному на следующем методе исследования – интерпретации существующего законодательства и анализе его эволюции во времени. Это позволило сформулировать следующие выводы: партисипативный бюджет является подходящей формой общественного участия, благодаря которой могут быть созданы поддерживающие климат проекты, меняющие нашу реальность. Кроме того, существующие в польском законодательстве правовые нормы, касающиеся партиципаторного бюджета, следует характеризовать как общие, которые, на основании проведенного анализа, были признаны недостаточными и не адаптированными к современным социальным реалиям, направленным на реализацию предложений в области защиты климата. В данном исследовании формулируется вывод о том, что польскому законодателю необходимо принять меры и предоставить гражданам возможность представлять такие проекты в рамках отдельной процедуры климатического партисипативного бюджета.

Ключевые слова: партисипативный бюджет, зеленый партисипативный бюджет, общественное участие, политика в области климата

Резюме: Сучасні країни зобов'язані проводити ефективну кліматичну політику, адаптуючи рішення, які матимуть довгостроковий позитивний вплив на навколишнє середовище. Це стосується також і правового порядку, який повинен реагувати на реальність, що зазнає змін. Важливою дослідницькою проблемою, яка розглядається в цьому дослідженні, є питання, чи існує в польському законодавстві правове регулювання, яке уможливлює функціонування т. зв. "зеленого" бюджету участі. Зважаючи на це, я пропоную такі дослідницькі запитання: Чи бюджет участі, як інструмент соціальної участі, може бути основою для ефективної моделі залучення громадян до боротьби зі зміною клімату? Чи польська правова система передбачає створення таких бюджетів участі, які могли б бути пов'язаними із кліматом? Чи польське законодавство потребує нового законодавства щодо т. зв "зеленого" бюджету участі, завдяки якому створюватимуться лише прокліматичні проєкти? Відповісти на так сформульовані дослідницькі запитання стало можливим завдяки аналізу, основаному на дослідницькому методі, яким є тлумачення чинного права та аналіз еволюції права з плином часу. Це дозволило сформулювати наступні висновки: бюджет участі є відповідною формою соціальної участі, завдяки якій можна створювати прокліматичні проєкти, які дадуть можливість змінити нашу реальність. Крім того слід завважити, що чинні правові норми польського законодавства, що стосуються бюджету участі, слід охарактеризувати як загальні, які, на основі проведеного аналізу, вважаються недостатніми та непристосованими до сьогоднішніх соціальних реалій, спрямованих

на реалізацію прокліматичних ініціатив. Дане дослідження дозволяє зробити висновок, що польський законодавець повинен втрутитися і дозволити громадянам подавати такі проєкти у рамках окремої процедури кліматичного бюджету участі.

Ключові слова: бюджет участі, зелений бюджет участі, соціальна участь, екологічна політика

Introduction

The subject matter of environmental protection is a permanent element of fundamental laws of modern countries. In the Constitution of the Republic of Poland,[1] the obligation to protect the environment is in Chapter II, dealing with freedoms, rights and obligations of persons and citizens. However, from the point of view of this study, special emphasis should be given to Article 74 (4), which stipulates that public authorities support the activities of citizens to protect and improve the quality of the environment. Moreover, environmental protection is the responsibility of public authorities, and each citizen has the right to obtain information on the condition and protection of the environment. Such an approach from the legislator takes into account the idea of good governance, which stipulates citizen participation of citizens (or, more broadly, society) in environmental protection management based on partnership and equality.[2] The statutory regulation, which is an extension of the provisions of the Polish Constitution when it comes to public participation in environmental protection, is based on institutional assumptions, that is, on allowing participation of ecological organisations in administrative proceedings in a relevant mode and also on granting control powers to question acts or omissions that violate environmental laws.

As is accepted by legal scholars and commentators, the right to a healthy environment is one of the solidarity rights that belong to third-generation human rights.[3] Identifying climate problems with human rights means we need to address the question of implementation of goals of the policy for fighting climate change in the context of how local authorities and civil society can achieve them. The Polish legislator has not directly indicated in any Polish law the possibilities of mitigating

1 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483.

2 M. Górski, *Online Commentary on art. 74*, in: *Konstytucja RP*, vol. 1. *Komentarz do art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, https://sip.legalis.pl/document-view.seam?documentId=mjxw62zogizdkmjsha2tsmroobqxalrsgu4tgmq# [access: 10.08.2022].

3 J. Marszałek, *Prawo do czystego środowiska jako wartość konstytucyjna*, Gdańskie Studia Prawnicze 2021, vol. 25, no. 3 (51), p. 156.

the effects of the changing climate resulting from participatory democracy. As pointed out in the literature, this process allows public authorities to use all – legal and non-legal – available participatory tools to manage public matters in a local government community.[4] The most popular participatory tools include referendum, public consultation, public discussion and participatory budgeting (PB).

1. Research objective, problem and specific questions

In the face of climate and energy challenges faced by the EU and the world, we need to present proposals for bottom-up efforts that will engage residents locally in achieving global goals. Such a proposal ultimately involves introducing regulation in the Polish legal system in Article 5a of the Commune Self-Government Law[5] and, possibly in the EU Member States, common participatory budgeting relating to climate in self-governing communities. This form of public participation allows citizens to gain an effective tool for submitting projects that may prevent the consequences of climate change. Local communities may take tangible steps to limit climate consequences using this legal solution. Such actions will result in the creation of climate-friendly investments and improve the citizens' climate awareness.

Considering the context and direction which countries and their self-governing communities should follow to take local actions to fight climate change, we must ask the following research questions, which will allow us to verify the research hypothesis that the Article 5a (3–7) of the Commune Self-Government Law, which regulates participatory budgeting in Polish cities and provides for a climate participatory budget focused exclusively on pro-climate and energy-saving projects:

1. Can participatory budgeting as a public participation tool be a basis for an effective model of engaging residents in the fight against climate change?
2. Does the Polish legal system stipulate the creation of climate-related participatory budgeting?
3. Does the Polish legislation need a new regulation on climate participatory budgeting, through which only pro-climate projects will be created?

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4 M. Augustyniak, *Partycypacja społeczna w samorządzie terytorialnym w Polsce i we Francji. Studium administracyjnoprawne na tle porównawczym*, Warszawa 2017, p. 49.

5 Article 5a (1–7) of the commune self-government law of 8 March 1990, consolidated text: Journal of Laws 2022 items 559, 583, 1005, 1079, 1561.

2. Research methods

The analysis carried out to determine the impact of participatory budgeting on the inclusion of citizens in conducting environmental policy and combating climate change is theoretical. Proposing a separate legal regulation to address climate participatory budgeting in Article 5a of the Commune Self-Government Law first requires presenting the legal basis for the traditional PB model. A deeper understanding of the above issue is expected to evaluate the need – or lack thereof – for a new legal regulation for PB focused exclusively on the fight against climate change. The analysis of the principles and procedure of the operation of participatory budgeting in Poland will be based on Article 5a of the Commune Self-Government Law, where a commune is a basic unit of local government in Poland. The investigation is based on research typical to the study of law, which is part of social science. Considering the subject matter presented in the article, the method of interpretation of the law in force and the method of description of the development of law in time were chosen. The first method should be understood as using the content of the law in force *ipso iure*, which is the subject of this research. The law interpretation method is based on a logical and linguistic interpretation, known among legal scholars and commentators as the interpretation of law.[6] When using the interpretation of law, we must refer to the achievements of Zieliński, the creator of the derivative interpretation of law founded on the principle of *omnia sunt interpretanda*. Zieliński anchors his derivative concept on the systemic, functional and teleological phases. Moreover, this paper also uses the method of description of the development of the law in time, which allows a fuller approach. In this context, this historical method aims to show the origins of the emergence of the institution of participatory budgeting.

The methods used in this paper are intended to prove whether Article 5a (3–7) of the Commune Self-Government Law, which is the basis for Polish participatory budgeting, is sufficient to create a climate participatory budget or whether a legislative change is required to directly indicate the basis for a special type of participatory budget focused exclusively on climate and energy issues.

6 T. Barankiewicz, *Metody myślenia, badania prawa i systematyzacji wiedzy w naukach prawnych*, in: *Metodologia dysertacji doktorskiej dla prawników. Teoria i praktyka*, eds. H. Izdebski, A. Łazarska, Warszawa 2012, pp. 113 and 122.

3. Definition considerations and location of participatory budgeting on Arnstein's ladder of participation

Participatory budgeting[7] is a form of public participation in which citizens play an active role in helping authorities identify a given community's needs. Participatory budgeting is a decision-making process in which residents co-determine the distribution of a specific pool of funds.[8] In other terms, participatory budgeting refers to a bottom-up procedure for residents to define the expenses to be implemented in a given year.[9] According to Misiejko, the primary goal of participatory budgeting is to involve residents in the affairs of a given local government unit.[10] By implementing the idea of participatory management of public affairs, participatory budgeting creates a public space for an exchange of ideas and public debate, in which community needs are discussed, and proposals of projects that could be implemented under this procedure are put forward.[11] PB allows citizens to co-decide how some of the budget is spent on the proposals they submit.[12] This means that projects chosen by citizens are to be executed by the public authorities without much interference in the proposals, thus participatory budgeting has a decision-making character.

Participatory budgeting, as a tool involving people co-deciding on public affairs, is a type of public participation described by Arnstein as "delegated power."[13] According to the ladder of public participation she created, the delegated power rung is a consequence of the ongoing negotiations between citizens and the public authority, whereby citizens are given the opportunity to make decisions about a specific programme, plan or action. It is a rung on the ladder of participation in which citizens have decision-making power and must bear responsibility for the actions taken. PB is a procedure whereby public authorities put some of the financial resources in the hands of citizens, who can make independent decisions about which projects are to be executed.

Despite the fact that under Article 5a (3) of the Commune Self-Government Law, participatory budgeting is considered a special form of public consultation,

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7 Since the term 'participatory budget' is used in foreign doctrine, it will be used in this article.

8 W. Kębłowski, *Budżet partycypacyjny – krótka instrukcja obsługi*, Warszawa 2013, p. 8.

9 Z. Dolewka, *Budżet partycypacyjny w teorii i w praktyce*, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 2015, no. 408, p. 63.

10 A. Misiejko, *Budżet obywatelski w praktyce samorządów*, Warszawa 2020, p. 17.

11 G. Mattei, V. Santolamazza, G.F. Grandis, *Design of the Participatory Budget: How to Turn Citizens into Process Protagonists*, International Journal of Public Sector Management 2022, vol. 35, no. 3, p. 296.

12 J. Gomez, D. Insua Rios, C. Alfaro, *A Participatory Budget Model under Uncertainty*, European Journal of Operational Research 2016, vol. 249, no. 1, p. 352.

13 S.R. Arnstein, *A Ladder of Citizen Participation*, AIP Journal, July 1969, pp. 217, 222–223.

we need to move away from such an understanding of this institution. It is because certain features of participatory budgeting have emerged, which make it markedly different from the traditional form of public consultation. The latter's essence is to inform or collect opinions on a specific, significantly public topic, which are then forwarded to public authorities so that they can analyse them and perhaps agree to implement them. The consultation mode allows the authorities to hear the citizens but does not oblige them to enforce their voice. This is contrary to the idea behind the public participation process. It is a participatory decision-making process in which citizens have a significant voice by submitting and voting on projects. Unlike the usual mode of consultation, public authorities should not change citizens' decisions in the voting procedure. In addition, if participatory budgeting is to become a permanent part of the participatory primer of a given local government unit, it must be regular, preferably yearly, while consultations may be one-off and not continuous.

The choice of the type of public participation that attempts to engage citizens in the fight against climate change must be the form that has decision-making and authority-related features in its essence. Elections or referendums cannot come into play here because the legislation precisely describes their role. Most of all, they are held only in the cases and at the times prescribed by law. Participatory budgeting is the only form of public participation that can be effectively and continuously used to combat climate change.

4. Introduction and evolution of participatory budgeting in Poland

For the needs of this paper, we need to present the Polish context and the conditions in which the Polish model of participatory budgeting was introduced. In 2011, the first edition of participatory budgeting was introduced in Sopot. The Polish legal system did not offer such an institution then. Participatory budgeting was understood as part of another public participation tool – public consultation. However, under this procedure, citizens may decide how an allocated amount is spent on proposals that have been submitted and reviewed. What is more, in contrast to the regular mode of public consultation, the results of participatory budgeting are binding on local government bodies.[14] From the legal point of view, at the level of

[14] J. Baranowski, *Participatory Budget and the Sars-Cov-2 Pandemic in Poland*, Transylvanian Review of Administrative Sciences 2020, Special issue, p. 27.

the commune as a basic local government unit, participatory budgeting was organised under Article 5a (1) and (2) of the Commune Self-Government Law, which is the procedure for public consultation.

As pointed out by Sobol, the number of participatory budgeting procedures in 2011–2015 clearly shows the direction that Polish cities are following – joining in the creation of participatory budgeting due to the growing interest in them:

1) 2011 – 1 participatory budgeting procedure;
2) 2012 – 3 participatory budgeting procedures
3) 2013 – 16 participatory budgeting procedures;
4) 2014 – 92 participatory budgeting procedures;
5) 2015 – 171 participatory budgeting procedures.[15]

5. Participatory budgeting under Polish law

The Polish legislator introduced the institution of general participatory budgeting in the Act of 11 January 2018 on amending certain acts in order to increase the participation of citizens in the process of selecting, operating and controlling certain public bodies. Since then, the legal basis for the participatory budget in Polish cities is Article 5a (3–7) of the Commune Self-Government Law. The participatory budget was not introduced in a separate law, such as in Peru,[16] for example, which gives rise to certain consequences. Despite the introduction of the new law, it is not comprehensive. It does not address some crucial problems, i.e. protecting the legal interest of a citizen who has submitted a project to the participatory budget, which won but the city authorities do not want to implement it,[17] or continuing the investment projects already created under the participatory budget. As a result, the current normative form equates the participatory budget with public consultations, unequivocally diminishing its status as a decision-making form of public participation.

The most significant legislative change in Article 5a of the Commune Self-Government Law, from the point of view of local authorities and residents, was the

15 A. Sobol, *Budżet obywatelski jako narzędzie rozwoju lokalnego*, Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach 2017, no. 316, p. 175.

16 L.S. McNulty, *Barriers to Participation: Exploring Gender in Peru's Participatory Budget Process*, The Journal of Development Studies 2015, vol. 51, no. 11, p. 1432.

17 For more, see J. Baranowski, *Problematyka ochrony interesu prawnego w procedurze budżetu partycypacyjnego*, Acta Iuris Stetinensis 2023, vol. 46, no. 5, pp. 7–20.

introduction in the largest Polish cities of the obligation to hold the PB procedure annually at least 0.5% of the community's expenses included in the latest PB report. Importantly, the legislator did not stipulate any exceptions in this process. Participatory budgeting may differ depending on the decision of the regulatory authority of a given local government unit. In one, the rules may be more complex than in another. This exclusive competence to establish rules and procedures for holding participatory budgeting transferred onto the decision-making body has both flaws and advantages. The advantage is that a local government body, looking at its specific characteristics and needs, may model rules that suit them. The flaw is that despite general rules for participatory budgeting, the same proposal may be assessed differently in different cities.

6. Green participatory budgeting as an effective tool of public participation in environmental policy and combating climate change – a case study of selected Polish cities

In the current legal status based on Article 5a (6) of the Commune Self-Government Law, funds spent under participatory budgeting in Polish cities may be grouped into wallets that cover the entire commune or its parts or amount-based categories of proposals that apply to the whole territory of a commune or its part. Such a provision yields ambiguous results. The Polish legislator did not directly prescribe setting aside a certain amount of funds for the so-called thematic PB processes, including green participatory budgeting. Under the legalism principle, this means that without a clear legal basis, public authorities cannot take any action. A commune, as an entity exercising public authority – according to Article 169 of the Polish Constitution – is obliged to act on the basis and within the limits of the law. The laconic content of Article 5a (6) of the Commune Self-Government Law results in the fact that not all Polish cities have decided to introduce thematic participatory budgets due to the fear of invalidating such measures by the Polish supervisory authority over local government units, which is the province governor (voivode). Despite this, due to the prevailing social realities and citizens' green attitudes, Polish cities have decided to organise green participatory budgeting without a clear legal basis. Such actions show that we need such processes, which means that the Polish legislator must interfere and that the legal status must be prescribed in Article 5a of the Commune Self-Government Law. Supplementing Article 5a with additional normative content will enable Polish cities to launch a climate participatory budget

procedure separate from the traditional participatory budget, focusing exclusively on pro-climate and energy-saving projects. Thus, the scope of application of the supplemented Article 5a will not raise doubts about interpretation.

Even though today's legislature has no legal standard that would allow Polish local governments to create participatory budgeting dedicated to climate change, some cities decided to allocate a certain amount of funds to do so. Katowice and Lublin will serve as examples here.

The second edition of the "Green participatory budgeting" of Katowice was held based on the ordinance of the President of the City of Katowice.[18] It lays down that public consultation on green participatory budgeting of Katowice is intended to diagnose the needs of residents in terms of broadly understood technology and environmental protection[19] (§ 2). Residents had PLN 3 million (EUR 700,000), which they could use to create flower meadows, revive squares or parks or set up rain gardens. The most important element in the proposal assessment procedure was the proposal's feasibility, which was examined by officials who deal with green areas in their day-to-day work. The procedure led to the following result: during the second edition, residents submitted more than 164 proposals for tasks to be carried out, of which 84 were chosen for implementation. Examples of such projects include:
planting trees,

1) setting up a community garden on the roof of an underground car park,
2) organising ecological educational panels.[20]

In Lublin, green participatory budgeting was launched in 2017, and residents may propose projects (except 2020, the first year of the SARS-CoV-2 pandemic). Like in Katowice, the project aims to encourage residents to participate locally by submitting a general proposal for greening parts of the city. Projects proposed by residents must be consistent with local zoning plans, the design of underground and above-ground infrastructure, and applicable laws. In consideration of the fight against climate change, experts who evaluate green projects do so on the basis of the following criteria:

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18 Ordinance no. 1504/2021 of the President of the city of Katowice of 26 February 2021 on holding public consultation on proposing projects for the second edition of Katowice's Green Budgeting, https://www.katowice.eu/SiteAssets/dla-mieszkańca/zaangażuj-się/konsultacje-społeczne/zielony-budżet/ii-edycja-2021/pliki-do-pobrania/1.%20zarządzenie%20Prezydenta%20Miasta.pdf [access: 30.08.2022].

19 Ibidem.

20 Projects selected for implementation as part of the second edition of Katowice's Green Budgeting, https://archiwumbo.katowice.eu/Aktualnosci/Documents/Zadania%20wybrane%20do%20realizacji%20w%20ramach%20II%20edycji%20Zielonego%20Bud%c5%bcetu.pdf [access: 30.08.2022].

1) availability and environmental context – an absence of an organised green area within a 5–7 minute walking distance is especially important;
2) functionality, resourcefulness, innovativeness – understanding of capabilities to satisfy the needs of self-governing communities, including an effect on social integration and how greenery in urban space is viewed;
3) share of green areas – the greatest emphasis is placed on creating new green areas, renovating degraded terrains and increasing biodiversity.[21]

Since the introduction of green participatory budgeting in Lublin, 68 green projects have been selected for implementation, which has crucially improved the city's greenery.

Despite the lack of a legal basis in Article 5a of the Commune Self-Government Law, green PB in Poland is no longer a theoretical model of bottom-up public participation but a tangible benefit for a local community. The launching of this procedure means that Polish cities gain new green areas, which may aid actions for climate.

7. The theoretical model for climate participatory budgeting in Poland – new regulation

This discussion of participatory budgeting in Poland leads to the conclusion that the current provisions of Article 5a of the Commune Self-Government Law are insufficient to introduce a dedicated participatory budget for climate change. The above indicates the laconic nature of the Polish participatory budget regulations, which raises interpretive doubts for Polish cities. Therefore, Article 5a of the Commune Self-Government Law needs a new legal regulation focusing exclusively on climate participatory budgeting. The current regulation allows citizens to submit a wide range of projects – from school- or health-related projects to transport- and climate-oriented ones. This procedure may mean that the percentage of pro-climate projects that pass the review stage and citizens' voting will not be satisfactory. Taking up the subject of the introduction of a new regulation into Polish legislation through the establishment of provisions on climate participatory budgeting should be considered necessary. It will allow citizens to submit only proposals focused on

[21] Information for residents of Lublin about the assessment criteria for green participatory budgeting projects, https://lublin.eu/mieszkancy/partycypacja/zielony-budzet-obywatelski/informacje/ [access: 30.08.2022].

climate, with the tangible consequence that only such projects will be selected for implementation.

Creating a new regulation on climate participatory budgeting for each city in Poland may provide a solution for enhancing residents' involvement in improving the quality of green areas and local actions for climate and energy. A climate participatory budget in every Polish city will contribute to improving the environment through civic projects, improved awareness of climate change, and educational activities for climate and energy conservation. Correctly constructed principles of such a process will allow residents to submit proposals intended to positively impact their local community, and their usefulness will affect the fight against climate change. The aim is to introduce obligatory climate PB in each Polish city, which is crucial for the trend of green participatory budgeting and energy-related subjects.

The legal basis for introducing climate participatory budgeting in Polish cities should be found in Article 5a of the Commune Self-Government Law. In the future, the issue of climate participatory budget should be an integral part of this legislation. The procedure of climate participatory budgeting should be as simple as possible. It should be considered reasonable to leave the detailed rules for the climate participatory budgets to each Polish city– as in the case of the traditional participatory budget. This procedure should also include examples of thematic areas that will help residents submit proposals on combating climate change, such as for example:

1) urban green stops – intensifying plantings in stretches along roads and effective retention of rainwater;
2) new tree plantings in urban spaces;
3) creating new green spaces – pocket-sized parks;
4) eco-waste collection points, where small waste, such as batteries, light bulbs or small electronics, may be disposed of.

An essential fact is that Polish public authorities have noticed the problem of a lack of a legal basis for creating participatory budgeting intended to combat climate change. The website of the Government Legislation Centre posted a draft law amending certain acts to strengthen the climate-related dimension of municipal policy, which includes provisions on participatory budgeting.[22] This draft law directly responds to an increasingly popular practice of local governments where green participatory budgeting is created. It was decided that the trend followed by more

[22] Draft law on amending certain acts to strengthen the climate-related dimension of the municipal policy. Draft law along with reasoning available online: https://legislacja.rcl.gov.pl/projekt/12350802 [access: 31.08.2022].

and more Polish cities should be formalised. Under the statutory proposal, the existing Article 5a of the Commune Self-Government Law will read as follows: "Communes referred to in Article 5 (communes which are towns with district rights, that is the biggest Polish cities), should, as part of funds spent on the implementation of participatory budgeting, allocate sums dedicated to projects associated with the protection of urban natural environment and whose implementation should lead to an increase of the surface area of a biologically active zone and of retention of rainwater and snowmelt." The reasoning for the statute is that the essence of this amendment is intended to "green" participatory budgeting, which also aspires to have a positive impact on the local community.[23]

It must be remembered that the draft law, submitted for reading by the Polish parliament, may be amended after a parliamentary discussion. However, the direction of changes presented by the Ministry of the Environment and Climate leads to one positive conclusion. Polish local governments will be able to introduce special participatory budgeting dedicated to climate change, and the largest Polish cities will be obliged to do it. It is not an optimal move. From the author's point of view, in order to bring about the first effects of a local climate fight as quickly as possible, that is, to carry out as many climate-focused projects as possible, climate participatory budgeting should be introduced in each Polish city. Only a quick and efficient response from the legislator, as well as appropriately construed laws that regulate issues of prompt execution of climate projects, may yield measurable results that the community expects. It should be noted that the above solution, proposed by the Polish authorities, is not a sufficient response to the demand arising from the interest of citizens in pro-climate solutions within participatory budgeting. The above proposal should be supplemented with the solutions presented in this article, relating to the introduction of a mandatory climate participatory budget in every Polish city (not only in the cities with district rights – i.e. the largest Polish cities), as well as to allowing the submission of energy-saving projects, which does not directly follow from the proposed changes.

Conclusions

To answer the first research question, it must be pointed out that participatory budgeting is perceived as a participatory decision-making process through which citizens get involved and co-decide on local matters. I use Arnstein's research and

[23] Ibidem.

participation ladder to place the role of participatory budgeting in the structure of public participation. In view of this analysis, I have concluded that PB is most suitable for the delegated power rung and is about a balance between delegating specific activities by public authorities (delegating funds and creating legal provisions that allow it) and by citizens (involvement by proposing tasks and participating in voting). A participatory budget is, therefore, an ideal tool in the hands of public authorities to effectively encourage people to take an interest in public affairs. However, given the climate challenges that global societies face, it is essential to address the issue of selecting a separate thematic category for the participatory budget.

The analysis of PB as a participatory process that co-creates the policy of fighting climate change points to the fact that it may effectively co-participate in executing this policy. The use of human potential to develop solutions and raise awareness of climate threats is an appropriate step towards green participation at a local level. PB is not an aged and worn-out process; it is an innovative and interesting method of involving residents in matters most important to them. The Polish cities where green participatory budgeting operates could be enticing factors and could initiate similar actions on a global scale, broader than to date, which will mean new climate-friendly places and also greater knowledge about the progressing climate change.

To answer the second research question, creating green or climate participatory budgeting is not possible under current regulations in Poland. Public administration operates according to the principle of legalism and is based on the foundation of the law in force. From this point of view, we must conclude that there is no legal norm in Article 5a of the Commune Self-Government Law that would vest any entity with the power to create such participatory budgeting. Admittedly, this analysis with case studies of Polish cities also demonstrates that participatory budgeting dedicated to combating climate change is introduced in the form of green participatory budgeting, but it is done so through legally dubious means. Referring to the research problem posed in the introduction, it should be stated that the current wording of Article 5a of the Act on Commune Self-Government, which is the legal basis for the participatory budget in Polish cities, is insufficient.

To answer the third research question, it must be pointed out that – based on case studies of Polish cities that have introduced green participatory budgets without a clear legal basis – the Polish legislation needs a new regulation on climate participatory budgeting. In order to meet public expectations, the Polish legislator should make the same decision as in 2018 – when the legal regulation of the traditional participatory budget was introduced into legal order – and introduce the

legal regulation of the climate participatory budget in Article 5a of the Commune Self-Government Law. Such an act will positively impact climate policy-making at the local level. If the Polish legislator enacts a separate law on participatory budgeting, given the need for detailed legal regulation of this institution, climate participatory budgeting should have its place in Polish cities.

Approval must be expressed that current legislative works, despite previous criticism for too much reserve towards the amendments introduced, are a step towards formalising a good practice of using participatory budgeting for environmental protection and fighting climate change. This real legislative action shows that public authorities see this form of public participation as an effective tool for a local fight against climate change. Adequate requirements must be met for it to work well, both for the authorities and residents. Citizens must be ensured access to climate education and supported in submitting and promoting climate projects to participatory budgeting.

However, the above legislative proposal should not be considered sufficient. After the introduction of proposed legislative changes by the Polish government based on directions of changes presented by the Ministry of the Environment and Climate, the largest Polish cities will create participatory budgeting every year to carry out climate-friendly projects. Smaller Polish cities will be able to decide whether to make this tool available for residents. The author believes that such action will not be sufficient. We need to consider making this instrument accessible to all Polish citizens by making climate participatory budgeting obligatory at the level of each Polish city. Such a move may bring tangible benefits. There will be more pro-climate ideas, which will also involve greater interest in climate education and the effects of climate change.

This analysis attempted to prove whether PB as a public participation tool may be a basis for an effective model of engaging residents in the fight against climate change. This efficiency is expressed in hundreds of proposals submitted under Polish green participatory budgeting, translating into tens of projects in the Polish cities presented in this paper. Effects of the transformation of Polish cities into green enclaves and climate-friendly places will stay with local communities for the years to come, while the awareness of improvement of the fate of our planet by executing a climate PB may boost local climate appreciation and awareness.

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STUDIA PRAWNICZE KUL
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Conventions for the avoidance of double taxation as acts of international and domestic law: consequences of applying tax agreements with differences between official language versions. Commentary to the verdict of the Polish Supreme Administrative Court of 18 April 2023, II FSK 400/21

Międzynarodowe umowy podatkowe jako akty prawa międzynarodowego oraz akty prawa krajowego – konsekwencje stosowania umów w przypadku rozbieżności pomiędzy różnymi wersjami językowymi. Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 18 kwietnia 2023 r., II FSK 400/21

Международные налоговые договоры как акты международного права и акты внутреннего права – последствия применения договоров в случае расхождений между различными языковыми версиями. Комментарий к решению Высшего Административного Суда от 18 апреля 2023 г., II FSK 400/21

Міжнародні податкові договори як акти міжнародного права та акти національного права – наслідки застосування договорів у разі розбіжностей між різними мовними версіями. Коментар до постанови Вищого адміністративного суду від 18 квітня 2023 року, II FSK 400/21

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Summary: The author discusses the verdict of 18 April 2023 issued by the Polish Supreme Administrative Court in case II FSK 400/21 concerning the obligations of a Polish entity (tax remitter) in the area of uncollected flat-rate corporate income tax – also referred to as withholding tax or WHT – on payments made from Poland to a Swedish entity. The author aims to express approval for the standpoint taken by the Court by underlining the dogmatic correctness and axiological value of the commented verdict, as well as recognising it as a notable example of the voice of reason amongst rather inconsistent rulings in similar cases. The main issue the Court considered was the interpretation of Article 11 section 1 of the Convention of 19 November 2004 between the Government of the Republic of Poland and the Government of the Kingdom of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. At the time when the events of the case took place, three language versions of Article 11 section 1 of the Convention existed, and the Polish version – contrary to Swedish and English – did not contain the "beneficial owner" clause. The consequence of the Polish tax remitter assuming that there were no grounds to examine the fulfilment of this condition was, in principle, that no tax was collected on payments made to Sweden, irrespective of whether or not the recipients were the beneficial owners of the receivables. This approach was challenged by Polish tax authorities, according to whom the comparison of different language versions of the disputed provision should effectively lead the tax remitters to notice and apply the beneficial owner condition. In the verdict, the Supreme Administrative Court mostly focuses on the results of discrepancies between the linguistic versions of

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the Convention, nevertheless, the judgment itself is also a valuable voice in the discussion on withholding tax, in particular the position and function of the tax remitter in the tax system, as well as the scope of the obligations that can reasonably be imposed on it within a democratic state under the rule of law.

Key words: international tax law, beneficial owner clause, agreements on the avoidance of double taxation

Streszczenie: Autorka omawia wyrok Naczelnego Sądu Administracyjnego z dnia 18 kwietnia 2023 r., II FSK 400/21, wydany w sprawie określenia odpowiedzialności polskiej spółki (płatnika) za niepobrany zryczałtowany podatek dochodowy od osób prawnych od odsetek wypłaconych podmiotowi w Szwecji. Celem opracowania jest wyrażenie aprobaty dla stanowiska zajętego przez Sąd, w szczególności podkreślenie dogmatycznej poprawności oraz wartości aksjologicznej wyroku – będącego godnym uwagi przykładem głosu rozsądku wśród szeregu niespójnych rozstrzygnięć odnoszących się do tego zagadnienia. Kluczowym elementem wyroku jest kwestia wykładni art. 11 ust. 1 Konwencji między Rządem Rzeczypospolitej Polskiej a Rządem Królestwa Szwecji w sprawie unikania podwójnego opodatkowania i zapobiegania uchylaniu się od opodatkowania w zakresie podatków od dochodu, umowy o unikaniu podwójnego opodatkowania z 2004 r. W badanym okresie wskazany przepis funkcjonował w trzech wersjach językowych, przy czym jego polska wersja – inaczej niż wersja szwedzka i angielska – nie zawierała klauzuli tzw. rzeczywistego właściciela otrzymywanych należności. Konsekwencją przyjęcia przez polskich płatników stanowiska mówiącego, że nie ma konieczności badania spełnienia tego warunku, był zasadniczo brak poboru podatku od płatności dokonywanych do Szwecji, niezależnie od tego, czy odbiorcy byli rzeczywistymi odbiorcami otrzymywanych należności, czy też nie. Podejście to zakwestionowały organy podatkowe, wskazując, że porównanie różnych wersji językowych ww. aktu powinno doprowadzić płatników do wniosku o istnieniu w nim przesłanki rzeczywistego właściciela. Gros rozważań Naczelnego Sądu Administracyjnego koncentruje się właśnie na kwestii rozbieżności między wersjami językowymi Konwencji oraz skutkach tychże, a przywołany wyrok stanowi ponadto cenny głos w dyskusji na temat podatku u źródła, w szczególności pozycji i funkcji płatnika w systemie podatkowym oraz zakresu obowiązków, jakie mogą być na niego racjonalnie nałożone w ramach demokratycznego państwa prawa.

Słowa kluczowe: międzynarodowe prawo podatkowe, klauzula rzeczywistego właściciela, umowy o unikaniu podwójnego opodatkowania

Резюме: Автор анализирует решение Высшего Административного Суда от 18 апреля 2023 г., II FSK 400/21, вынесенное по делу об определении ответственности польской компании (плательщика) за невзысканный фиксированный корпоративный подоходный налог с процентов, выплаченных юридическому лицу в Швеции. Цель статьи – выразить одобрение позиции, занятой Судом, в частности, подчеркнуть догматическую правильность и аксиологическую ценность решения, которое является показательным примером голоса разума на фоне ряда противоречивых решений по этому вопросу. Ключевым элементом решения является вопрос толкования статьи 11 (1) Конвенции между Правительством Республики Польша и Правительством Королевства Швеция об избежании двойного налогообложения и предотвращении уклонения от уплаты налогов в отношении налогов на доходы, соглашения об избежании двойного налогообложения от 2004 года. В течение рассматриваемого периода вышеупомянутое положение действовало в трех языковых версиях, причем польская версия – в отличие от шведской и английской – не содержала так называемой оговорки о бенефициарном владельце в отношении полученной дебиторской задолженности. Следствием того, что польские плательщики придерживались позиции об отсутствии необходимости проверять соблюдение этого условия, стало то, что в принципе платежи в Швецию не облагались налогом, независимо от того, являлись ли получатели фактическими бенефициарами полученной дебиторской задолженности или нет. Этот подход был оспорен налоговыми органами, которые указали, что сравнение различных языковых версий вышеупомянутого закона должно привести плательщиков к выводу о существовании в нем условия о бенефициарном владельце. Основная часть рассуждений Высшего Административного Суда посвящена именно вопросу расхождений между языковыми версиями Конвенции и последствиям таких расхождений. Кроме того, цитируемое решение является ценным аргументом в дискуссии о налоге у источника, в частности о статусе и функции плательщика в налоговой системе и объеме обязательств, которые могут быть обоснованно возложены на него в демократическом правовом государстве.

Ключевые слова: международное налоговое право, оговорка о бенефициарном владельце, соглашения об избежании двойного налогообложения

Резюме: Авторка обговорює рішення Вищого адміністративного суду від 18 квітня 2023 року, II FSK 400/21, винесене у справі про визначення відповідальності польської компанії (платника) за несплачення паушального корпоративного податку на прибуток з відсотків, сплачених суб'єкту господарювання у Швеції. Мета статті – висловити схвалення позиції, зайнятої Судом, зокрема, підкреслити догматичну правильність та аксіологічну цінність рішення, яке є яскравим прикладом голосу розуму серед низки суперечливих рішень з цього питання. Ключовим елементом рішення є питання тлумачення статті 11, розділ 1 Конвенції між Урядом Республіки Польща і Урядом Королівства Швеція про уникнення подвійного оподаткування та запобігання податковим ухиленням щодо податків на доходи, угоди про уникнення подвійного оподаткування 2004 року. Протягом звітного періоду вищезгадане положення функціонувало у трьох мовних версіях, причому його польська версія – на відміну від шведської та англійської – не містила так званого положення про "фактичного власника" отриманої дебіторської заборгованості. Наслідком того, що польські платники прийняли позицію про відсутність необхідності перевіряти виконання цієї умови, стало те, що в принципі не стягувався податок з платежів, здійснених до Швеції, незалежно від того, чи були одержувачі фактичними отримувачами отриманої дебіторської заборгованості, чи ні. Такий підхід був оскаржений податковими органами, які вказали, що порівняння різних мовних версій вищезгаданого закону має привести платників до висновку про наявність бенефіціарного власника в згаданому законі. Основна частина дискусії у Вищому адміністративному суді зосереджена саме на питанні розбіжностей між мовними версіями Конвенції та наслідках таких розбіжностей, а цитоване рішення, крім того, є цінним голосом у дискусії про податок що утримується, зокрема, про позицію та функції платника в податковій системі та обсяг зобов'язань, які можуть бути обґрунтовано покладені на нього в демократичній правовій державі.

Ключові слова: міжнародне податкове право, положення про бенефіціарного власника, угоди про уникнення подвійного оподаткування

Introduction

In the commentary,[1] the author discusses the verdict of 18 April 2023 issued by the Polish Supreme Administrative Court (hereinafter also as: the Court) in case II FSK 400/21 concerning the obligations of a Polish tax remitter in the area of flat-rate corporate income tax (also known as withholding tax or WHT) with regard to interest payments made to its Swedish affiliate.[2] Under Polish regulations, tax remitters (i.e. domestic entities disbursing interest payments abroad) are generally obligated to calculate withholding tax at a rate of 20%, collect it, and remit it to the relevant tax office – taking into account the rules governing the application of

1 The scope of the sources cited in this article was determined by the form and aim of the text (commentary), as well as its object (verdict issued by a Polish court), resulting in limited need and possibility to cite studies, especially international ones. Therefore, for comparative purposes, the text is limited to citing only examples of international source materials.

2 The commented verdict was issued in one of four similar cases considered on 18 April 2023, under case II FSK 2524/20, II FSK 2525/20, II FSK 2782/20 and II FSK 400/21.

tax exemptions or different tax rates based on other provisions.[3] One example of such an exemption stems from the Convention of 19 November 2004 between the Government of the Republic of Poland and the Government of the Kingdom of Sweden for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income[4] (hereinafter: the DTT with Sweden). Nevertheless, the wording discrepancies between different language versions of this act, i.e. lack of the beneficial ownership condition in the Polish version, with its simultaneous presence in the English and Swedish versions, resulted in a number of disputes between tax authorities and tax remitters.

The author's aim is to express approval for the standpoint taken by the Court in one of such disputes, by underlining the dogmatic correctness and axiological value of the commented verdict, as well as recognising it as a notable example of clear legal reasoning amongst rather inconsistent rulings in similar cases.[5] As to the merits, the commented verdict focuses on the consequences of a wording discrepancy between different language versions of provisions determining the choice of tax remitter's conduct. However, it also includes important remarks of a systemic and axiological nature with which the author fully agrees and considers worthy of wider advocacy (with the outstanding question of trust in the state and the law it creates). By focusing on the linguistic interpretation of the provisions, the Court manifests a high regard for the guarantee function of tax law, refusing to accept a situation where the burden of errors in legislation issued by the State is shifted to the taxpayer (remitter). This way the Court resists the temptation to adopt a simplistic, short-term approach focused on pursuing solely fiscal objectives but chooses to take into account the historical "state of mind" of the tax remitter, thus ensuring that its position is deeply in line with fundamental values and rules upon which the Polish state and tax system is built. Taking into account the controversies

3 As of 2019, these rules have been significantly modified, including the introduction of the so-called *pay & refund* mechanism, partly replacing the *relief at source* mechanism.

4 Journal of Laws [Dziennik Ustaw] 2006 no. 26, item 193.

5 As for the cases where the Courts sided with the tax authority, see e.g. the judgments of the Supreme Administrative Court of 2 February 2012, II FSK 1398/10 and II FSK 1399/10 (tax ruling cases on cash pooling); of 26 July 2017, II FSK 1866/15 (tax ruling case); of 27 April 2018, II FSK 1370/16; of 26 July 2022, II FSK 1230/21; of 30 January 2024, II FSK 560/21 and of 11 June 2024, II FSK 1170/21 and II FSK 1161/21 (the last two with a dissenting opinion by one of the judges). A different position so far was taken by the Provincial Administrative Court in Szczecin in judgements of 27 October 2021, I SA/Sz 645/21, of 19 May 2021, I SA/Sz 820/20 – currently under no. II FSK 1173/21 where a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges – and of 13 October 2021, I SA/Sz 646/21, as well as the Provincial Administrative Court in Opole in the judgement of 23 February 2024, I SA/Op 340/23, although, as in September 2024, none of these four judgements have become final yet.

arising in cases that involve language discrepancies between different language versions of the provisions, it would be recommended to adopt a general, uniform practice, encouraging judges to resolve such issues in accordance with general tax law principles – and perhaps the first step in this direction has already been taken in case II FSK 1173/21 where a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges.

1. Overview of the legal issue assessed

The commented verdict concentrates on the interpretation of Article 11 point 1 of the DTT with Sweden, with the main focus on the consequences of the wording discrepancy between the three official language versions of the same act.

At the time when the events of the case took place, the English version of Article 11 point 1 of the DTT with Sweden indicated that "Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State." Such a wording would seem fairly clear, were it not for the fact that until the end of 2017, the Polish version (originally published along with the English and Swedish texts in the Journal of Laws – Poland's official government journal[6]) lacked the phrase "beneficially owned": according to its wording, the interests were simply to be "paid to a resident of the other Contracting State."[7] As time has demonstrated, this discrepancy, and the notion of beneficial ownership itself, proved to be critical to the adjudication of similar cases including cross-border payments and to WHT matters in general.[8] Although Poland removed this discrep-

6 See footnote no. 3.

7 As indicated by Werner Haslehner in: *Klaus Vogel on Double Taxation Conventions*, eds. E. Reimer, A. Rust, Alphen aan den Rijn 2015, the requirement of beneficial ownership should not be used in a narrow technical sense, but rather understood *(i)* in relation to the purpose for which it was introduced to the OECD Model Convention (i.e. to clarify the meaning of the words "paid to a resident" and to demonstrate that the State of source is not obliged to give up taxing rights over interest income merely because that income was paid directly to a resident of a State with which the State of source had concluded a convention), and *(ii)* in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. One should, however, keep in mind that the OECD Model Convention is not a treaty under international public law but rather serves as a starting point for tax treaty negotiations, cf. M. Lang, *The Interpretation of Tax Treaties and Authentic Languages*, in: *Essays on Tax Treaties. A Tribute to David A. Ward*, eds. G. Maisto, A. Nikolakakis, J.M. Ulmer, Amsterdam 2013.

8 The notion of "beneficial owner," widely commented on by various international and Polish tax law academics, was officially defined in Polish CIT regulations in 2017, then underwent several

ancy under a dedicated procedure, i.e. through a Notice from the Minister of Foreign Affairs, it was not until 2017 that the adjustment was officially made.[9] Before that, judging by the number of disputes on the subject,[10] there were at least a dozen Polish tax remitters (including State-owned companies[11]) who, while applying this provision, concluded there were no grounds to deduct withholding tax on the interest paid out to Swedish companies, irrespective of whether the recipient could or could not be considered as the beneficial owner of the payables.

changes – all of this while becoming a focal point of many disputes between tax remitters and tax authorities, both in tax ruling and tax assessment cases. A separate discussion revolves around whether beneficial ownership should be examined in cases where the regulations do not provide explicitly for this condition, as is the case with dividend payments, cf., e.g., verdicts of Provincial Administrative courts in Warsaw of 25 April 2022, III SA/Wa 2679/21 and III SA/Wa 2668/21; in Opole of 9 December 2022, I SA/Op 311/22; in Poznań of 9 July 2021, I SA/Po 230/21 (the last one upheld by the Supreme Administrative Court in its verdict of 13 June 2024, II FSK 1209/21, as on 11 September 2024 written justification is not published yet) or in Łódź of 4 October 2022, I SA/Łd 505/22 and of 9 September 2020, I SA/Łd 322/20 (the last one upheld by the Supreme Administrative Court in its verdict of 27 April 2021, II FSK 240/21), as well as the verdicts of the Supreme Administrative Court of 31 January 2023, II FSK 1588/20, or of 6 October 2023, II FSK 1333/22. See also: M. Wilk, *Klauzula rzeczywistego beneficjenta (beneficial ownership) po zmianach w Komentarzu do Konwencji Modelowej OECD w sprawie podatku od dochodu i majątku z 2014 r.*, Przegląd Podatkowy 2015, no. 9, pp. 49–55; idem, *Znaczenie przesłanki rzeczywistego właściciela (beneficial owner) dla zastosowania zwolnienia dywidend z podatku u źródła*, Przegląd Podatkowy 2020, no. 8, pp. 21–29; B. Kuźniacki, *Antyabuzywna wykładnia koncepcji rzeczywistego beneficjenta (beneficial owner) z pominięciem Konwencji wiedeńskiej na gruncie polsko-szwedzkiej umowy o unikaniu podwójnego opodatkowania. Glosa do wyroku NSA z 26.07.2022 r., II FSK 1230/21*, Przegląd Podatkowy 2023, no. 4, pp. 45–46; B. Kuźniacki, *Rzeczywisty beneficjent a podatek u źródła*, Warszawa 2022 and A. van Boeijen-Ostaszewska, J. de Goede, L. Nouel, B. Obuoforibo, J. Wheeler, W. Wijnen, *Response from IBFD Research Staff to: Clarification of the Meaning of 'Beneficial Owner' in the OECD Model Tax Convention*, University of Amsterdam 2011.

9 Notice from the Minister of Foreign Affairs of 20 November 2017 on the correction of errors, Journal of Laws 2017 item 2177.

10 When reviewing the Central Database of Rulings of Administrative Courts, the author identified eight judgements of the Supreme Administrative Court where Article 11 point 1 of the DTT with Sweden was invoked as the basis as to the merits (results as on 11 September 2024), however, there are at least a few more judgments of different Provincial Administrative Courts that are still under consideration of the Supreme Administrative Court and therefore not final yet (e.g., cases I SA/Sz 645/21, I SA/Sz 820/20, I SA/Sz 646/21, I SA/Op 155/22, I SA/Op 156/22, I SA/Op 340/23). Case I SA/Sz 820/20 is already being handled by the Supreme Administrative Court under no. II FSK 1173/21 where a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges.

11 J. Mazurek, *Euroobligacje – solidny zastrzyk kapitału*, Computerworld, 20.07.2016, https://www.computerworld.pl/news/Euroobligacje-solidny-zastrzyk-kapitalu,405878.html [access: 2.04.2024].

2. Facts of the case

The case involves a Polish entity that in 2012 made cross-border interest payments as a result of a loan agreement concluded in 2007 with a Swedish-affiliated company. When disbursing the payments, the tax remitter applied Article 11 point 1 of the DTT with Sweden in a version that did not include the beneficial owner clause, and thus, did not collect any tax.

Several years later, having verified the correctness of the tax remitter's compliance with its WHT obligations within the dedicated procedure, the relevant tax authority disagreed with this approach and ruled on this entity's liability for the uncollected and unpaid WHT.

Not surprisingly, as the case unfolded, the tax remitter and the tax authority took opposing positions, and while the former claimed they were only compelled to apply the Polish version of the regulations (which effectively meant no obligation to verify the beneficial ownership of the Swedish company), the latter maintained it was the tax remitter's duty to:

(i) compare Polish and Swedish versions of the DTT with Sweden,
(ii) identify the discrepancies in Polish and Swedish wording with respect to the beneficial owner clause,
(iii) look at the English version of the DTT with Sweden to identify the beneficial owner clause, thus resolving the doubts in this regard, and
(iv) apply the beneficial owner clause accordingly.

Having conducted such an analysis itself, the tax authority then claimed that the Swedish entity proved to be nothing more than a conduit company,[12] so the beneficial owner condition was not fulfilled – meaning the tax remitter should have collected the WHT at the 20% domestic rate provided specifically for interest payments.

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12 The concerns about the role of conduit companies in improper use of tax conventions ("treaty shopping") were expressed by the Committee on Fiscal Affairs of the Organisation for Economic Cooperation and Development (hereinafter: OECD) in its Commentary on Article 1 of the 1977 OECD Model Convention. According to the report, the most important situation of this kind regards a company situated in a treaty country and acting as a conduit for channelling income economically accruing to a person in another State who is thereby able to "improperly" take advantage of the benefits provided by a tax treaty – to the detriment of the country of source of income, see: *Double Taxation Conventions and the Use of Conduit Companies*, in: *Model Tax Convention on Income and on Capital 2017*, OECD iLibrary 2019, R(6). Similar positions were also expressed on the grounds of the United Nations Model Convention, see: P. Baker, *Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion*, in: *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries*, eds. A. Trepelkov, H. Tonino, D. Halka, New York 2013.

3. Other issues assessed

To resolve the dilemma in question, the Court focused primarily on the differences in the place and effects of the international agreements in the legal system, both as acts of international and domestic law. Although the indicated issue is central to the case, the Court also commented on a number of other legal and axiological problems extensively raised by the parties and reviewed in this and other similar cases. Absorbing as they may be, due to the limited space, these topics do fall outside the scope of this comment, but being an integral and important part of the broader discussion accompanying the WHT and, they do deserve a mention, albeit a brief one.

The other assessed issues were the following:

(i) the question of intertemporal interpretation of legal provisions, here focused on resolving whether the beneficial owner clause, introduced *expressis verbis* to the DTT with Sweden in 2017 by means of a notification procedure (which, as the name suggests, assumes not so much a change in the law but rather a "correction" thereof), can be applied to actions taken since the official publication of all three versions of the DTT with Sweden in 2006 – as the tax authorities would have it – or only *ex nunc,* starting from the publication of the corrected version in 2017, as the tax remitters claim,

(ii) the discussion about tax remitter's position and functions in the area of WHT and in the tax system in general,[13] naturally followed by the question of the scope of this entity's obligations, which materialise at this philosophically important moment of deciding whether "to collect or not to collect," and if yes – which tax rate to apply,[14]

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13 In section 6.3 of the commented judgement the Court underlines that while according to Article 8 of the Tax Ordinance Act tax remitters improve tax collection and prevent the possibility of tax evasion, they also support taxpayers in the fulfilment of their tax obligations, thus relieving them from direct contact with the tax authorities. To this end, tax remitters perform three material-technical operations: they calculate the tax due from the taxpayer, collect it and pay it to the competent tax authority within the time limit prescribed by the tax law. Thus, due to the nature of their obligations (which do not include verification of compliance of national tax regulations with the provisions of Community law or the Constitution of the Republic of Poland), tax remitters cannot be identified with the tax authority.

14 This part of the discussion focuses on whether, at the moment of disbursing the payment, *(i)* the tax remitter is able to and should investigate all possible facts to ensure that the substantive conditions for exemption / reduced tax rate are actually met, or *(ii)* tax remitter's duties are limited to collecting formal documentation (taxpayer's certificate of residence and statement confirming fulfilment of conditions to apply exemption or a lower tax rate), calculating the tax accordingly and paying it to the competent authority within the statutory deadline. Although, contrary to the area of value-added

(iii) the extent of the obligations that a democratic state can reasonably impose on its citizens, as well as that state's duty to provide them with conditions for carrying out these obligations, especially when noncompliance is linked not only to tax liability but also penal fiscal consequences – here discussed in the context of the historically unspoken (and only manifested years later) duty to compare all the language versions of double taxation agreements and to look for possible discrepancies between them, whereby the state itself has not exercised due diligence in drafting the text in such a way as to avoid potential interpretive doubts,

(iv) the fundamental question of trust in the state and the law it creates,[15] which – bearing in mind the argument of abusiveness that is being increasingly raised by the tax authorities in different disputes[16] – may as well spark a general debate about fairness in relations between the state and private law entities, including such issues as a duty to create legal provisions that are as precise, clear and correctly formulated as possible (test of determinacy of law), the general prohibition of abusing the law (by all the entities that apply legal provisions, including state authorities), and finally, the obligation to bear consequences for all actions taken in this regard,[17] especially if the lack of due

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tax (hereinafter: VAT), the requirement for the WHT remitter to maintain "due care" when applying the exemption / lower tax rate was officially introduced to Polish regulations and not developed by the courts, this topic somehow reminds the author of the discussion regarding verification by the taxpayers of their counterparts in terms of potential involvement in VAT frauds. One has to keep in mind, though, that in the area of WHT regulations stipulate mutual relations, be it capital or personal, between tax remitters and taxpayers, which enable the tax remitters to invoke the taxpayer's fault to exclude their liability for failing to collect the tax (Article 30 § 5 of the Tax Ordinance, currently of less importance due to introduction in 2019 of Article 30 § 5a of the Tax Ordinance).

15 In accordance with the principle of a democratic state of law, which stems from Article 2 of the Constitution of the Republic of Poland, the stipulation and application of the law must not become a kind of trap for this law's addressee, as they must be allowed to arrange their affairs in confidence that they do not expose themselves to unforeseeable legal consequences, and in the belief that their actions taken in accordance with the applicable law will also be recognised by the legal order in the future, cf. the verdicts of Polish Constitutional Tribunal of 7 February 2001, K 27/00, published in the official files of the Tribunal, OTK ZU 2001, no. 2, item 29 and of 14 June 2000, P 3/00, OTK ZU 2000, no. 5, item 138.

16 Cf., e.g., the argumentation on Article 22c of the Act of 15 February 1992 on Corporate Income Tax invoked in the verdicts of the Provincial Administrative Court in Opole of 9 December 2022, I SA/Op 311/22 and of 17 February 2023, I SA/Op 5/23 and I SA/Op 379/22.

17 Interestingly, despite the tax remitter's timely fulfilment of its information duties towards tax administration, tax authorities have only "seized the opportunity" to start the tax audit after the publication of the Notice on the correction of errors by the Minister of Foreign Affairs. Since the audit covered fiscal year 2012, the payments must have been made in December 2011 and in November 2012, meaning the tax authorities were aware of tax remitter's not collecting the tax since 2012. Nevertheless, they only started – and finished – the tax audit in November 2017, barely avoiding the expiration of tax liabilities due to a 5-year statute of limitations (suspended shortly thereafter, due to the initiation of fiscal penal proceedings). Such a sequence of events, as the Court underlined in section 6.6 of the

care and mistakes made in the process of drafting and applying the law have created loopholes that were used by tax remitters and/or taxpayers to reduce the scope of their tax burdens.[18]

4. Essence of the judgment and the Court's position

Regarding the essential issue in question, the Court agreed with the tax remitter and took a position that can be summarised as follows: for actions taken before 2017 (that is when the Polish state as a party to the DTT with Sweden corrected the Polish version of the agreement, thus ensuring mutual conformity of all its authentic texts), both the tax remitter and the tax authorities should use the text published in the official language applicable in the Republic of Poland in accordance with Article 27 of the Polish Constitution,[19] i.e. the Polish version officially published in 2006. It was only in 2017 – when the Notice of correction adding the beneficial owner clause to Article 11 point 1 of DTT with Sweden was published – that the tax remitter was able to become acquainted with the correct wording of the act. And since the Notice cannot have a retroactive effect, tax authorities could not have held the tax remitter liable for not collecting the WHT on interest payments made in 2012.

As the Court underlined,[20] a citizen (here: the tax remitter) cannot be compelled to compare different language versions of an international agreement (even if all of them are authentic texts, published in a promulgation journal), to look for

justification, may in turn raise doubts as to whether, before the publication of the Notice, the tax authorities themselves were fully convinced that the Polish authentic version of DTT with Sweden differs that much from other versions. In the commented case, the Court mostly focused on whether there was any obligation on the part of the tax remitter to collect the WHT in the first place and did not discuss the issue of expiration of tax liability, considering it a matter of secondary importance. This issue does, however, provoke reflection about the dynamics of relations between state itself and its citizens, as well as of the condition of trust between them.

18 As underlined by the Court, the Polish state took its time to ensure the correct wording of the authentic Polish text of the DTT with Sweden: the DTT itself was officially promulgated in 2006 and while the Supreme Administrative Court drew attention to the language versions' discrepancy already in 2012 (verdict of 2 February 2012, II FSK 1398/10), the Notice on the correction of errors was only published in November 2017.

19 Cf. verdicts of the Provincial Administrative Court in Warsaw of 7 October 2009, III SA/Wa 101/09 and of the Supreme Administrative Court of 26 November 2001, I SA/Ka 1843/00; of 21 April 2008, I GSK 966/07 and of 27 September 2011, I GSK 482/10.

20 Section 6.6 of the commented verdict.

any discrepancies between these versions, and finally, to resolve the problem caused by these discrepancies in order to determine the scope of obligations arising from applicable provisions – especially if this citizen is not equipped with the legal means to resolve the discrepancy.[21] At the same time, having made a mistake in formulating the authentic Polish text of the agreement, and thus failing to exercise due diligence in this regard, the state cannot demand that the addressee of the regulation performs an obligation that goes further than complying with the provision published in the official language.

To reach this conclusion, the Court had to take into account the signification of the DTT with Sweden (and international tax agreements in general) in the legal system, both as acts of international and domestic law.[22]

5. Conventions for the avoidance of double taxation as acts of international and domestic law

As the Court explained,[23] the conventions for the avoidance of double taxation should be considered at two levels: *(i)* externally, as acts of international law, and *(ii)* internally, as part of domestic law.

On the external level, DTTs express the will of states-parties to agree on a certain division of tax jurisdiction, by allocating the right to tax through dedicated

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21 When it comes to the legitimacy and necessity of comparing different texts of the international agreements in order to determine possible discrepancies, it appears logical to agree with the currently prevailing view that the court may "routinely" limit its interpretation to the version prepared in its national language (provided the interpretation is in "good faith"). Nevertheless, one has to keep in mind that relying on the domestic language version may not always suffice, especially in areas, such as tax law, where the interests of the parties to legal relations are largely divergent and so the interpretation of underlying regulations may have certain financial effects to the country whose court settles the case. To guarantee the effective and reliable application of the DTTs, domestic courts should seek to ensure consistent results of interpretation (the rule of common interpretation). Cf. B. Brzeziński, K. Lasiński-Sulecki, W. Morawski, *Problemy wykładni międzynarodowych umów w sprawie unikania opodatkowania, sporządzonych w dwóch lub większej liczbie języków*, Kwartalnik Prawa Podatkowego 2023, no. 1, pp. 9–18 and the literature cited there.

22 As further explained by F. Majdowski in a commentary to the same verdict: *O zakresie odpowiedzialności płatnika w świetle błędnego tłumaczenia tekstu podatkowej umowy międzynarodowej na przykładzie polsko-szwedzkiej konwencji w sprawie unikania podwójnego opodatkowania. Glosa do wyroku NSA z 18.4.2023 r., II FSK 400/21*, Monitor Podatkowy 2023, no. 4.

23 Section 6.5 of the commented verdict.

distributive (allocation) norms,[24] aimed at ensuring the implementation of the general purpose of DTTs, i.e. elimination of double taxation.[25] DTTs do not therefore create the right to taxation but limit the already existing rights to the extent agreed to by the contracting states. As a result, DTTs can only improve the situation of a taxpayer (including the scenario where states-parties agree on fully giving up their right to tax certain payments[26]), but cannot burden the taxpayer or the tax remitter with an obligation that does not arise from national law.[27]

A crucial aspect of understanding and interpreting DTTs on the external level is of course the examination of the consensual intent of the parties-states at the time of agreement conclusion, including such factors as the reservations on the authenticity of different language versions of the agreement, as well as the choice of the authentic text that is decisive in the interpretation of any discrepancies of the agreement.

The Polish state is obligated to resolve any discrepancies by Article 9 of the Polish Constitution, and has various complementary tools that allow it to fulfil this obligation:

1. The DTTs themselves, including the DTT with Sweden, where Article 30 stipulates anti-collision rules that point to the English version of the agreement as binding in case states-parties to the agreement have any interpretation doubts regarding the allocation of taxation rights between them,[28]
2. Article 33 section 1 and Article 79 section 1 of the Vienna Convention of 23 May 1969 on the Law of Treaties,[29] regulating the issue of authenticity of various lan-

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24 Cf., e.g., B. Kuźniacki, *Antyabuzywna wykładnia koncepcji rzeczywistego beneficjenta*…, pp. 45–56. The author argues that while the allocation function of the beneficial owner clause results from an accurate and comprehensive analysis of this instrument, compliant with the interpretation rules applicable to international agreements (including DTTs), the anti-avoidance function is mostly based on the pro-fiscal, unclear and undefined approach towards beneficial ownership clause, presented by the Organisation for Economic Co-operation and Development (OECD) over the past 50 years.

25 Cf. M. Wilk, *Klauzula rzeczywistego beneficjenta*…, pp. 49–55 and B. Kuźniacki, *Rzeczywisty beneficjent*…, pp. 130–132. In essence, both researchers advocate in opposition to the treatment of "beneficial owner" clause as a type of anti-avoidance rule.

26 Section 6.5 of the commented judgement.

27 F. Majdowski, *O zakresie odpowiedzialności płatnika*…, p. 3.

28 As the court underlined in section 6.5 of the commented verdict, being international law acts, DTTs generally regulate the mutual agreement procedures intended to, among other things, remove difficulties or doubts that may arise in the interpretation or application of a particular DTT (e.g. choice of that DTT's binding text and the correction of errors in it). States may also jointly agree on how to prevent double taxation in cases that are not regulated by the DTT. This, however, only concerns these acts as acts of international law, thus regulating the obligations and rights of the parties to such agreements.

29 Journal of Laws 1990 no. 74, item 439 (hereinafter: Vienna Convention).

guage versions and the way of treating errors that are mutually determined by contracting states,[30]

3. Polish Act of 14 April 2000 on International Agreements,[31] with its Article 18b, regulating the official procedure of correcting any language and translation mistakes that may occur in international agreements – applied by means of a notice made by the competent minister, and effectively used in the case at hand.

Nevertheless, one cannot lose sight of Article 87 section 1 of the Polish Constitution and the fact that international agreements, as one of the sources of universally binding law of the Republic of Poland, also constitute part of domestic law. As a result, unless specified otherwise, international agreements must have an officially promulgated Polish language version to be used as the basis for interpretation.[32] In other words, whatever the authentic languages of the agreement are, its correct applicability may only be ensured if this international agreement was published in the Polish language in the Journal of Laws. This is the only approach that will enable full implementation of all the principles derived from Article 2 of the Polish Constitution: the principle of determinacy of law, requirements of proper legislation and the principle of protection of trust in the state and the law it creates.[33]

Having conducted the above analysis of DTTs' meaning and significance as acts of both international and domestic law, the answer to the question in the commented case has proved to be fairly simple: as the Court concluded, the regulations invoked by the tax authorities in the commented case – regarding the issue of a binding text of an agreement and the procedure aimed at correcting errors in this

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30 Article 33 section 3 of the Vienna Convention establishes a rebuttable presumption that the terms of the treaty have the same meaning in each authentic text. The underlying idea is to spare the interpreter the need to scrutinise and compare all of the authenticated texts in order to apply the treaty. That is why the solution adopted in the DTT with Sweden – with English prevailing in case of discrepancies in interpretation – should generally mean that as long as the wording in the local language version is clear, there is no reason for the interpreter to consider other versions. In this regard, M. Lang presents an example of the treaty between Greece and Turkey where a similar solution has been adopted: "If the wording is completely clear and does not leave any room for doubt, there is no reason for the Greek official to consider the English or the Turkish version of the treaty as well. Likewise, Turkish tax officials interpreting the same treaty provision may limit themselves to examining the Turkish version of the provision. If the wording is clear, they will not be required to take the English or the Greek version into account," M. Lang, *The Interpretation of Tax Treaties*…, pp. 18–19. To learn more on the purpose, content and scope of the rules enshrined in Article 33 of the Vienna Convention, as well as its history, see also P. Arginelli, *The Interpretation of Multilingual Tax Treaties*, Leiden 2013.

31 In the commented verdict, consolidated text: Journal of Laws 2000 no. 39, item 443 as amended.

32 Ref. in Article 87 secition 1 (hierarchy of the universally binding law sources in Poland), Article 27 (Polish as the official language in the Republic of Poland) and Article 2 (principle of a democratic state of law).

33 Cf. verdict of Polish Constitutional Tribunal of 28 October 2009, Kp 3/09, OTK-A 2009, no. 9, item 13.

area – concern the DTTs at the external level only, i.e. as acts of international law. As a result, these factors are not relevant in terms of the tax remitter's situation and the scope of its obligations – especially bearing in mind that it is possible for the states-parties to the DTT to resign from their authority to tax the interest paid to a non-resident who is not the actual beneficiary, as it does not violate the allocation of tax jurisdiction adopted in the agreement.

It is worth noting that not all of the Supreme Administrative Court's judges make the distinction between DTTs as acts of international and domestic law. For example, in the verdict of 26 July 2022, II FSK 1230/21, the same Court – while noting that the language discrepancy of Article 11 section 1 of DTT with Sweden was not removed until 20 November 2017 – underlined that ever since the DTT with Sweden came into force, it included an anti-collision rule of Article 30 indicating the English version of the agreement as binding in case of interpretation doubts. Analysing the same provisions, namely Article 27 and 91 of the Polish Constitution, the Court nevertheless came to a completely different conclusion as to the (lack of) necessity to rely on the Polish version of the DTT. In this regard, the Court effectively advocated for the direct application of the English version of the DTT as a ratified international agreement. A similar position was taken by the Court in its verdict of 30 January 2024, II FSK 560/21. What these judgements did not cover (contrary to the commented verdict) was that this provision is only applicable in the area of international law, and not in that of domestic law.[34]

6. Assessment of the verdict & practical comments

The commented verdict is a commendable example of legal reasoning. It resists the temptation to adopt the simplistic approach that is not necessarily based on regulations but rather pursues the undefined goal of combating tax avoidance. As pointed out in the doctrine, such a standpoint comes not without controversy,[35] since one of the arguments raised by tax authorities in similar cases contained an element of emotionality, emphasising the intentional character of tax burden reduction by means of the DTT with Sweden.[36] In this regard the commented verdict represents

34 As criticised by B. Kuźniacki, *Antyabuzywna wykładnia koncepcji rzeczywistego beneficjenta*…, pp. 45–56.

35 F. Majdowski, *O zakresie odpowiedzialności płatnika*…, p. 5.

36 See also the issue of the parties' intention to create a tax-efficient structure discussed in the verdicts of the Provincial Administrative Court in Opole of verdicts of 9 September 2022, I SA/Op 155/22

the voice of reason, pointing out that it is not mandatory for the taxpayer (tax remitter) to conduct an in-depth analysis of provisions which – at the moment of application – appear clear and uncontroversial. This seems particularly relevant for case at hand as in an attempt to justify a completely reverse approach, the Polish courts have more than once gone as far as to directly invoke Swedish text of the agreement as a reference – which in the days before widely available machine translations was a rather misguided argument, unless, of course, the interpreter of the text actually knew Swedish.[37] Yet, one should remember that laws are derived from abstract and general norms that are not addressed to specific, individual subjects. Unless otherwise specified, the rules and corresponding guarantees are therefore the same for everyone and cannot be understood differently depending on the type of entity (large, small, poor, prosperous etc.) that applies them. And it is exactly by focusing on the linguistic interpretation of the provisions that the Court manifests a high regard for the guarantee function of tax law, refusing to accept a situation where the burden of errors in legislation is shifted to the taxpayer (tax remitter). This way the Court resists the temptation to adopt a simplistic, short-term approach focused on pursuing solely fiscal objectives but chooses to take into account the historical "state of mind" of the tax remitter. As a result, the Court's standpoint is deeply in line with fundamental values and rules upon which the Polish state and tax system is built, such as a democratic state of law and trust, principle of the rule of law or principle of statutory regulation of taxes.[38]

Taking into account the controversies arising in cases that involve language discrepancies between different language versions of the provisions, it would be recommended to adopt a general, uniform practice, encouraging judges to resolve such issues in accordance with fundamental tax law principles – and perhaps the first step in this direction has already been taken in case II FSK 1173/21 where

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and I SA/Op 156/22 (which are not yet final, i.e. waiting to be heard by the Supreme Administrative Court).

37 Position originally expressed by the Supreme Administrative Court in its verdicts of 2 February 2012, II FSK 1398/10 and II FSK 1399/10, and repeated by Provincial Administrative Courts in Szczecin (verdict of 26 February 2012, I SA/Sz 65/15, upheld by the Supreme Administrative Court on 26 July 2017, II FSK 1866/15), Warsaw (verdict of 16 December 2015, III SA/Wa 390/15, upheld by the Supreme Administrative Court on 27 April 2018, II FSK 1370/16), Gorzów Wielkopolski (verdicts of 26 May 2021, I SA/Go 107/21 and I SA/Go 108/21, upheld by the Supreme Administrative Court on 11 June 2024, II FSK 1161/21 and II FSK 1170/21 – as on 11 September 2024, written justification is still to be published) and Opole (verdicts of 9 September 2022, I SA/Op 155/22 and I SA/Op 156/22, still to be heard by the Supreme Administrative Court).

38 Regulated in Article 2 of the Constitution and Article 120 of the Tax Ordinance Act, Article 7 of the Constitution and Article 121 of the Tax Ordinance Act, Article 217 of the Constitution.

a question about legal issue that gives rise to serious doubts was submitted to a panel of seven judges.

Sadly, having determined that the applicable version of the DTT with Sweden did not contain the "beneficial owner" clause, the Court obviously could not comment on the character of this regulation, i.e. whether – in the absence of a separate dedicated provision[39] – it is a *sui generis* anti-avoidance clause or a solely distributive norm aimed only at determining the allocation of income taxation rights. A clear position of the courts in this respect would be highly desirable, especially taking into account that the phenomenon of using regulations not originally intended to combat tax avoidance as a form of anti-avoidance tools is not new – as illustrated by the example of Article 199a of the Tax Ordinance Act, historically used by tax authorities in their attempts to question certain tax avoidance structures; a practice that has been criticised by both the courts and tax academics.[40] Nonetheless, there is often the impression that a conclusive answer to this dilemma in the area of WHT may not come too soon (or at all), especially ever since the Court of Justice of the European Union advocated the existence of a general EU law principle, according to which provisions of EU law cannot be invoked in a way that bears the hallmarks of fraud,[41] thus giving tax authorities an alternative tool to challenge tax settlements in this regard.

All in all, setting aside the detailed argumentation on the application of the DTT with Sweden, it seems that in the commented case, the dilemma effectively

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39 Article 7 section 1 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (as of March 2024, modifications to this convention have not been introduced into DTT with Sweden yet) or Article 22c of the Act of 15 February 1992 on Corporate Income Tax, consolidated text: Journal of Laws 2014 item 851 as amended (Article 22c generally introduced as of 31 December 2015, and with regard to interest payments – in 2019).

40 Cf., e.g., W. Nykiel, M. Wilk, *Nieprzydatność art. 199a § 2 ordynacji podatkowej w walce z unikaniem opodatkowania a następstwa czynności pozornych*, Przegląd Podatkowy 2017, no. 2, pp. 17–23.

41 The two verdicts of the Court of Justice of the European Union (CJEU) of 26 February 2019 in the so-called "Danish cases," regarding the application of WHT exemption based on the regulations of the *(i)* Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, so-called Parent Subsidiary Directive (combined cases C-116/16 and C-117/16) and the *(ii)* Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (combined cases C-115/16, C-118/16, C-119/16 and C-299/16). Within the framework of these cases, CJEU addressed numerous controversies over the meaning of the term "beneficial ownership" – and provoked just as many others. Widely commented by various experts, the "Danish cases" are justifiably referred to as "landmark rulings" on the concept of beneficial ownership, cf. J. Schwarz, *Beneficial Ownership: CJEU Landmark Ruling*, Kluwer International Tax Blog, 27.02.2019 and W. Haslehner, G. Kofler, *Three Observations on the Danish Beneficial Ownership Cases*, Kluwer International Tax Blog, 13.03.2019.

amounted to deciding who is to bear responsibility for the shape of the legal system, including the mistakes made by state authorities at the stage of drafting or applying tax provisions: the state or the citizen. When solving this dilemma, the Court rightly pointed at the former, thus choosing the approach that is both legally correct and axiologically right. Taking into account the steadily deteriorating condition of Polish tax provisions,[42] this issue will probably become relevant more than once in the future – which, nevertheless, is a topic for a separate study.

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STUDIA PRAWNICZE KUL
4 (100) 2024

Understanding the requirement to document the receipt of a donation from close relatives in order to benefit from inheritance and gift tax exemption (Article 4a (1) (2) of the Act on Inheritance and Gift Tax). An approving commentary on the resolution of the Supreme Administrative Court of 20 March 2023, III FPS 3/22

Rozumienie wymogu udokumentowania otrzymania darowizny celem skorzystania ze zwolnienia z podatku od spadków i darowizn przez osobę najbliższą (art. 4a ust. 1 pkt 2 ustawy o podatku od spadków i darowizn). Glosa aprobująca do uchwały Naczelnego Sądu Administracyjnego z dnia 20 marca 2023 r., III FPS 3/22

Понимание требования документального подтверждения получения дарения с целью воспользоваться освобождением от уплаты налога на наследство и дарение ближайшим лицом (статья 4а, 1, пункт 2 Закона о налоге на наследство и дарение). Одобрительный комментарий к постановлению Высшего Административного Суда от 20 марта 2023 г., III FPS 3/22

Розуміння вимоги документального підтвердження отримання дарчі для того, щоб скористатися звільненням від сплати податку на спадщину та дарування найближчою особою (ст. 4а абз. 1 п. 2 Закону „Про податок на спадщину та дарування"). Відгук до постанови Вищого адміністративного суду від 20 березня 2023 року, № III FPS 3/22

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Summary: The study approvingly refers to the resolution of the Supreme Administrative Court of 20 March 2023, III FPS 3/22, adopted at the request of the Commissioner for Human Rights, on the formal and technical requirements that a taxpayer must meet to obtain an inheritance and gift tax exemption on account of receiving a donation of funds from close relatives. Contrary to the prevailing line of jurisprudence, the Supreme Administrative Court stated in the above-mentioned resolution that it is not sufficient for the donee to deposit the donation to a bank account on behalf of the donor in order to prove entitlement to a tax exemption. According to the Supreme Administrative Court, this does not make it possible to identify the parties to the donation agreement and does not achieve the purpose of the obligation to document cash donations, i.e. to tighten the tax system and prevent activities aimed at introducing cash of undetermined origin into circulation. The above-mentioned resolution indicates that the condition of documenting the acquisition of a donation is fulfilled only when the donor makes a transfer to the recipient's bank account (or uses a postal order). This study examines the normative content of the obligation to document the acquisition of a donation of funds, aiming

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to dispel doubts raised by the linguistic interpretation of Article 4a (1) (2) of the Act of 28 July 1983 on inheritance and gift tax, which establishes this obligation. A dogmatic-legal research method is used in the study. The result is the claim that a recipient's payment to their own bank account does not meet the conditions of the exemption regulated in Article 4a of the above-mentioned Act, which prompts the author to positively assess the commented resolution of the Supreme Administrative Court.

Key words: Inheritance and Gift Tax, donation, tax exemption, bank transfer, postal order

Streszczenie: W opracowaniu aprobująco odniesiono się do uchwały Naczelnego Sądu Administracyjnego z dnia 20 marca 2023 r., III FPS 3/22, podjętej na wniosek Rzecznika Praw Obywatelskich w sprawie wymogów formalno-technicznych, jakie musi spełnić podatnik, aby uzyskać zwolnienie z podatku od spadków i darowizn z tytułu otrzymania darowizny środków pieniężnych od osób najbliższych. Wbrew przeważającej linii orzeczniczej, NSA w wyżej wymienionej uchwale stwierdził, że do skorzystania ze zwolnienia podatkowego nie jest wystarczające dokonanie wpłaty darowizny na rachunek bankowy przez obdarowanego na własną rzecz w imieniu darczyńcy. Zdaniem NSA taki sposób wpłaty pieniędzy nie pozwala na identyfikację stron umowy darowizny oraz nie realizuje celu obowiązku udokumentowania darowizny pieniężnej, jakim jest uszczelnienie systemu podatkowego i uniemożliwienie działań zmierzających do wprowadzenia do obiegu środków pieniężnych o nieustalonym pochodzeniu. W przywołanej uchwale wskazano, że przesłankę udokumentowania nabycia darowizny spełnia dopiero dokonanie przez darczyńcę przelewu na rachunek bankowy obdarowanego (względnie posłużenie się przekazem pocztowym). Przedmiotem badań jest treść normatywna obowiązku udokumentowania nabycia darowizny środków pieniężnych, a ich celem rozwianie wątpliwości, jakie budzi wykładnia językowa art. 4a ust. 1 pkt 2 ustawy z dnia 28 lipca 1983 r. o podatku od spadków i darowizn, który ten obowiązek ustanawia. W analizach posłużono się dogmatyczno-prawną metodą badawczą. Rezultatem badań jest twierdzenie, że dokonanie wpłaty własnej na rachunek bankowy obdarowanego nie spełnia warunków zwolnienia uregulowanego w art. 4a ww. ustawy, co skłoniło autora do pozytywnej oceny komentowanej uchwały NSA.

Słowa kluczowe: podatek od spadków i darowizn, darowizna, zwolnienie, przelew bankowy, przekaz pocztowy

Резюме: В документе с одобрением рассматривается постановление Высшего Административного Суда от 20 марта 2023 года, III FPS 3/22, принятое по заявлению Уполномоченного по гражданским правам о формальных и технических требованиях, которые должен выполнить налогоплательщик, чтобы получить освобождение от налога на наследство и дарение при получении дарения денежных средств от ближайших родственников. Вопреки сложившейся судебной практике, Высший Административный Суд в вышеупомянутом постановлении утверждает, что для того, чтобы воспользоваться освобождением от уплаты налога, недостаточно, чтобы дарение было перечислено на банковский счет получателя им самим от имени дарителя. По мнению Высшего Административного Суда, такой способ внесения денег не позволяет идентифицировать сторон договора дарения и не осуществляет цели обязанности документального подтверждения дарения денежных средств, которая заключается в обеспечении эффективности налоговой системы и предотвращении действий, направленных на введение в оборот денежных средств неопределенного происхождения. В рассматриваемом постановлении указано, что условие о документальном подтверждении получения дарения выполняется только путем перечисления дарителем денежных средств на банковский счет получателя (или с использованием почтового перевода). Предметом исследования является нормативное содержание обязанности документального подтверждения приобретения дарения денежных средств, а его целью – устранение сомнений, возникающих при лингвистическом толковании статьи 4a, 1, пункт 2 Закона о налоге на наследство и дарение от 28 июля 1983 года, устанавливающей данную обязанность. В исследовании был использован догматико-правовой метод. Результатом исследования является утверждение о том, что осуществление собственного платежа на банковский счет получателя не соответствует условиям освобождения, установленного в статье 4a вышеупомянутого Закона, что привело автора к положительной оценке комментируемого постановления Высшего Административного Суда.

Ключевые слова: налог на наследство и дарение, дарение, освобождение, банковский перевод, почтовый перевод

Резюме: У дослідженні схвально оцінюється рішення Вищого адміністративного суду від 20 березня 2023 року, III FPS 3/22, прийняте на запит Омбудсмена щодо формальних і технічних вимог, яким повинен відповідати платник податків, щоб отримати звільнення від сплати податку на спадщину та дарування при отриманні грошової допомоги від найближчих родичів. Всупереч домінуючій судовій практиці, у вищезгаданому рішенні ВАС зазначило, що для того, щоб скористатися податковим звільненням, обдаровуваному недостатньо здійснити на свою користь платіж пожертви на банківський рахунок від імені дарувальника. На думку ВАС такий спосіб внесення коштів не дозволяє ідентифікувати сторони договору пожертви та не відповідає меті обов'язку документального оформлення готівкової пожертви, яка полягає в герметизації податкової системи та запобіганні діям, спрямованим на введення в обіг готівки невизначеного походження. Вищезазначена постанова вказує на те, що передумовою документального оформлення набуття пожертви є лише здійснення пожертвувачем переказу на банківський рахунок набувача (або за допомогою поштового переказу). Предметом дослідження є нормативний зміст обов'язку документального підтвердження набуття пожертви готівкою, а його метою – розвіяти сумніви, викликані лінгвістичним тлумаченням статті 4a абз. 1 п. 2 Закону „Про податок на спадщину та дарування" від 28 липня 1983 року, яка встановлює цей обов'язок. У дослідженні використано догматико-юридичний метод. Результатом дослідження є твердження про те, що здійснення власного платежу на банківський рахунок одержувача не відповідає умовам звільнення, регламентованого ст. 4a вищезгаданого Закону, що зумовило позитивну оцінку автором коментованої постанови Вищого адміністративного суду.

Ключові слова: податок на спадщину та дарування, дарування, звільнення, банківський переказ, поштовий переказ

Introduction

The subject of the study, undertaken with the intention to comment on the resolution of the Supreme Administrative Court (hereinafter: the SAC) of 20 March 2023 (ref. no. III FPS 3/22; hereinafter: the Resolution), is the obligation to document the acquisition of a donation of money specified in Article 4a (1) (2) of the Act of 28 July 1983 on Inheritance and Gift Tax (hereinafter: Inheritance and Gift Tax Act). The wording of this provision gives rise to doubts as to interpretation, which give rise to a dispute as to whether making a payment by the donee to their own payment account a correct form of fulfilling the obligation set out in the above-mentioned provision. This is particularly important because the proper performance of the said obligation is associated with obtaining an exemption from inheritance and gift tax on the received donation of funds.

The thesis that the author will seek to prove when commenting on the Resolution is the view that the above-mentioned obligation should be interpreted strictly and, consequently, that the interpretation that accepts ways of fulfilling this obligation other than those expressly indicated in Article 4a (1) (2) of the Inheritance and Gift Tax Act is incorrect.

At the outset, it should be noted that the thesis adopted by the author makes the commentary approving, and its subject is the analysis and assessment of the

Resolution adopted at the request of the Commissioner for Human Rights of 16 November 2022 (ref. no. V.511.953.2022.EG) for a panel of seven judges of the SAC to adopt a resolution aimed at clarifying the issue, which is the subject of divergences in the case-law of administrative courts, namely: "Should the expression used in Article 4a (1) (2) of the Act of 28 July 1983 on Inheritance and Gift Tax (Journal of Laws 2021 item 1043, as amended): 'where the object of the acquisition is cash as a gift or donor's instruction […], they [i.e. the acquirer] document their receipt with a confirmation that the above amount was transferred to the acquirer's account in a bank […]' be understood as meaning that the payment or transfer of the funds which are the subject of the legal transaction of donation exclusively by the donor to the account of the donee is deemed to be evidence for benefitting from the tax exemption for close relatives, or is it sufficient for the donee to make a payment of funds to their own account on behalf of the donor?" In response to the question posed in this way, the SAC ruled in the operative part of the resolution that: "Expression used in Article 4a (1) (2) of the Act of 28 July 1983 on Inheritance and Gift Tax (Journal of Laws 2021 item 1043, as amended) 'where the object of the acquisition is cash as a gift or donor's instruction […], they [i.e. the acquirer] document their receipt with a confirmation that the above amount was transferred to the acquirer's account in a bank […]', it should be understood as meaning that a sufficient condition for benefitting from the tax exemption provided for in that provision is that the donor has documented the transfer of funds to the donee in the manner indicated in that provision."

The SAC thus opted for an unfavourable interpretation for taxpayers under Article 4a (1) (2) of the Inheritance and Gift Tax Act. According to this interpretation, the conditions for exemption will not be met if the payment to a payment account is made by the recipient themselves (e.g. in person at a bank branch), even though the parties to the donation agreement are clearly indicated and the monetary value of the donation is known and beyond doubt. In other words, the right to tax exemption is to be determined by whether the donation agreement was performed by way of a factual act of bank transfer or postal order (the exemption is granted) or by means of another factual transaction (the exemption is not granted).

In the commented case there is no factual situation in the classic sense of the term, as the Commissioner for Human Rights requested that the SAC adopt a so-called abstract resolution based on Article 15 (1) (2) of the Act of 30 August 2002 – The Law on Proceedings Before Administrative Courts, in connection with a significant discrepancy in the jurisprudence of administrative courts in the scope covered by the above-mentioned application for the issuance of the Resolution.

The considerations are based on the legal status as at the date of the SAC's resolution, i.e. 20 March 2023, unless it is clearly stated otherwise.

1. Legal status

On the day of the Supreme Administrative Court's ruling pursuant to Article 4a (1) (2) of the Inheritance and Gift Tax Act:

> Acquisition of ownership title to tangible property or property rights by a spouse, descendants, ascendants, stepchild, siblings, stepfather and stepmother, is exempt from tax if:
> 1) they report the acquisition of ownership of tangible property or property rights to the competent head of the tax office within 6 months as of the day on which the tax liability arose […], and
> 2) the object of acquisition by way of donation or donor's instruction is cash,
>
> and their value […] exceeds the amount specified in Article 9.1 (1) – they document their receipt with a confirmation that the above amount was transferred to the acquirer's account in a bank or a savings and credit union, or by postal order.

This regulation entered into force on 1 January 2007 and has been amended several times since then[1] but the relevant provision has not changed since the date of adoption of the Resolution.

It should be noted that in the explanatory memorandum to the bill introducing the exemption in question, it was emphasised that the introduction of the necessity to document donations is to ensure the tightness of the tax system, and at the same time to prevent actions aimed at introducing cash of undetermined origin into circulation, and to prevent fictitious contracts drawn up to reduce other tax liabilities,

[1] For more information on the tax preference and its evolution, see: P. Borszowski, in: K.J. Musiał, A. Nita, K. Stelmaszczyk-Borszowska, J. Wantoch-Rekowski, P. Borszowski, *Ustawa o podatku od spadków i darowizn. Komentarz*, Warszawa 2022, Commentary on Article 4a; J. Szczygieł, in: S. Bogucki, G. Liszewski, P. Smoleń, K. Winiarski, J. Szczygieł, *Podatek od spadków i darowizn. Komentarz*, Warszawa 2021, Commentary on Article 4a; R. Styczyński, *Ustawa o podatku od spadków i darowizn. Komentarz*, Warszawa 2014, Commentary on Article 4a; S. Babiarz, in: A. Mariański, W. Nykiel, S. Babiarz, *Ustawa o podatku od spadków i darowizn. Komentarz*, Warszawa 2010, Commentary on Article 4a; S. Brzeszczyńska, *Podatek od spadków i darowizn. Komentarz*, Warszawa 2009, and more indicated in Bibliography.

for example by invoking amounts obtained from donations from relatives in proceedings concerning undisclosed sources of revenue.[2]

2. Discrepancies in the jurisprudence of administrative courts

With regard to the interpretation of the rules for documenting the acquisition of funds as a gift, two lines of jurisprudence have developed in the case law of administrative courts:

1) a sufficient condition for the exemption to be applied is also when the donee makes a payment to their own account on behalf of the donor;
2) a sine qua non condition for the exemption is that it is only the donor who makes a transfer or payment to the recipient's account.

Examples of judgments representing the first of these lines of case-law are: judgment of the SAC of 11 December 2019 (II FSK 3954/17), judgment of the Voivodeship Administrative Court in Gliwice of 25 January 2023 (I SA/Gl 1069/22), judgment of the Voivodeship Administrative Court in Gliwice of 25 January 2023 (I SA/Gl 1069/22), judgment of the Voivodeship Administrative Court in Kraków of 20 December 2022 (I SA/Kr 933/22), judgment of the Voivodeship Administrative Court in Gliwice of 14 April 2022 (I SA/Gl 1684/21), judgment of the Voivodeship Administrative Court in Gliwice of 15 February 2022 (I SA/Gl 1307/21), judgment of the Voivodeship Administrative Court in Łódź of 25 August 2020 (I SA/Gl 1307/21), judgment of the Voivodeship Administrative Court in Bydgoszcz of 1 December 2021 (I SA/Bd 249/21) and judgment of the Voivodeship Administrative Court in Lublin of 13 March 2020 (I SA/Lu 742/19). In the grounds of those judgments, similar arguments are repeated in support of a more favourable interpretation of Article 4a (1) (2) of the Inheritance and Gift Tax Act. First, in the cited judgments, the administrative courts draw attention to the technical aspect of this obligation, which is secondary when there is no doubt as to the parties, date and value of the donation of funds. Second, those courts consider that it does not follow from Article 4a (1) (2) of the Inheritance and Gift Tax Act that the person making the payment to the recipient's payment account must be the donor. Third, the time lapse between the payment of the donation in cash and its payment to the recipient's payment account is not an obstacle to obtaining the exemption. In summary, on the

[2] Explanatory memorandum to the government's bill amending the Act on Inheritance and Gift Tax and the Act on Tax on Civil Law Transactions – V term, Sejm paper no. 736.

one hand, those courts give priority to facts rather than to how they are established and thus consider it sufficient to make an own payment of funds received without a bank transfer.

Examples of judgments representing the second line of case law are: judgment of the SAC of 19 December 2019 (II FSK 293/18), judgment of the SAC of 26 November 2013 (II FSK 2967/11), judgment of the Voivodeship Administrative Court in Łódź of 8 March 2022 (I SA/Łd 890/21), judgment of the Voivodeship Administrative Court in Gliwice of 27 February 2020 (I SA/Gl 1570/19) and judgment of the Voivodeship Administrative Court in Gliwice of 26 February 2020 (I SA/Gl 1000/19). In those judgments, the reasoning of the administrative courts is different. These courts emphasise that the recipient's payment to their own account is neither proof of the donor's transfer of funds nor proof of their receipt from the donor – it is only proof of own payment by the account holder. Proof of transfer should document the donor's payment to the recipient's account – only then can the fact of the donation be proven. Those courts also note that a donation amounts to a gratuitous transfer of a specific property to the donee by the donor. The proof should be a manifestation of the donor's activity, not that of any other entity – that is why own payment does not meet the condition set out in Article 4a (1) (2) of the Inheritance and Gift Tax Act.

A review of the case law clearly indicates that its prevailing line is more favourable to taxpayers, in particular at the level of voivodeship administrative courts.

3. The verdict made in the voted Resolution of the Supreme Administrative Court and its assessment

In the opinion of the SAC, as in every case of judicial application of law, it is necessary to refer to interpretative directives belonging to the achievements of legal culture established by legal science and legal practice. In the present case, the totality of the principles of interpretation of national law clearly supports the rejection of the interpretation adopted by the Ombudsman in their request for the adoption of an abstract resolution.

The SAC, assessing the clarity of the provisions to be interpreted in order to adopt the Resolution, assessed that the mere use of the words contained in Article 4a (1) (2) of the Inheritance and Gift Tax Act is not sufficient to determine the possible meaning of these words, which is necessary to determine the legal norm encoded in the above-mentioned provision. It should be remembered, however,

that when applying a teleological interpretation, the wording of legal acts is linked to the meaning and purpose of the legal provisions, and the limit of interpretation is the possible meaning of the words used by the legislator to express its will.

The SAC clearly stated that it did not agree with the view of the Commissioner for Human Rights, who downplayed the role of the obligation to properly document the purchase of a monetary donation.

The SAC also emphasised that, in its opinion, the discrepancy in the case law and doubts in interpretation do not concern the understanding of the legal text because of its ambiguity, but the issue of departing from the unambiguous wording of the provisions and applying them without the conditions expressly stated therein, i.e. omitting a fragment of the provision that would have to be considered not so much unnecessary as inadmissible, grossly violating the Constitution of the Republic of Poland, contrary to the values it protects.

In the opinion of the SAC, treating the condition of documentation as a technical obligation of lesser importance is unjustified. This leads to an erroneous interpretation of Article 4a (1) of the Inheritance and Gift Tax Act postulated by the Ombudsman. At the same time, the SAC states that it approves the pro-constitutional interpretation of Article 4a of the Inheritance and Gift Tax Act indicated by the Commissioner for Human Rights and the adjudicating panels of the SAC in justifications for some judgments. At the same time, it should be noted that the introduction of point 2 to Article 4a (1) of the Inheritance and Gift Tax Act was a deliberate action of the legislator. The reconstruction of the *ratio legis* of Article 4a of the Inheritance and Gift Tax Act cannot disregard this circumstance.

The SAC rightly points out that the legislator, when constructing the tax exemption referred to in Article 4a of the Inheritance and Gift Tax Act, was guided by a complex goal: on the one hand, it sought to introduce a family-friendly tax solution in the field of inheritance and gift tax, and on the other hand, it imposed conditions for the use of the analysed exemption to ensure the security of legal transactions and the tax system that serves the state, i.e. the common good of all citizens (Article 1 of the Constitution of the Republic of Poland). Both aspects of the *ratio legis* of Article 4a (1) (2) of the Inheritance and Gift Tax Act must be taken into account.

Considering the entirety of the legal, functional and systemic circumstances, the SAC took the view that one of the equivalent prerequisites for the application of the exemption, i.e. proper documentation of the acquisition of a donation, cannot be underestimated. It is not the role of the judiciary to interpret provisions in law, which could be the case, in particular, in a situation where a court's assessment of the reasonableness of a given legal regulation is questionable. As a consequence, the SAC held that the obligation to document the acquisition of a donation should

be interpreted strictly and, in the face of reconciling both the protection of the interests of the immediate family and the interests of public finances, it cannot be concluded that the implementation of this obligation in another way than those indicated by the legislator could be valid, taking into account the overriding need for unambiguous identification of both parties to the donation agreement.

Moving on to the assessment of the resolution under discussion, it should be emphasised that the donor's payment of funds to their own bank account does not allow to state with certainty that these funds actually come from a donation obtained from a specific person. Such a payment also does not have a documentary function in terms of determining the date of execution of the donation (an unspecified period of time may elapse from the moment of actual receipt of the funds to the moment of their payment by the donee to their own account), which is particularly important in the case of donation agreements not concluded in the form of a notarial deed (which form is defined by the legislator in first sentence of Article 890 § 1 of the Civil Code). In such a case, the date on which the service is rendered by the donor determines the date on which the tax obligation arises.

Making a transfer by the donor to the recipient's bank account is devoid of the above-mentioned drawbacks of recipient's own payment. A bank transfer clearly indicates the name of the donor (the holder of sender's bank account) and the date of making the donation (the date of the transfer order). In such a case, the amount of the endowment on the part of the donee is also not disputed. Precise determination of the date of the transfer of assets between the donor and the donee is not only an advantage in determining the moment when the tax obligation arises but also enables a more precise determination of the chronology of the transaction in a broader context, when, for example, the entire financial settlements of the donee and the donor (both mutual and with other entities) are subject to tax audit.

It seems that the problem with the subject of the Resolution results from widespread criticism of the rather clear linguistic interpretation of Article 4a (1) (2) of the Inheritance and Gift Tax Act, which is further strengthened by suggestions that it is necessary to apply other methods of interpretation of the law, which are supposed to result in an understanding of the above-mentioned provision other than its linguistic understanding, consistent with a more liberal view. In this context, however, it is necessary to refer to one of the fundamental rules of tax law interpretation, which is the principle of the primacy of linguistic interpretation, additionally strengthened by the prohibition of a broad interpretation of a legal provision establishing an exception to a legal principle (exceptiones non sunt extendae).[3] In

[3] L. Morawski, *Zasady wykładni prawa*, Toruń 2006, pp. 171–182.

the author's opinion, the literal interpretation of Article 4a (1) (2) of the Inheritance and Gift Tax Act leaves no doubt and leads to the conclusions presented by the Supreme Administrative Court in the Resolution.

As rightly noted in the case law of the Supreme Administrative Court, the linguistic analysis of a given provision of law is not only the starting point for the interpretation of law, but also delineates its limits. An attempt to interpret a provision of law that would be contrary to the linguistic meaning of that provision would be a violation of the rule of law. The linguistic meaning of a provision of law sets the limits of permissible interpretation, since "a verbal formula is […] the limit of any permissible meaning that can be looked for in the text of legal provisions."[4]

In order to determine this meaning, it is possible to refer to the linguistic, systemic and functional context of the legal provision being interpreted, in accordance with the principles of linguistic, systemic and functional interpretation adopted in the jurisprudence. When resorting to non-linguistic methods of interpretation, it should be remembered that their result must be within the linguistic meaning of the words forming a given provision of law, because accepting the result of an interpretation that is clearly incompatible with the broadly understood meaning of the interpreted phrases would be tantamount to a contra legem interpretation.[5]

In the author's opinion, it is particularly important to follow the principle of linguistic interpretation, referred to as the prohibition of interpretation per non est, in the course of interpretation, and therefore it is not possible to interpret a given provision of law in such a way that some part of it turns out to be superfluous.[6]

The principle of the primacy of linguistic interpretation should not lead to the conclusion that the interpreter is entitled to ignore a systematic or functional interpretation altogether. It may turn out that the meaning of a provision that seems linguistically clear turns out to be questionable when confronted with other provisions or when the purpose of the legal regulation is taken into account. One of the strongest arguments for the correctness of an interpretation is the fact that the linguistic, systemic, and functional interpretations give a consistent result. Whenever there is a suspicion that the result of a linguistic interpretation may be inadequate, the interpreter should confront it with a systemic and functional interpretation.[7]

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4 See: judgment of the SAC of 26 November 2019, II FSK 2967/11, and judgment of the SAC of 18 December 2000, III SA 3055/09.

5 See: judgment of the SAC of 26 November 2019, II FSK 2967/11, and judgment of the SAC of 3 December 2009, II FSK 1019/08.

6 L. Morawski, *Zasady*…, p. 122.

7 M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2002, p. 275.

With regard to the interpretation of the condition of documentation, such a confrontation also occurs. As rightly pointed out by the Supreme Administrative Court in the Resolution, the documentation of the acquisition of funds as a donation should enable the identification of the parties to the agreement. The condition in question is not expressly stated in Article 4a (1) (2) of the Inheritance and Gift Tax Act, and it is taken into account by applying a functional and systemic interpretation.[8]

Questioning the legitimacy of the allegedly "narrowing" interpretation of Article 4a (1) (2) of the Inheritance and Gift Tax Act cannot be justified by the payment habits of Poles today. According to the results of a survey conducted by the National Bank of Poland (NBP) in 2020, 88.5% of respondents had a payment account, and in the survey, such an account was defined as an account in a bank, cooperative bank, credit union or other institution that could be used for payments (e.g. a current account).[9] On the other hand, according to the World Bank data quoted by the NBP in the Report on cash turnover in Poland in 2022,[10] 96.7% of adult Poles have a bank account. This means that the number of account holders has increased by 26 percentage points over the last decade.[11] In the author's opinion, the quoted data justify the view that the condition of making a donation by way of a bank transfer is not an organisational obstacle today. At the same time, it should be remembered that the legislator still provides for a solution that allows to meet the statutory requirement as to the form of making a cash donation to and by persons who do not have a bank account (both on the part of the recipient and the donor), i.e. a postal order.

In the author's opinion, the views discrediting the so-called strict interpretation of Article 4a (1) (2) of the Inheritance and Gift Tax Act presented in the Resolution have no legal basis. However, this does not change the fact that these views are supported by important axiological arguments. At the same time, as the SAC rightly noted in the Resolution, the purpose of resolving the issue by a panel of seven judges of the SAC "is not to find an optimal normative solution."

Certainly, a solution according to which forms of transfer of control over funds (which are the subject of the donation) other than a bank transfer or a postal order do not deprive the donee of the right to the exemption provided for in Article 4a of

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8 A. Goettel, *Obowiązek udokumentowania nabycia środków pieniężnych jako warunek zwolnienia z podatku od spadków i darowizn*, Glosa 2014, no. 3, pp. 124–125.

9 NBP, Zwyczaje płatnicze w Polsce w 2020 r., https://nbp.pl/wp-content/uploads/2022/09/zwyczaje_platnicze_Polakow_2020p.pdf [access: 9.11.2023], p. 18.

10 NBP, Raport o obrocie gotówkowym w Polsce w 2022 r., https://nbp.pl/wp-content/uploads/2023/10/Raport-o-obrocie-gotowkowym-2022_internet.pdf [access: 9.11.2023], p. 25.

11 Global Database of World Bank Findex 2021, https://www.worldbank.org/en/publication/globalfindex/Data [access: 9.11.2023].

the of the Inheritance and Gift Tax Act would make it possible to avoid a situation where the donee risks having to comply with the obligation to pay the tax as a result of their ignorance of regulations in this respect, rather than of a deliberate effort to conceal the true nature of money transfers. However, taking this direction would require the intervention of the legislator and the explicit addition of "confirmation of a cash payment made by the donor or the donee to the donee's bank account" to the methods of documenting the transfer of a donation (subject to tax exemption) because one should agree with the Resolution that such a possibility does not follow from the current wording of Article 4a (1) of the Inheritance and Gift Tax Act (derived after a reliable linguistic interpretation of this provision).

As far as the main thread of considerations is concerned, it is worth mentioning an issue which, however, calls into question the consistency of the legislator's intentions, which speak in favour of the current form of taxation of cash donations from persons listed in Article 4a (1) of the Inheritance and Gift Tax Act. On the one hand, the legislator establishes a technical requirement concerning the form of making a donation, which determines the right to exemption, while on the other, the only clear 'sanction' for failure to comply with this requirement is the payment of tax at the rate provided for tax group I (which includes, i.a., all persons referred to in Article 4a (1) of the Inheritance and Gift Tax Act).[12] Along the way, however, there is generally no instrument that would verify that there was in fact a donation of a particular amount between the persons concerned. Consequently, the legislator maintains that the purpose of proper documentation of a donation is to verify beyond doubt that the donation was made by the indicated donor in a known amount. However, the lack of such verification in the manner prescribed by the legislature (bank transfer or postal order) does not prevent the legislator from taxing such a donation made on unverified terms. Of course, the tax authority has general tools to verify the correct fulfilment of tax obligations (e.g. through verification activities or a more far-reaching tax audit), but it is striking that while the legislator approaches the taxpayer with reserve at the stage of applying the tax exemption, at the stage of application of Article 4a (3) of the Inheritance and Gift Tax Act, a specific verification of the above-mentioned circumstances is usually not performed.

[12] I. Nowak, *Zwolnienie dla osób najbliższych na podstawie art. 4a ustawy o podatku od spadków i darowizn w świetle orzecznictwa i poglądów doktryny*, Toruński Rocznik Podatkowy 2012, pp. 77–78.

Conclusions

In the author's opinion, the Resolution deserves approval. Undoubtedly, the issue under study, due to its universality, is important for all Poles who can potentially receive funds by way of a donation. The importance of this issue is revealed in the common risk of a tax obligation arising if a method of transferring funds other than that provided for in Article 4a (1) (2) of the Inheritance and Gift Tax Act is used in the performance of a donation agreement. This risk reinforces the view expressed in the Resolution, because according to it, an own payment made by the donee on behalf of the donor does not satisfy the conditions for the application of the tax exemption.

This view, although different from the prevailing line of case law so far, and at the same time controversial due to its rigorousness, should be considered to be based on the current legal situation. In this context, despite the axiological doubts, it should be remembered that the primacy of the linguistic interpretation of the law has a special force in tax law.

On the other hand, the above-mentioned axiological doubts may constitute the basis for formulating possible postulates to amend Article 4a (1) (2) of the Inheritance and Gift Tax Act by taking into account "confirmation of a cash payment made by the donor or the donee to the donee's bank account" as a factual act satisfying the requirement to document the acquisition of a donation of funds. However, as long as this issue is not settled, it should be assumed, following the correct operative part of the Resolution, that "a sufficient condition for benefitting from the tax exemption provided for in that provision is that the donor has documented the transfer of funds to the donee in the manner indicated in that provision."

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Reports / Sprawozdania

STUDIA PRAWNICZE KUL
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10th Polish-Italian Law Colloquium: "Security and Democracy," Bari, 19–20 October 2023

X polsko-włoskie kolokwium prawnicze nt. „Bezpieczeństwo i demokracja", Bari, 10–20 października 2023 r.

10-ый польско-итальянский юридический коллоквиум «Безопасность и демократия», Бари, 19–20 октября 2023 г.

10-й польсько-італійський юридичний колоквіум "Безпека та демократія", Барі, 19–20 жовтня 2023 р.

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On 19 and 20 October 2023, the 10th International Polish-Italian Law Colloquium, in the form of an international research conference, was held in Italy. Such events have been held regularly for several years. As part of this cooperation, meetings of Italian and Polish lawyers are organised alternately in Poland and Italy, during which problems that are critical from the perspective of the functioning of a modern state are discussed.

The initiators of this cooperation are Prof. Zbigniew Witkowski, Dean of the Faculty of Law and Administration at the Nicolaus Copernicus University in Toruń and Prof. Gian C. De Martin from LUISS Gudio Carli University in Rome, a long-time Director of the "Vittorio Bachelet" Research Center on Public Administration. On the Italian side, the research cooperation has been undertaken by leading Italian research centres from Rome, Palermo, Molise, Florence, Venice and Messina. In Poland, such meetings were organised at the University of Toruń, the University of Gdańsk and Adam Mickiewicz University in Poznań. Conferences were held, i.a., in 2010 in Rome, in 2012 in Toruń, in 2014 in Venice, in 2016 in Gdańsk and in 2018 in Palermo. In 2021, the 8th edition of the Law Colloquium was organised in Mrągowo, with the support of the University of Warmia and Mazury in Olsztyn. In 2022, the host of the 9th Polish-Italian Law Colloquium was the John Paul II Catholic University of Lublin. The Law Colloquium titled "Human Rights in the Face of Contemporary Challenges: Polish and Italian Experiences" was organised jointly by the employees of the Department of

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Constitutional Law at the Catholic University of Lublin and the Nicolaus Copernicus University in Toruń.

The 10th meeting was held in Italy. It was divided into two parts: the first in Bari, and the second in Foggia. In Bari, the presentations and discussions were held at the Regional Council of Apulia (Apulia is an administrative region in southern Italy with the capital in Bari), and in Foggia the venue was the Faculty of Law at the University of Foggia. The conference was divided into four thematic blocks. The first was titled "New Dimensions of Security in Democratic States Among Sovereignty, Rights and Constitution," the second "External Security and Defence Policy Among National States, the European Union and the OSCE," the third was titled "Security and New Technologies: Challenges and Prospects Between Digitalisation and Cybersecurity," and the fourth was "Security and Democratic Control: Data Circulation and Transparency – What Are the Prospects."

The opening of the conference was attended by representatives of regional authorities: the President of the Regional Council of Apulia Loredana Capone, the Vice-President of the Regional Council Raffaele Piemontese, the Secretary General of the Regional Council of Apulia Domenica Gattulli, and the Mayor of Bari, the President of ANCI Antonio De Caro. A representative of the Polish Embassy in Rome also attended the meeting and read a letter from Ambassador Anna Maria Anders.

The Mayor of Bari, in his welcoming speech, emphasised that Polish-Italian Culture Week, initiated by an actress playing Bona Sforza, has been taking place in Bari for five years, to cultivate the relations between these countries. The Secretary General of the Regional Council of Apulia indicated that talking about democracy and security at such a delicate moment is an important task. As the Secretary said, democracy, both for Italy and Poland, is a fundamental value on which protection of rights is built. It is appropriate to reflect on what security is, especially after the events related to the COVID-19 pandemic that swept the world and also had an impact on human rights.

The event was attended by over forty esteemed constitutionalists from Poland and Italy, who discussed the topic of security and its perception in the face of the COVID-19 pandemic, the war in Ukraine and climate security. The first session was opened by Prof. Hanna Suchocka from Adam Mickiewicz University in Poznań, and during her speech she pointed out that ensuring security is one of the state's goals and there is no such thing as "permanent security." The next speaker was Dr. habil. Katarzyna Witkowska-Chrzczonowicz, professor at the Nicolaus Copernicus University in Toruń, who emphasised the need to protect security values, which must be democratically controlled and monitored.

The speakers raised various issues in their speeches. Prof. Vincenzo Antonelli, who works with the LUISS Guido Carli University in Rome, referred to the Hamas attack on Israel pointing to the fact that war and migration processes cause great uncertainty among the world's communities. Prof. Daniele Coduti from the University of Foggia took a similar view. He said that the concept of security is often accompanied by other terms, such as national security. For some time now, measures have been implemented that violate freedom and limit it in the name of the need to protect other values. According to the speaker, sometimes only the sense of security is protected. Dr. Alessandro Nato from the University of Teramo also spoke about the need to build a common defence policy in the European Union. The author referred to the supply of weapons to Ukraine, which in his opinion is an element of defence policy. In turn, Prof. Andrzej Szmyt from the University of Gdańsk presented a project of changes to the Constitution of the Republic of Poland in response to the war in Ukraine. The project includes legal provisions ensuring, in the event of war in Poland, access to loans for the country's defence needs.

During the afternoon session, Prof. Tanja Cerruti from the University of Turin said that she sees borders not as divisions, but as areas where integration can be achieved. Internal borders determine the identity of states, but it is hoped that they will become geographical divisions and will be increasingly less visible. The participants were moved to the issues of climate security by a joint speech by Dr. Kamila Doktór-Bindas and Dr. Ilona Grądzka from the John Paul II Catholic University of Lublin. The presentation covered the issue of security from the perspective of climate threats. The authors talked about forced ecological migration, the problems of inhabitants of small islands in the Pacific Ocean and the need to adapt international regulations to this relatively new phenomenon.

Other speakers in this session were Prof. Maciej Serowaniec, professor at the Nicolaus Copernicus University in Toruń, Prof. Gabriele Fattori from the University of Foggia, Dr. Alessandro Nato from the University of Teramo, Dr. Marta Simoncini from the LUISS Guido Carli University in Rome, and Dr. Dobrochna Ossowska-Salamonowicz from the University of Warmia and Mazury in Olsztyn.

On the second day, the meeting was held in the auditorium of the Faculty of Economics in Foggia and was opened by the Vice-President of the Regional Council of Apulia, Raffaele Piemontese. Then the speakers were the President of the Province of Foggia, Giuseppe Nobiletti, the Prefect of Foggia, Maurizio Valiante, and the Rector of the University of Foggia, Lorenzo Lo Muzio. On that day of the conference, the speakers from Italy were the representatives of the University of Foggia and the LUISS Guido Carli University in Rome. The Polish side was represented by

researchers from such centres as the University of Gdańsk, the University of Warsaw and the Nicolaus Copernicus University in Toruń. The participants discussed institutional changes in the area of security and democracy.

The meeting was summarised by Prof. Zbigniew Witkowski from the Nicolaus Copernicus University in Toruń and Prof. Gian C. De Martina from LUISS Guido Carli University in Rome.

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12th Scientific Seminar of the Department of Civil Procedure of the John Paul II Catholic University of Lublin, Milan, 22 June 2024

XII Seminarium Naukowe Katedry Postępowania Cywilnego Katolickiego Uniwersytetu Lubelskiego Jana Pawła II, Mediolan, 22 czerwca 2024 r.

XII Научный семинар Кафедры гражданского процесса Люблинского католического университета Иоанна Павла II, Милан, 22 июня 2024 г.

XII науковий семінар Кафедри цивільного процесу Люблінського католицького університету Івана Павла II, м. Мілан, 22 червня 2024 року

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The Scientific Seminar of the Department of Civil Procedure of the John Paul II Catholic University of Lublin took place on 22 June 2024. This was the twelfth edition of this annual meeting. Following last year's event in Vienna, this year's seminar was also held abroad – this time at the University of Milan (Università degli Studi di Milano) in northern Italy. It was attended by the Head of the Department of Civil Procedure, Prof. Dr. habil. Joanna Misztal-Konecka, together with academic researchers and doctoral students from the department.

This year's edition was international not only because of the location of the event in Italy but also because of the participation of Prof. Albert Henke, who is affiliated with the host university and conducts research, among other things, in Italian civil procedure. Together with Prof. Dr. habil. Joanna Misztal-Konecka, he opened the seminar. The participants were warmly welcomed to the University of Milan, leading to fruitful discussions. Each speaker presented an absorbing topic in the civil procedure framework during the seminar. The papers often had a theoretical and practical dimension, as the seminar participants were also practising judges, officers of justice, judicial assistants, lawyers or legal advisers.

The seminar was divided into two panels, which were moderated by Prof. Dr. habil. Joanna Misztal-Konecka, who invited individual speakers to the floor and introduced the topics of each paper. Ten papers were presented. The first were devoted to recently introduced or planned amendments to the Code of Civil Procedure.[1]

[1] Act of 17 November 1964 on the Code of Civil Procedure, consolidated text: Journal of Laws [Dziennik Ustaw] 2024 item 1237 as amended.

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The first speaker was Dr. Kinga Dróżdż-Chmiel with the paper, "Possession of an email address by a professional attorney – some remarks *de lege lata* and *de lege ferenda*." She focused not only on legislative solutions in this respect but also referred to the practical problems and challenges related to the electronic delivery of correspondence to professional attorneys, taking into account the ethical requirements binding on members of professional self-governments of professional attorneys. The second speaker was Dr. Paulina Woś. Her presentation was entitled "March changes in civil procedure made by the Act of 7 July 2023 (Journal of Laws of 2023, item 1860)." The paper focused on the most significant changes affecting the model of civil procedure. The speaker referred in particular to the provisions introducing open hearings held using technical devices that allow them to be conducted remotely, as well as the norms regulating the composition of courts of both first and second instance. In turn, Dr. Sylwia Lisowska-Krakowiak presented the paper, "The impact of the amendment of Art. 139^1 (2) of the CCP, in force since 1 July 2023, on the plaintiff's procedural situation." She discussed the consequences of the amendment of Article 139^1 (2) of the CCP. The speaker also referred to the practical issues of making, on the initiative of the plaintiff, service of the first correspondence in the case on the defendant by a bailiff, including the efficiency of the institution in question, as well as possible actions to be taken if the bailiff's service proves ineffective.

The next two papers, on the other hand, concerned real estate. Dr. Paweł Wrzaszcz delivered one entitled "Conduct of legal transactions concerning a parking space as a right related to the separate ownership of a dwelling." He focused on answering whether legal transactions "concerning a parking space alone are allowed, given that, in principle, it is a right connected with real estate. The speaker raised the issue of the defectiveness of the current legislation on this matter. Subsequently, Dr. Emil Kowalik presented the paper "Transformation of an entrepreneur into a capital company and the form of a real estate transfer." The speaker discussed the problem of transferring an entrepreneur's real estate ownership during its transformation into a commercial company, which occurs in the practice of legal transactions. This includes issues related to disclosing this in the land and mortgage register. This presentation concluded the first panel and was immediately followed by a fruitful discussion.

The second part of the seminar began with M.A. Katarzyna Woch's paper entitled "Action to exempt a seized object from enforcement in criminal enforcement proceedings." The speaker presented the mutual relations between civil and criminal proceedings at the enforcement stage. She referred to the possibility of rebutting the presumption of Article 45 (3) of the Penal Code[2] before a civil court. Then

[2] Act of 6 June 1997 on the Penal Code, consolidated text: Journal of Laws 2024 item 1228 as amended.

Dr. Dominika Wójcik discussed the paper entitled "Securing evidence vs securing means of evidence in intellectual property proceedings." The presentation raised the issue of the institution of securing the nature of the evidence in separate proceedings in intellectual property cases and discussed the aim of the legal construction in question. It was also juxtaposed with securing evidence in a civil trial. The next speaker, Katarzyna Kajmowicz, M.A., delivered a paper "Evaluating the admissibility of further procedural material in proceedings before the court of second instance." The presentation dealt with the submission of evidence to a court of appeal, taking into account the applicable regulations and the jurisprudence in this respect. The second panel was closed with M.A. Anna Haciuk's paper "Opinion of a science institute or a science and research institute in civil proceedings." The paper pointed out the cases when it is justified to admit and take such evidence and compared it with submitting an expert's opinion alone.

Next, Prof. Dr. habil. Joanna Misztal-Konecka presented the paper "The legal character of Supreme Court resolutions." The presentation juxtaposed Supreme Court resolutions with decisions issued by courts, including common courts, in civil proceedings, taking into account their subject matter and characteristics. The issue of classifying resolutions as judgments was also addressed. After the speech by the Head of the Department of Civil Procedure, a discussion began. During this time, each speaker had the opportunity to elaborate on the issue presented by answering questions from the other seminar participants. An undeniable advantage of this part of the meeting was that the speakers also drew the topics of their speeches from their professional practice, which gave the seminar not only a theoretical and scientific but also a practical one related to the discussion of challenges faced by law practitioners regarding the matters presented by the speakers.

At the end, the seminar was summarised by Prof. Dr. habil. Joanna Misztal-Konecka. The annual scientific seminars of the Department of Civil Procedure of the John Paul II Catholic University of Lublin held abroad have already become a tradition. They provide an opportunity for their participants to share their observations on topics that interest them and are focused on civil procedure issues. In addition, the fact that they have already been held abroad twice is shaping a new tradition of holding meetings at universities in other countries, which provides a stimulus to gain international experience. This tradition is one that participants of past meetings are keen to continue.

Faculty activities /
Z życia Wydziału

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DIARIUSZ
Kalendarium ważniejszych wydarzeń naukowych z udziałem pracowników Wydziału Prawa, Prawa Kanonicznego i Administracji KUL styczeń – marzec 2024 r.

DIARY
Calendar of major scientific events with the participation of academic staff of the Faculty of Law, Canon Law and Administration of the John Paul II Catholic University of Lublin
January – March 2024

КАЛЕНДАРЬ МЕРОПРИЯТИЙ
Главные научные события с участием сотрудников Факультета права, канонического права и администрации Люблинского католического университета Иоанна Павла II
январь – март 2024 года

ЖУРНАЛ ПОДІЙ
Календар головних наукових заходів за участю співробітників факультету Права, Канонічного Права та Адміністрації Люблінського католицького університету Івана Павла II
січень – березень 2024 р.

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Styczeń

15 stycznia 2024 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr **Marleny Krawczyk** pt. *Prawo do poznania wizerunku sprawcy przestępstwa*. Promotor: dr hab. Wojciech Lis, prof. KUL.

17–19 stycznia 2024 r. – dr **Robert Tabaszewski**, podczas ogólnopolskiej konferencji naukowej nt. *EU Enlargement and Acquis Adoption Burden: State of Art and Proposals for a Correct Adoption of the Acquis for Albania*, zorganizowanej przez Uniwersytet w Elbasanie im. Aleksandra Xhuvaniego, wygłosił referat pt. *Navigat-*

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ing the Boundaries of Human Rights in the EU: A Case Study of Poland's Compliance and Challenges.

19 stycznia 2024 r. – dr **Zuzanna Gądzik**, podczas ogólnopolskiej konferencji naukowej nt. *Cyberprzestępczość a polskie prawo karne*, zorganizowanej przez Studenckie Koło Naukowe Prawników UMCS, wygłosiła referat pt. *Catfishing – perspektywa prawnokarna*.

30 stycznia 2024 r. – prof. dr hab. **Joanna Misztal-Konecka**, podczas Annual Conference and Meeting of the Association of European Data Protection Judges nt. *Data Protection for the Judiciary*, wygłosiła referat pt. *Judicial Practice in GDPR Compliance Cases at the National Level*.

Luty

3 lutego 2024 r. – dr **Paweł Widerski**, podczas II Ogólnopolskiego Kongresu Gospodarczego nt. *Prawo handlowe – rynki kapitałowe – bankowość – podatki – finanse*, zorganizowanego przez Stowarzyszenie Center for American Studies oraz Fundację Center for American & European Studies, wygłosił referat pt. *Obrót bonami skarbowymi – wybrane zagadnienia*.

12–14 lutego 2024 r. – dr hab. **Krzysztof Wiak**, prof. KUL, podczas międzynarodowej konferencji naukowej nt. *Human. Meanings and Challenge*, zorganizowanej przez Assembly of Pontifical Academy for Life, wygłosił referat pt. *Dr Wanda Półtawska (1921–2023)*.

22 lutego 2024 r. – ks. prof. dr hab. **Antoni Dębiński**, podczas ogólnopolskiej konferencji naukowej nt. *Nasz Założyciel – ks. Idzi Radziszewski. Przyjaciele i kontynuatorzy*, zorganizowanej przez Ośrodek Badań nad Dziejami KUL, wygłosił referat pt. *O miesięczniku „Prąd" i jego związkach z KUL-em*. Ponadto dr hab. **Paweł Fajgielski**, podczas ogólnopolskiej konferencji naukowej nt. *Przekazywanie danych osobowych poza Europejski Obszar Gospodarczy – uwarunkowania prawne i praktyczne*, zorganizowanej przez Wydział Prawa i Administracji Uniwersytetu Łódzkiego, wygłosił referat pt. *Transfer danych osobowych na podstawie standardowych klauzul umownych*.

29 lutego 2024 r. – dr hab. **Paweł Fajgielski**, podczas ogólnopolskiej konferencji naukowej nt. *Dostęp do informacji publicznej i otwarte dane. Perspektywy i wyzwania*, zorganizowanej przez Wydział Prawa i Administracji Uniwersytetu Łódzkiego oraz Wydział Prawa i Administracji Uniwersytetu Kardynała Stefana Wyszyńskiego, wygłosił referat pt. *Usuwanie danych osobowych z BIP*.

Marzec

4 marca 2024 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr **Igi Lalak** pt. *Społeczna inicjatywa mieszkaniowa jako prawna forma zaspokajania potrzeb mieszkaniowych obywateli przez państwo*. Promotor: dr hab. Tomasz Sienkiewicz, prof. KUL.

5 marca 2024 r. – dr **Robert Tabaszewski**, podczas IV Międzynarodowej Konferencji Naukowej nt. *Prawa człowieka jako fundament demokratycznego panstwa prawnego: Gospodarczy wymiar praw człowieka i obywatela*, zorganizowanej przez Stowarzyszenie Center for American Studies oraz Fundację Center for American & European Studies, wygłosił referat pt. *Harmonizing Economic and Professional Freedoms within the Framework of Human Rights Boundaries*.

13 marca 2024 r. – podczas ogólnopolskiej konferencji naukowej nt. *Zrównoważony rozwój instrumentem współpracy makroregionalnej w Europie Środkowo-Wschodniej*, zorganizowanej przez Stowarzyszenie Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego, Instytut Prawa Akademii Zamojskiej, Fundację „Myśląc Ojczyzna" im. ks. inf. Ireneusza Skubisia oraz Instytut Rozwoju Samorządu Terytorialnego Województwa Lubelskiego, ks. prof. dr hab. **Mirosław Sitarz** wygłosił referat pt. *Troska o ład społeczny Prymasa Tysiąclecia*, natomiast dr **Agnieszka Romanko** wygłosiła referat pt. *Współpraca polsko-węgierska w nauczaniu św. Jana Pawła II*.

18 marca 2024 r. – odbyła się publiczna obrona rozprawy doktorskiej mgr **Emilii Gulińskiej** pt. *Zasada pogłębiania zaufania obywateli do organu władzy publicznej*. Promotor: ks. dr hab. Sławomir Fundowicz.

20 marca 2024 r. – dr hab. **Dominik Tyrawa**, podczas ogólnopolskiej konferencji naukowej nt. *Administracja gospodarcza – zadania, oczekiwania, reformy*, zorganizowanej przez Katedrę Prawa Administracyjnego oraz Katedrę Prawa Gospodarczego i Finansowego Wydziału Prawa i Ekonomii Uniwersytetu Kazimierza Wielkiego w Bydgoszczy, wygłosił referat pt. *Spółka ważna dla rozwoju gminy – próba dookreślenia pojęcia*.

21 marca 2024 r. – dr **Zuzanna Gądzik**, podczas ogólnopolskiej konferencji naukowej nt. *Ochrona zwierząt w Polsce jako wyzwanie dla prawa karnego i kryminologii. Perspektywy i wyzwania*, zorganizowanej przez Katedrę Prawa Karnego i Kryminologii Wydziału Prawa Uniwersytetu w Białymstoku, wygłosiła referat pt. *Egzotyczne zwierzęta i jak je znaleźć – prawnokarna ochrona gatunków obcych w Polsce*.

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Przyjęto następującą klasyfikację: I. Opracowania książkowe; II. Artykuły i studia; III. Hasła encyklopedyczne; IV. Glosy; V. Recenzje i noty; VI. Sprawozdania; VII. Inne.

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