

## Countering Tax Avoidance

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The Anti Tax Avoidance Rule discussed in the article breaches systemic principles that compel the legislator to respect the principle of a democratic rule of law (as per Article 2 of the Constitution). In an obvious and clear way, the rule betrays the principle of legitimate expectation of the state and statutory tax law. It means that the rule is contradictory to Article 2 of the Constitution in conjunction with Article 31, section 3 of the Constitution. Thus, a constitutional regulation was breached, which obliges the legislator to make precise – that is, unambiguous in terms of the substance, scope, and prerequisites – permissible interferences in taxpayers' rights *ratione personae*. Arbitrary inhibition of the freedoms guaranteed by the Constitution, including economic freedoms, is all the more hazardous for the taxpayer because the procedural regulations applicable within the framework of the rule, which are intended to protect the taxpayer from abuse of the rule, are only apparent; they are a legal illusion. This, in turn, breaches the principle of mutual loyalty that the taxpayer-state relation is supposed to be characterised by.

The rule has these qualified faults because: a) It does not ensure legal security of the taxpayer; b) It does not respect the principle of descriptiveness of the provisions of tax law; c) It breaches the principle of mutual loyalty that the taxpayer-state relation is supposed to be characterised by; d) It also breaches the principle of legitimate expectation of the state and the tax law it passes.

By the fault of the legislator, the legal construction of the rule is unclear, imprecise, and ambiguous, which creates uncertainty as to the rights and obligations of the taxpayer, and so it creates a basis for arbitrary decisions of tax bodies because the freedom of the tax authority's decision is excessive.

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### Tax law versus civil law: the essence of the conflict

In civil law, two parties entering into an agreement may shape their legal relation as they wish, as long as its substance or purpose contradict neither the nature of such a relation, nor an act of

law, nor the principles of social co-existence. That way civil law expresses the principle of party autonomy, which is of a particular relevance in legal transactions. Parties to an agreement may make unrestrained decisions as to whether they want to conclude an agreement or not, which counterparty to choose, what the wording of the agreement

will be as well as what form of establishment of a legal relation to select.<sup>1</sup> The consequence of contractual freedom in legal transactions is the principle that anything that is not forbidden is allowed. Such a principle does not apply in tax law.

This is because tax law regulates social relations between the state and entities obliged to make payments of money to the state. These relations, whose nature is constructive, are only constituted on the legislator's volition. A specific characteristic of the rules of tax law is that the legislator compels the addressees of the rules to behave in a way defined in the legal tax rules. A legal tax rule has a completely different character than a civil law rule and, what is more, tax law is one of the most restrictive branches of public law (Małecki, 1998, p. 155 ff).

Relations between tax law and civil law are both systemic and structural in nature (Golat, 2000).

The essence of the systemic relations consists in tax law using concepts developed within the framework of civil law. In that case, the consequences of events or legal acts concerned with specific civil law concepts create premises for the functioning of tax and legal concepts. In effect, tax obligation may arise with respect to a particular tax.

The structural connections arise from the fact that both civil and tax law have a similar (and sometimes identical) scope of social relations that are regulated. A characteristic phenomenon of mutual penetration of legal norms emerges. As a consequence of legal transactions shaped by the principle of autonomy of parties to civil law relations, revenue, income, and equity are generated as well as operations on assets are carried out. All of those: revenue, income, assets, and allocation of assets may be subject to taxation. In that case, the substance of a civil law relation is simultaneously similar or identical to the substance of a tax law relation.

Mutual relations both *ratione personae* and *ratione materiae* in character are formed. This is be-

cause both civil law and tax law use the following notions with respect to the social relations that they regulate: assets, property rights, real estate, movable goods, revenue, income, profit, expense, cost, depreciation, service, commodity, sales, agreement, mortgage, lien, heritage, leasing, licence, trademark, know-how, receivables, assignment of receivables, debt, assumption of a debt, exemption from debt, and loan. The notions used in tax law: natural person, legal person, partnership, and entities without legal personality – are explained with the use of the concepts of civil law.

The relations and mutual dependencies between civil law and tax law show that the alternative to meeting the tax obligation is the possibility of evading it, which may lead to decreased effectiveness of tax regulations. Validity and effectiveness of civil law agreements do not mean that their consequences are legal within the framework of tax law.

The basic issue is the effectiveness of civil law agreements within the framework of tax law, and in particular the consequences as regards tax evasion or reduction of tax burdens with the use of civil law concepts and principles (Kalinowski, 2001, pp. 45–177).

### **Circumvention of tax law: evolutionary aspect (as regards law and judicial decisions)**

Since 1 January 1998, that is, from the day the provisions of Tax Ordinance entered into force, there had been no legal regulation that would – whether with regard to the subject-matter or in procedural terms – be concerned with circumvention of tax law.<sup>2</sup> That had been the case until 31 December 2002.

The essence of tax proceedings was the tax authority's right to evaluate the substance of any legal relation that might influence the burden of

<sup>1</sup> See more in Karwat(2002), pp. 42–49; Rozmaryn (1939), pp. 132–287; Olesińska (2013), pp. 25–43.

<sup>2</sup> See more in: Stanik, Winiarski (2009); Stanik (2008), pp. 48–69.

tax obligation imposed on a taxpayer; the substance of civil law agreements as well as the parties' will expressed in them to a degree that they influence tax obligation are elements of factual circumstances within the framework of tax law. In tax law, validity of civil law acts is different from the effectiveness of those acts. Hence, it is possible that a legal act will be valid from the point of civil law but will not give rise to the expected consequences as regards tax obligations – ones that are expected by the parties to a civil law agreements.

The concept of circumvention of tax law has found support in the judicial decisions of courts, which held a view that the provisions of tax law as an autonomous law may not be considered with respect to the consequences of civil law acts carried out by taxpayers. Thus, correctness in terms of civil law as well as the consequences of execution of an agreement by a party should be considered separately from the consequences of specific economic operations made by a taxpayer within the framework of their tax obligations.<sup>3</sup>

It has also been concluded that when interpreting tax law, tax authorities should pay particular attention to whether freedom of shaping civil law relations as well as interpretation of the provisions of tax law from the perspective of civil law does not lead a particular entity to evade taxation or to a reduction of their tax burden.<sup>4</sup>

What is more, in tax cases, the tax authorities that issue a decision may evaluate not only civil law agreements from the point of view of the fiscal interest understood in narrow terms but also the substantial content of the agreements in terms of the legal consequences in the light of the general provisions of the Civil Code concerning both legal acts and the provisions on contractual liabilities; while evaluation from the point of view of the prerequisites stipulated in Article 58, section 1 in

<sup>3</sup> Judgement of the Supreme Administrative Court of 10 November 1994, SA/Po 1652/94, Monitor Podatkowy 1995, No. 7.

<sup>4</sup> Judgement of the Supreme Administrative Court in Katowice of 27 September 1995, SA/Ka 1682/94, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

conjunction with Article 353, section 1 of the Civil Code is possible as well.<sup>5</sup>

It was also indicated that agreements named 'hiring', 'lease with the right to collect proceeds' or with a name of a similar character, including with the term 'leasing', should, first and foremost, be evaluated in terms of the consistency of their name with their substance. At this stage of examination, tax authorities may take into account any criteria, especially the parties' intent and purpose of the agreement.<sup>6</sup>

It is thus acceptable to examine a civil law agreement between parties within the framework of tax law, which means that such an agreement must be evaluated in terms of its implications as regards tax consequences that it gives rise to.

There has also been criticism expressed in the administrative courts' judicial decisions. It has been concluded that Article 24b, section 1 of Tax Ordinance authorising tax authorities and fiscal audit bodies to disregard – while considering tax cases – the consequences of legal acts performed exclusively in order to obtain a tax advantage was only introduced on 1 January 2003.

This amendment was normative and confirmed that before it entered into force, such practice had no legal basis.<sup>7</sup>

There was also a thesis put forward by administrative courts that Article 24b, section 1 of Tax Ordinance introduced a general rule that was only relevant to a tax law relation. Hence, it was not relevant for assessment of civil law acts from the perspective of their compliance with the binding civil law rules. It was a special regulation allowing to disregard the tax consequences of acts that are

<sup>5</sup> Judgement of the Supreme Administrative Court in Warsaw of 07 April 1999, III SA 1610/98, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>6</sup> Resolution of the Supreme Administrative Court of 4 June 2001, FPS 14/00, ONSA 2001, No. 4, item 147.

<sup>7</sup> Judgement of a composition of 7 judges of the Supreme Administrative Court of 24 November 2003, FSA 3/03, ONSA 2004, No. 12, item 44; see similar judgements of the Regional Administrative Court in Warsaw: of 30 May 2005, III SA/Wa 1/05, POP 2006; No. 4, item 61; of 31 May 2006, III SA/Wa 983/06, POP 2007, No. 2, item 28.

valid within the framework of civil law (especially agreements concluded based on the principle of contractual freedom arising from Article 353<sup>1</sup> of the Civil Code), if the only purpose of these acts is to produce specific tax consequences.<sup>8</sup>

On 1 January 2003, Article 24b, section 1<sup>9</sup> was introduced into Tax Ordinance; it stipulated that when considering tax cases, tax and fiscal audit authorities shall disregard the tax effects of legal acts, if these authorities prove that such acts could not have been expected to produce any significant advantages other than the ones resulting from lowering the amount of tax due or increasing loss, tax overpayment or tax refund.

With the Judgement of the Constitutional Tribunal of 11 May 2004, K 4/03, OTK-A 2004, No. 5, item 41 this provision was judged to be unconstitutional.<sup>10</sup>

Taking into consideration the taxpayer's right to optimise tax burdens as well as freedom of shaping civil law acts to a degree permitted by law, administrative courts' judicial decisions show remarkable restraint as regards the issue of circumvention of tax law.

And thus, a claim was formulated that tax authorities have no legal basis within the framework of tax law to question effectively concluded agreements, even if their purpose is to lower the tax burden. Striving to pay as little tax as possible

<sup>8</sup> Judgement of the Supreme Administrative Court of 18 October 2006, II FSK 1353/05, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>9</sup> Act of 12 September 2002 amending the Tax Ordinance act and some other acts (Journal of Laws No. 169, item 1387, as amended).

<sup>10</sup> The Tribunal ruled that the general rule stipulated in Article 24b does not adhere to the constitutional standards of proper legislation, breaches the principle of legitimate expectation of the state and statutory law (as per Article 2 of the Constitution) and does not meet the requirement of proper descriptiveness of statutorily defined elements of tax liability (as per Article 217 of the Constitution). This stance was quoted in the explanatory statement to an act amending the CIT Act as regards removal of Articles 24a and 24b of Tax Ordinance and introduction of Article 199a to it as a basis for the amendment (the amendment was made with the act of 30 June 2005 amending the Tax Ordinance act and some other acts, Journal of Laws, No. 143, item 1199, as amended).

is not prohibited by law; it is though, as it were, a natural right of each taxpayer. It is the tax authorities' and, subsequently, the administrative courts' job to assess how effective (i.e., compliant with the law) such striving by a particular entity is.<sup>11</sup> There is also no general rule obliging the taxpayer to operate in a way that aims at generating the highest possible tax liability.<sup>12</sup>

On 1 September 2005, Article 199a was introduced into Tax Ordinance (and it was not a law circumvention rule). This legal solution was only concerned with three issues:

- determination of the substance of a legal act performed by parties to an agreement;
- determination of tax effects when a legal act is fictitious;
- a tax authority's request to a common court to establish whether a legal relation or right exists or not.

The issue of the authority of tax authorities is thus significant; whether they are authorised to bring an action to a common court under Article 189<sup>1</sup> of the act of 17 November 1964 – the Code of Civil Procedure (consolidated text: Journal of Laws of 2014, item 101, as amended) to establish whether a legal relation or right exists or not, if any doubt arises in this respect. The issue is when a tax authority becomes obliged to bring such an action.<sup>13</sup>

The judicature of an administrative court solved this problem by formulating the following theses.

Article 199a, section 3 of Tax Ordinance indicates that doubts as to the existence or non-existence of a legal relation or right may only be considered, if there has been evidence collected in a case which gives rise to such doubts.<sup>14</sup>

<sup>11</sup> Judgement of the Supreme Administrative Court of 16 December 2005, II FSK 82/05, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>12</sup> Judgement of the Regional Administrative Court in Warsaw of 31 May 2006, III SA/Wa 983/06, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>13</sup> See more in: Łukawska (2008), p. 25; Filipczyk (2007), p. 20.

<sup>14</sup> Judgement of the Regional Administrative Court in Rzeszów of 19 February 2008, I SA/Rz 906/07, Central

Only then is a tax authority obliged to bring such an action, if doubts as to the existence or non-existence of a legal relation or right that tax effects are concerned with could not have been eliminated in the course of tax proceedings. The factual circumstances remain outside the scope of Article 199a, section 3 of Tax Ordinance.<sup>15</sup>

The findings of an unappealable conviction issued in criminal proceedings may not be challenged in the course of a civil suit under Article 199a, section 3 of Tax Ordinance.<sup>16</sup>

Article 199a, section 3 of Tax Ordinance does not define any tax effects of the taxpayer's activity in terms of their rights and obligations. Its substance and location within the provisions of Tax Ordinance demonstrate that its character is strictly procedural. It may be considered breached to a degree that provides basis for investigating a complaint, if it is possible to demonstrate a significant impact on the case result produced by the fact that the provision has not been applied. The notion of doubts used in Article 199a, section 3 of Tax Ordinance should be understood in objective terms. This means that they may not be considered through the prism of a subjective conviction of a tax authority that there are no such doubts or a subjective conviction of the taxpayer that such doubts exist.<sup>17</sup>

The essence of a regulation introduced with Article 199a, section 3 of Tax Ordinance was the discontinuance of tax authorities' authority to single-handedly settle difficult civil law issues arising in the course of tax proceedings; the cited regulations have not taken away tax authorities' authority to single-handedly determine the existence

or non-existence of a legal relation or right. Only then is a tax authority obliged to bring such an action, if doubts as to the existence or non-existence of a legal relation or right that legal effects are concerned with could not have been eliminated in the course of tax proceedings.<sup>18</sup>

Article 199a, section 3 of Tax Ordinance compels a tax authority to bring an action to a common court, if doubts as to the existence or non-existence of a legal relation or a right that tax effects are concerned with arise in the course proceedings. This obligation is not relevant in a situation when a tax authority challenges the fact of execution of an agreement but none of the parties in the proceedings questions whether an agreement has been concluded.<sup>19</sup>

The notion of doubts used in Article 199a, section 3 of Tax Ordinance should be understood in objective terms. Assessment in this respect must be preceded by analysis of the entirety of the circumstances in a case. Doubts may not arise from a tax authority's subjective opinions but the collected evidence.<sup>20</sup>

First, a tax authority is obliged to attempt to take evidence from a party's statements. Next, in line with Article 191 of Tax Ordinance, it should assess the collected evidence. Only when the assessment justifies a claim that there are objective doubts as to the matter described in Article 199a, section 3 of Tax Ordinance, it is a tax authority's obligation to bring an action to a common court to establish whether a legal relation or right that tax effects are concerned with exists or not. If, however, a tax authority assesses the legitimate evidence collected in the case in line with Article 191 of Tax Ordinance and as a result demonstrates that a given circumstance has been proven beyond doubt

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Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>15</sup> Judgement of the Regional Administrative Court in Bydgoszcz of 26 February 2008, I SA/Bd 838/07, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>16</sup> Judgement of the Regional Administrative Court in Kraków of 27 February 2008, I SA/Kr 481/07, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>17</sup> Judgement of the Regional Administrative Court in Gdansk of 6 March 2008, I SA/Gd 1028/07, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

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<sup>18</sup> Judgement of the Regional Administrative Court in Gorzów of 27 March 2008, I SA/Go 113/08, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>19</sup> Judgement of the Supreme Administrative Court of 4 June 2008, II FSK 523/07, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>20</sup> Judgement of the Regional Administrative Court in Olsztyn of 11 February 2009, I SA/Ol 446/08, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

and appropriately justifies its stance, then there is no sufficient basis for the application of Article 199a, section 3 of Tax Ordinance.<sup>21</sup>

### Circumvention of tax law: its nature and character

A person acts against an act of law, if they take action that is contradictory to the stipulations of the act; a person acts fraudulently with respect to an act of law, if they take action that is in compliance with the wording of the act while simultaneously circumventing its intention.<sup>22</sup>

Tax and legal conditions are an important reason for concluding agreements. Tax advantages for both parties to an agreement are taken into consideration. It is evaluated whether civil law concepts may be useful in complete circumvention of tax obligations and which can only serve to limit the effectiveness of tax regulations.

The provisions of tax law do not forbid parties to an agreement from taking actions or performing acts that would be the most advantageous from the point of taxation. There is only one condition. The actions and acts that produce such an effect must be legal and consistent with tax law.

The default character of a civil law act means that it is possible for the parties to shape their legal circumstances as regards their obligations and rights freely. That freedom is, nevertheless, only applicable in civil law (in terms of validity and effectiveness of agreements). The consequences of civil law acts are evaluated from the point of view of taxation and the substance of a tax obligation as regards a given tax serves as a benchmark. The functions that tax law is supposed to serve are also taken into consideration. The fundamental and principal objective of tax regulations is fiscal in character.

<sup>21</sup> Judgement of the Regional Administrative Court in Warsaw of 19 September 2007, VIII SA/Wa 425/07, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

<sup>22</sup> Radwański (2002), p. 227; see also: Longchamps de Bériér (2004).

Tax law is not bound by the civil law consequences arising from a given act (such as a contract or agreement). In practice, this means that tax authorities are not bound by the civil law assessment of the consequences both when establishing the emergence of a tax obligation and when establishing or determining the amount of a tax liability.

Civil law concepts and principles may serve to produce effects within the framework of tax law, which arise from fictitious acts.

Fictitious acts are ones that only pretend to produce a certain actual effect. The form, mode, substance, time, place of activity may be pretended, while actual legal acts are hidden behind the fictitious ones. Thus, the determination of a tax obligation is concerned with the difference between pretended and actual acts or actions. Civil law may be used to mask the actual substance of relations between parties to an agreement.

Limitation of the efficacy of application of tax regulations is achieved with the use of the concept of circumvention of an act of tax law (Brzeziński, 2004, p. 7; Karwat, 2002; Kalinowski, 2001; Kukulski, 2005). Two possible understandings of the term 'circumvention of an act of tax law' are offered in the tax doctrine.<sup>23</sup>

Firstly, circumvention of an act of tax law is such deliberate shaping of relations that makes tax in a given case undue despite the fact that the taxpayer achieves the same effects as would be produced in circumstances giving rise to a tax obligation.

Secondly, circumvention of an act of tax law is deliberate shaping of relations in a way that causes a tax liability not to emerge despite the fact that the taxpayer achieves the same economic effects as in identical circumstances giving rise to a tax obligation but qualified differently from the point of view of civil law. It may be assumed that it is circumvention of tax law, if a taxpayer's action

<sup>23</sup> See more in: Brzeziński (2002), p. 50; Kudert, Jamróży (2007); Litwińczuk (2003); Radzikowski, *Klauzula obejścia prawa podatkowego a pozorność czynności prawnej* (2007); idem, *Normatywne podstawy koncepcji obejścia prawa podatkowego* (2005); Rosmarin, p. 196 ff.

breaching the provisions of tax law is undertaken in order to obtain a relief that is otherwise impossible to obtain, if that action were consistent with the stipulations of the provisions of tax law (Stanik, Winiarski, 2008).

It may thus mean that in order for circumvention of an act of tax law to take place, the following prerequisites must be fulfilled (Karwat, 2002):

- The taxpayer achieves such an economic (or financial) effect that should be burdened with tax in accordance with the legislator's will;
- The transaction has a civil law form that does not give rise to a tax obligation;
- The form of transaction has an unusual character in relation to the economic (or financial) effect;
- The taxpayer reveals the intention to circumvent tax.

Circumvention of an act of tax law is thus concerned with the abuse of a civil law construct that, if applied, leads to non-materialisation of the normative factual circumstances that a tax act attributes a tax obligation to.<sup>24</sup>

Transactions concluded in order to circumvent an act of tax law have some specific characteristics and the basic ones may be described as follows:<sup>25</sup> they are unnatural, bizarre, unclear, artificial, complicated, drawn-out, meticulous, ineffective, and not very useful. It may thus be concluded that the essence of circumvention of a tax obligation is taking action oriented at shaping economic, property or financial relations in a specific way different from the typical one under the given circumstances and the

<sup>24</sup> Karwat, 2002; Judgement of the Regional Administrative Court in Gorzów Wielkopolski of 27 March 2008, I SA/Go 113/08, Central Database of Administrative Courts' Judicial Decisions (CBOSA). Ignorance of the provisions of the law does not testify to deliberate activity within the framework of a "deceptive transaction." In order for participation in such a transaction to produce negative effects for the purchaser, there must be "deliberate intent"; whereas ignorance of the provisions of the law concerning a given transaction is burdened with negligence, which is a type of fault but unintentional and not deliberate – see also Litwińczuk (2000).

<sup>25</sup> Ibidem, p. 35.

only intended effect of such actions is a more advantageous – from the point of view of the taxpayer – legal and tax classification of these relations.<sup>26</sup>

When evaluating the legal and tax effects of circumvention of an act of tax law with the use of civil law concepts, the following criteria need to be applied:

- tax obligation is part of public law, therefore, rules governing civil law relations may not be the only ones applied to it;
- neither tax obligations nor the rights relevant to them – arising from acts of tax law – may be exempted, changed or broadened with civil law agreements;
- civil law agreements concluded by parties may not produce any effects that would consist in modifying taxpayers' tax obligations just as they cannot cause changes in the existing or future tax relations. Since such agreements function within the framework of private law, they do not influence the obligations of the parties to them, which arise from the commonly applicable provisions of tax law;
- civil law agreements that shape mutual rights and obligations of the parties to the agreement may not be used to circumvent the mandatory provisions of tax law;
- the principle of contractual freedom may not be understood as a means of successful incapacitation of tax law;
- tax obligations and rights are not contingent upon the parties' will and the rule 'what is not forbidden is allowed' does not apply in tax law; On the contrary, each taxpayer's right and obligation must arise from a particular provision of tax law.<sup>27</sup>

<sup>26</sup> Ibidem, p. 35.

<sup>27</sup> Civil law agreements may not change the obligations that arise from the provisions of tax law and tax authorities are authorised within their competence (under Article 191 of Tax Ordinance) to assess the effectiveness of civil law acts from the point of view of the law on levies. Judgement of the Supreme Administrative Court of 12 February 2008, I FSK 264/07, Central Database of Administrative Courts' Judicial Decisions (CBOSA).

## Anti Tax Avoidance Rule

This is a legal solution introduced into Tax Ordinance on 15 July 2016 (Section IIIA, Chapter 1 – Anti Tax Avoidance Rule).

Tax avoidance is a legal form of tax optimisation, which is consistent with the law but may lead to lowering the amount of tax due. Prior to the introduction of the rule to the Polish legal order, there was no rule compelling the taxpayer to take action that would lead to an increase in a tax burden.<sup>28</sup>

The rule delimits permissible tax optimisation, that is, tax optimisation which is acceptable by tax authorities. It provides criteria for the Head of the National Revenue Administration (NRA) to assess whether a taxpayer can be charged with crossing the boundary of acceptable tax avoidance.

In accordance with Article 119a, tax avoidance takes place when the following prerequisites exist jointly:

- the taxpayer takes action in order to obtain a tax advantage;
- gaining a tax advantage is the main or sole purpose of the taxpayer's action;
- under given factual and legal circumstances, the taxpayer's action is contradictory to the substance or purpose of an act of law or a provision of an act of law;
- the taxpayer's manner of operation is artificial.

The substance, scope, and legal form of the rule limit and quite frankly eliminate the possibility of gaining a tax advantage in compliance with the law. The border between optimisation and tax avoidance has been shifted in such a way that any action accompanied by an intention to gain a tax advantage may be qualified as tax avoidance.

The rule is general in character, which means that, in principle, it can be applied to any act performed in order to gain a tax advantage regardless

of which tax the expected advantage is supposed to be concerned with.<sup>29</sup>

The essence of the rule is determination of tax effects in relation to the existing factual circumstances but in accordance with the principles appropriate for the factual circumstances that have not occurred but which should be deemed adequate for the determination of the tax effects under specific circumstances. The tax effects are determined based on such circumstances that could have occurred if an appropriate act had been performed. The appropriate act may consist in both taking action and failure to act. An act is deemed appropriate, if, under given circumstances, it could be performed by a reasonable entity pursuing legal objectives other than obtainment of a tax advantage that is inconsistent with the substance or purpose of a tax act or a provision of a tax act and the entity's manner of operation were not artificial.

In order to apply the rule, it is necessary to determine that consecutive actions are related in a way showing that their primary and common purpose is to avoid taxation.

The definition of a tax advantage does not specify the essence of this notion. It is only limited to an enumeration of the forms that such an advantage may take (see Article 3 point 18 of Tax Ordinance):

- non-emergence of a tax liability;
- deferral of a tax liability;
- lowering of a tax liability;
- emergence or overstatement of loss;
- emergence or overstatement of an overpayment;
- establishment of the right to a tax refund;
- overstatement of a tax refund.

When defining a tax advantage, the legislator resigned from specifying the limit of its amount.<sup>30</sup>

The tax advantage is supposed to be the main or one of the main purposes of the taxpayer's actions. In accordance with Article 119d, when assessing whether a tax advantage was the main or

<sup>28</sup> Judgement of the Constitutional Tribunal of 11 May 2004, K4/03.

<sup>29</sup> Except for value added tax.

<sup>30</sup> Such a limit had been in force until 31 December 2018 and it was PLN 100 thousand.

one of the main purposes of performing an act, its economic objectives indicated by the taxpayer are taken into consideration. An act is both a one-off action and a series of related actions taken by the same or different entities. The objective mentioned in the Article must be realistic and verifiable so it must be based on objective criteria. An economic objective is evaluated against the taxpayer's business activity.

The rule is also applicable when there are "other objectives equivalent to the advantage" or "they are one of the main objectives of actions".

Each taxpayer's action is indeed oriented at the achievement of a specific expected economic or financial effect. When deciding whether a tax advantage was the main or one of the main taxpayer's objectives, it is key to answer the question whether getting the advantage determined the manner of the taxpayer's operation. Evaluation of what has determined the taxpayer's operation is subjective and so the Head of the NRA may always decide that an action was determined by a resultant tax advantage.

In linguistic terms, artificial action means an odd, peculiar, ridiculous, unnatural, or inadequate action. In normative terms, that is, in line with Article 119c, a negative definition was put forward, which says that a manner of operation is not artificial, if, based on the existing circumstances, it should be assumed that a reasonable entity pursuing legal objectives would follow this manner of operation mostly for justified economic reasons. Thus, *a contrario* reasoning allows one to conclude that all other activity is artificial. Therefore, the taxpayer has been rid of the right to choose the form that is least burdensome in terms of taxation in order to carry out their business since the resultant tax advantages will be deemed tax avoidance.

In Article 119c, section 2, the legislator enumerates examples of actions that should be deemed artificial. It is an open list because the phrase 'especially' is used there. And so, artificiality is first and foremost:

- unfounded division of an operation or
- involvement of intermediary entities in the absence of economic justification or

- elements leading to the emergence of factual circumstances that are identical or similar to the circumstances from before the operations or
- elements that offset or cancel each other.

### Assessment of legal solutions that the Anti Tax Avoidance Rule is based on

The rule<sup>31</sup> breaches systemic principles that compel the legislator to respect the principle of a democratic rule of law (as per Article 2 of the Constitution). In an obvious and clear way, the rule betrays the principle of legitimate expectation of the state and statutory tax law. It means that the rule is contradictory to Article 2 of the Constitution in conjunction with Article 31, section 3 of the Constitution. Thus, a constitutional principle has been breached, which obliges the legislator to make precise – that is, unambiguous in terms of the substance, scope, and prerequisites – permissible interference in taxpayers' rights *ratione personae*. Arbitrary inhibition of the freedoms guaranteed by the Constitution, including economic freedoms, is all the more hazardous for the taxpayer because the procedural regulations applicable within the framework of the rule, which are intended to protect the taxpayer from the abuse of the rule, are only apparent; they are a legal illusion.<sup>32</sup> This, in turn, breaches the principle of mutual loyalty that the taxpayer-state relationship is supposed to be characterised by.

<sup>31</sup> The theoretical assumptions behind the rule as well as the possible concepts of legal solutions and justifications for those are comprehensively discussed by Olesińska (2013), in particular see: *Charakter prawny i struktura klauzuli ogólnej przeciwko unikaniu opodatkowania*, pp. 295–318; *Dylematy konstrukcji prawnej*, pp. 343–358.

<sup>32</sup> See more in Chapter 2, *Postępowanie podatkowe w przypadku unikania opodatkowania*; Chapter 3, *Rada ds. Przeciwdziałania Unikaniu Opodatkowania*; Chapter 4, *Opinie zabezpieczające*; Chapter 4, *Cofnięcie skutków unikania opodatkowania*.

In reality, there is no institutional solution that would effectively protect the taxpayer from the abuse of the rule, that is, from arbitrariness of the decisions of the Head of the National Revenue Administration. Therefore, a constitutional principle has been breached, which compels establishment of such a procedure that would protect the taxpayer against an unfounded accusation of tax avoidance in a real and actual way.

The legal construction of the rule as well as the phrases, terms, and definitions that it uses allow one to voice an objection that the legislator is not rational in linguistic terms.<sup>33</sup>

The rule contains blurry phrases whose character is evaluative, and which are frequently imprecise. And so the substance and sense of the rule are determined by the following phrases: ‘tax advantage’, ‘inconsistency under given circumstances with the substance or purpose of the act of tax law or a provision of an act of tax law’, ‘the main or one of the main purposes of an act’, ‘artificial manner of operation’, ‘circumstances that could have occurred’, ‘an appropriate act’, ‘reasonable operation’, ‘pursuing a legal objective other than gaining a tax advantage’, ‘circumstances that would have occurred, if an appropriate act had been performed’, ‘manner of operation is not artificial’, ‘selecting the manner of operation for predominantly justified economic reasons’, ‘unjustified division of operations’, ‘no economic justification’, ‘elements that offset or cancel each other’, ‘elements leading to the emergence of identical circumstances’, ‘elements leading to the emergence of circumstances that are similar to the existing ones’, ‘economic risk outweighing the expected benefits other than tax advantages’, ‘tax advantage is not reflected by the economic risk taken by the entity’.

All these phrases used in the rule, which are key for charging an entity with tax avoidance, are a threat to the effective protection of the taxpayers’ rights *ratione personae* and a threat to their legal safety since “...there is an excessive stream of

imprecision of meaning and an excessive room for the latitude in tax authorities’ decision making” (Münnich, 2017, p. 171).

Such manner of description of the rule makes one realize that the legislator has consciously built its legal construct on the tragedy concerning human freedom, including economic freedom. This is because:

- interpretation of the evaluative phrases, which are imprecise on top of that, is determined by subjective perception of a tax authority;
- definitions (such as ‘artificial action’) are formulated in a way that does not guarantee uniformity of decisions made by tax authorities;
- the substance of the rule makes room for diversity and freedom of interpretation for it contains imprecise normative wording, therefore, the decisions of the Head of the NRA become unpredictable and so incalculable for the taxpayer;
- the provisions of the rule refer to non-objective, untestable, and at least hardly verifiable criteria because the criteria for verification are blurry and so result in simplifications and schematic evaluations based on an assumption that the taxpayer strives to avoid taxation;
- even if the taxpayer proves that they have fulfilled an economic objective as a result of their actions, they can still be charged with tax avoidance (“...achievement of the advantage (...) was the main or one of the main purposes of the action”);
- the scope of the rule is practically – due to the wording of the legal construct – limitless. The directive arising from this construct imposes the following standard – if you do not want to risk being charged with tax avoidance, then when you choose the organisational form of your business or the form of economic acts, select the ones that result in the highest possible tax revenue. This means that the taxpayer’s freedom of economic activity has been revoked and so

<sup>33</sup> See a critical analysis of the issue in Münnich (2017), pp. 164–174.

this legal solution cancels and revokes the constitutional principle of freedom of undertaking and running economic activity (as per Article 20 in conjunction with Articles 21 and 22 of the Constitution);

- definition of the blurry notions was in reality delegated to the Head of the National Revenue Administration for the legislator bestowed total freedom upon them in terms of the determination of the substance of the phrases used within the framework of the rule in the course of interpretation and application of the law.

The legislative standard is that the legislator is required to pass tax regulations that are precise and clear as well as correct in linguistic terms.<sup>34</sup> The addressees expect the legislator to pass provisions of the law that are impeccable in terms of the legislative technique and so give rise to no doubts as to the substance of the obligations or rights that are being established. Faulty, imprecise, extremely blurry, and unclear wording of the provisions of tax law preclude precise determination of the substance of the statutory regulation, which give rise to uncertainty as to the obligations as well as entitlements.<sup>35</sup>

Such a general objection may be voiced against the solution adopted with Article 119a-119f.

Legal solutions that are imprecise, ambiguous, and cause serious doubts as to interpretation may eventually be judged by the Constitutional Tribunal as falling short of the standard of precision (Granat, 2018, p. 148 ff; Zalasinski, 2004, p. 18 ff; Choduń, pp. 179–283).

The fact that the legislator has fallen short of the quality standard is not always a sufficient justification for deeming provisions of the law unconstitutional. It may only take place if ambiguity is so severe that the resultant discrepancies may not

be removed with ordinary measures that serve to eliminate ambiguity in application of the law.<sup>36</sup>

Each provision of tax law that limits the right to own property, other property rights, and economic freedoms must be formulated in a way that allows for determining clearly who and under which circumstances is subject to limitation. Moreover, such a provision must be precise enough to ensure that it is interpreted and applied in a uniform way. It must also be formulated in a way that makes its scope cover only the situations where a reasonable legislator has actually intended to limit constitutional freedoms and economic rights by introducing relevant regulations.

Article 217 of the Constitution specifies the principle of descriptiveness of the law as regards tax obligations. It is part of the principle of legitimate expectation of the state and the law it passes, that is, the principle of loyalty. This standard is not observed by the solutions adopted in Articles 119a–119f – the Anti Tax Avoidance Rule.

The constitutional principle of prohibition of excessive interference (as per Article 31, section 3 of the Constitution) shifts an emphasis to the adequacy of the objective as well as the measure employed to accomplish the objective of a given legal regulation. The legislator should take this principle into consideration when interfering with the rights and economic freedoms of an individual (with a tax obligation).<sup>37</sup>

<sup>36</sup> Judgements of the Constitutional Tribunal of 3 December 2002, P 13/02, OTK 2002, No. 7, item 90; 3 November 2004, K 18/03, OTK 2004, No. 10, item 103; 28 February 2008, K 43/07, OTK 2008, No. 1, item 8. Cancelling the effect of an applicable provision of the law due to its ambiguity should be treated as the last resort only to be used when other methods, especially interpretations in judicial decisions, fail. Hence, the prerequisite of unconstitutionality is only qualified ambiguity. This is ambiguity that causes freedom of interpretation or lack of a possibility of making correct and logical interpretation and eventually lack of a possibility of making correct, functional, and systemically coherent interpretation. See more in the judgement of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK 2004, No. 10, item 103.

<sup>37</sup> See judgement of the Regional Administrative Court in Wrocław of 5 December 2011, I SA/Wr 1184/11, Central

<sup>34</sup> See Choduń, *Aspekty językowe derywacyjnej koncepcji wykładni prawa* [Linguistic Aspects of the Derivative Concept of Interpretation of the Law], Szczecin 2018, pp. 143-178.

<sup>35</sup> Judgements of the Constitutional Tribunal of 21 March 2001, K 24/00, OTK 2001, No. 3, item 51; 7 November 2006, SK 42/05, OTK 2006, No. 10, item 148.

The principle prohibiting excessive interference requires meeting the constitutional prerequisites in order for the interference into the right to own property, other property rights, and economic freedoms not to have an unconstitutional character.<sup>38</sup> And so the tax legislator's interference must be indispensable and necessary to accomplish the objectives defined in Article 31, section 3 of the Constitution, which are capable of justifying infringement on the rights and freedoms of an individual. At the same time, it is not enough for the adopted measures to aid these objectives or facilitate their accomplishment or for them to simply be convenient for the public authorities. Such an interference must be the least acute one for the taxpayer whose freedom or right is subject to limitation.<sup>39</sup>

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Database of Administrative Courts' Judicial Decisions (LEX) No. 1101758. "The principle of proportionality is applicable in each case where an administrative body holds authority to impose a certain obligation or limit a certain right. Undoubtedly, the principle should be respected within the framework of tax law, which is based on a system of interventive rules, and that comes down to respecting the principle that the obligations imposed by the provisions of tax law, including the ones that impose sanctions, should be acceptable only when and only to a degree that they serve to accomplish a statutorily defined goal of actions, if they are necessary for that purpose and burden the addressee proportionally to the social significance of this goal."

<sup>38</sup> In the judgment of 16 December 2009, I FSK 1172/08, LEX No. 575019, the Supreme Administrative Court concluded that "the principle of proportionality is not defined unambiguously. Based on the relevant literature, it may be concluded that this principle should be perceived as a directive addressing the authorities passing the law, which stipulates that when using their competence these authorities should not impose excessive limitations on fundamental rights and freedoms of individuals."

<sup>39</sup> One should bear in mind that the principle prohibiting excessive interference arises from EU regulations as well. Article 5, section 4 of the Treaty on European Union contains a solution according to which the scope and forms of activity of the EU do not go beyond the means necessary to accomplish the Treaty objectives. Also see more in Frąckowiak-Adamska (2009). In the Judgement of 12 January 2006 in case C-504/04 *Agrarproduktion Staebelow GmbH v. Landrat des Landkreises Bad Doberman*, ECR 2006, p. I-00679, the CJEU concluded that "The principle

The principle prohibiting excessive interference means that the legislator may not impose limitations that go beyond a certain level of onerousness. Especially, if they infringe on the proportion between the degree of interference in the taxpayer's rights and the rank of public interest that is supposed to be protected.

Evaluation of limitation of the rights and freedoms in the context of the principle prohibiting excessive interference must focus on the prerequisite of necessity of imposition of the limitations. Such a necessity is contingent upon the prerequisites enumerated in Article 31, section 3 of the Constitution.<sup>40</sup>

The substance of this principle allows one to conclude that the adopted solutions within the framework of the rule are tantamount to the legislator following the principle of primacy, that is, superiority, of the general public interest over the interest of the individual by equating this general interest with the fiscal interest of the state, whereas such a rule may not be derived from the Polish constitutional order.

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of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued." In an earlier judgment of 26 June 1990 in case C-8/89 *Vincenzo Zardi v Consorzio agrario provinciale di Ferrara*, ECR 1990, p. I-02515, the CJEU described the principle of proportionality similarly by claiming that "the legality of measures imposing financial burdens on economic operators is conditional upon those measures being appropriate to and necessary for the attainment of objectives legitimately pursued by the rules in question, provided, however that, where there is a choice of several appropriate measures, the least restrictive must be adopted and care must be taken to ensure that the burdens imposed are not excessive in relation to the aims pursued."

<sup>40</sup> Those are: security of the state or public order, environmental protection, protection of public health and morality, protection of the freedom and rights of others. The list of such constitutional prerequisites is closed, which means that it cannot be interpreted broadly.

The principle of mutual loyalty is such a set of characteristics attributed to a right that ensures legal security of the taxpayer.<sup>41</sup>

The principle of loyalty is the prohibition of excessive interference in the taxpayer's rights and economic freedoms, that is, prohibition of shaping obligations in a way that limits these freedoms unless required by an important public interest.

The legislator's obligation to respect the principle of loyalty encompasses the prohibition of passing law that introduces apparent legal institutions. This means that the legislator may not freely shape the substance of the applicable provisions of the law and treat them as an effective means of achieving the everchanging goals that he freely sets (e.g., the so called 'sealing the tax system').<sup>42</sup>

Loyalty means that the legislator respects the conditions that enable predictability of actions of the state authorities and the taxpayer's behaviours related to them. If respected by the legislator, legal security enables the taxpayer to predict the state authorities' actions and forecast their own economic, material, and financial activity related to this predictability.<sup>43</sup>

<sup>41</sup> Błaś (2001), pp. 203–204: "This principle (...) is the key to the constitutional axiology; a pattern that the Constitutional Tribunal consistently uses to reconstruct the detailed principles of the democratic rule of law; it is a merit that must be taken into consideration when interpreting the law as well as the supreme rule governing the manner of operation of all the public administration bodies"; see also Filipczyk, pp. 80–112.

<sup>42</sup> Judgement of the Constitutional Tribunal of 19 March 2007, K 47/05, OTK 2007, No. 3, item 27; see also on the topic: judgements of the Constitutional Tribunal of 15 February 2005, K 48/04 and of 29 November 2006, SK 51/06.

<sup>43</sup> A. Błaś (2001), p. 210: "In the rule of law, the law has primacy and not the policy. Adoption of the primacy of the policy would essentially mean there is permission to use the law to accomplish ongoing political objectives. These could be social or economic objectives. However, it is always the generally applicable law that is passed and applied in order to accomplish them (...). Thus, we have reached the most important principle of a constitutional rule of law: the principle of prohibition of instrumental treatment of the law or, more precisely, prohibition of passing and applying laws instrumentally."

Loyalty is betrayed, if the legislator passes the law in a way that gives excessive freedom to tax authorities, which leads to freedom of judgement. Hence, within the framework of the principle of loyalty, the manner of interpretation of the law followed by tax authorities in the course of applying the provisions of tax law must also be protected by the Constitution.<sup>44</sup> The Head of the NRA was awarded such freedom.

## Conclusion

It is rightly advocated in the tax doctrine that "the law is not the law, if it is not characterised by at least a specific minimal degree of certainty. This is expressed by a Roman maxim: ubi ius incertum, ibi ius nullum" (Filipczyk, 2013, p. 28).

Another issue is related to that the taxpayer's legal security is understood as certainty of law. Certainty of law is "an attribute of law, which means that an entity that the law applies to (i.e., the addressee of the rule, the citizen or the taxpayer) is capable of foreseeing the consequences of facts determined by this law, including own acts (i.e., actions or failures to act) or acts of other entities" (Filipczyk, 2013, p. 63).

The rule has these qualified faults because:

- it does not ensure legal security of the taxpayer;
- it does not respect the principle of descriptiveness of the provisions of tax law;
- it breaches the principle of mutual loyalty that the taxpayer-state relation is supposed to be characterised by;
- it also breaches the principle of legitimate expectation of the state and the tax law it passes.

<sup>44</sup> See more in Mastalski, *Prawo podatkowe a gospodarka* (2005), pp. 5–17; idem, *Stanowienie prawa podatkowe a jego wykładnia i stosowanie w ramach porządku prawnego Unii Europejskiej* (2005), pp. 33–38; idem, *Dyskurs argumentacyjny w doktrynie prawa podatkowego i w procesie jego stosowania* (2009), pp. 573–581.

By the fault of the legislator, the legal construction of the rule is unclear, imprecise, and ambiguous, which creates uncertainty as to the rights and

obligations of the taxpayer and so creates a basis for arbitrary decisions of tax bodies because the tax authority's freedom of decision is excessive.

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