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Good Faith in the Process of Making and Interpreting Legal Regulations on Value Added Tax

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The issue whether the content, interpretation, or construction, and, subsequently, application of laws and regulations are formed in good faith is probably of a broader dimension, exceeding the confines of tax laws – the value added tax (VAT) law included. This perspective of tax-law analysis is still part of an 'incorrect' current in the literature, with its predominant optimistic, 'rectified' vision of the Community version of VAT. Few have posed the question whether the mass-scale tax evasion and the hitherto unknown scale of tax fraud were caused, or at least supported, by the VAT regulations, their construction and application having been moulded in ill faith. By 'ill faith' I understand an attitude and deliberate action in respect of a given tax that proves to be entirely contrary to public interest and, above all, is not intended to enable legal budget revenue, whilst, in parallel, protecting the interest of honest citizens. Instead, such an attitude and actions would have sought to gain illegal, or apparently legalised, benefits at the expense of the State budget and honest taxpayers.

The problem concerns, in particular, the Community version of VAT that has been in force in Poland since 1 May 2004 (Act of 11 March 2004). The regulations on this particular tax were shaped in a way that has effectively enabled – or only apparently counteracted at best – the pathological phenomena of mass evasion of VAT or VAT fraud. It is undisputable that the regulations in question were worded with the knowledge that it would not sufficiently protect public interest and open the potential for abuse ('legislative investments'). This is one of the two spaces where ill-faith action is identifiable, the second being the false propaganda on the apparent advantages of VAT, which was depicted as taxpayer-friendly and safe. The supreme purpose was to attract thousands of VAT taxpayers into unconscious participation in tax evasion and fraud – the occurrences that would not have been possible without their participation. Regrettably, these aspects of ill-faith action have attained their purpose, which has, in turn, translated into fundamental and lasting shrinkage of budget revenue and undermined trust toward VAT among citizens.

Keywords: good faith, value-added tax/VAT, interpretation/construction of regulations
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1.

The issue of good faith in the processes of law-making, interpretation, and application of tax law has only recently emerged in research papers and legal publishing. It is still one of the so-called incorrect trends that stand in opposition to the correct (facade?) narrative, which continues to exist and has been meticulously overlooking the issue in question and others as well. The correct trend indirectly refers to the traditional antinomy of the 'bad tax office' that (supposedly) shapes the provisions of the law solely to 'increase fiscalism' and to this end interprets and applies the law demonstrating hostility towards the taxpayer; in contrast to the good, kind-hearted taxpayer. In this narrative, the latter is a homogeneous group, primarily guided by legality and trust in the authorities, but they are 'bullied' by the 'bad tax office' that, though not always legally, does not hesitate to consistently defend the fiscal interests of the State. To this end, the treacherous legislator unnecessarily complicates the provisions of the law, which must obviously be 'clear' and 'simple', abuses its power and, above all, makes tax decisions that are against the law but beneficial for the budget. In accordance with the correct trend, the only hope for the taxpayer bullied by the evil legislator and the tax office is the national judicature (i.e., administrative courts) and the EU (i.e., the CJEU) that (sometimes) defend the 'legitimate rights of the taxpayer'.

Seeing the contemporary reality of the tax law today through the prism of this antinomy, one fails to notice quite a deliberate ignorance of pathological behaviour in the processes of law-making as well as interpretation and application of tax law, which are displayed by both the public authorities and taxpayers themselves and do not conform to the adopted mechanisms. Over the years, the correct narrative trend concerning this tax has been stubbornly ignoring the mass phenomena of VAT avoidance and VAT return fraud that have taken place under the new EU version of this tax since it entered into force on 1 May 2004 (Act of 11 March 2004). I would like to recall that when the previous (pre-EU) form of value added tax was applicable, these phenomena had only been marginal, and the estimated ratio of budgetary income losses incurred under both taxes (1993–2003 and 2004–2019) is one to four: the average annual amount of irretrievably lost budgetary revenue due to tax evasion and tax return fraud has increased – compared to the average in 1993–2003 – at least fourfold in nominal terms.[1] The scale and phenomenology of mass VAT avoidance and VAT return fraud (and the fraud amounted to about half of the annual revenue in the worst period) has been an inconvenient topic that is absent or only reluctantly mentioned in the facade trend, which was after all an apotheosis of the EU version of this tax (presented as 'VAT at its best'). Moreover, few have attempted to answer the question whether emergence of pathological behaviour occurring on such an enormous scale, which was causing an unparalleled decrease in budgetary revenue (amounting to around 3% of GDP) from this tax, had resulted from the low quality and misinterpretation of the provisions of the law as well as errors in the interpretation of the law made by the executive authorities and courts. And such behaviour arose not only from incompetence but also from the bad faith of the entities taking part in the processes of law-making as well as interpretation and application of the regulations by the executive authorities and courts. This is the main subject-matter of this article, while the most important issue is good faith in the process of shaping the provisions of the law.[2]

2.

Several years ago, an important part of VAT taxpayers realised that they had been targeted by

[1] These losses should not be confused with the so-called tax gap, which is a different measure, though it also covers these phenomena.

[2] The issue of good faith of public authorities in the process of tax law interpretation is slightly better studied and the relevant analyses mostly focus on the activity of the executive bodies. Legal publications refer to this phenomenon as 'hostile interpretation of tax law'. See, among others, Modzelewski (2020g).

an unheard-of mystification perpetuated by numerous entities – from politicians and the media through experts to even the representatives of the public authorities – for more than a dozen years. The strategic goal of this mystification was to obtain equally unheard-of extreme benefits arising from tax fraud, which could only have been achieved at the expense of hundreds of thousands of honest but fervently gullible taxpayers.

The direct purpose of the mystification is very simple: if someone wants to obtain benefits arising from taxation, especially by fraudulently obtaining VAT returns paid out by the tax authorities, then someone else must first pay the money in. The logic underlaying fraud against banks is different: the fraudster steals from the richer. In this case the opposite is true: the tax office does not have 'its own money', so honest taxpayers have to pay money into the budget, which is fraudulently obtained afterwards, i.e., the poor finance the fraudsters. However, in order for this operation to succeed, it must be 'authenticated' by the participation of numerous honest and naive taxpayers, and so – because it is best to hide in the crowd – the fraudsters included thousands of unaware taxpayers in their machinations so that they would authenticate their 'optimisation schemes'. Thus, it was necessary to find many entrepreneurs who, without asking any unnecessary questions, would be involved in the so-called chain transactions or resale ('reinvoicing') of often non-existent goods or services in a long chain of essentially economically superfluous intermediaries. The most important thing in this operation was to make them believe that these activities were lawful, the re-sold goods and services did exist and their participation in the scheme did not involve any tax or legal risks.

In order to achieve that, there was a completely new propaganda machine launched, which intrusively and point-blankly advocated that the EU version of this tax had been 'civilized', the provisions of the law on this tax 'simple' and 'precise', and their interpretation (especially the 'pro-EU' one) raised no doubts. People were made to believe this tax was 'neutral', i.e., that taxpayers 'did not pay it' (but it remained curious who made tax transfers on their behalf to the tax authorities) and, above all, that deducting input tax and charging output tax on transactions where no one had seen any goods was (purportedly) completely safe just as obtaining refunds for intra-community supplies of goods. It was supposed to be 'VAT at its best': taxpayer-friendly and beneficial for taxpayers. For more than a dozen years, propaganda in the media continued on a daily basis and the above claims were repeated endlessly like a mantra; there were also multiple conferences and tax congresses with next-generation experts specialising in praising the advantages of the new version of the tax.[3]

It has been known since the very onset that the correct vision of this tax served to mislead the public for years, and today tens (if not hundreds) of thousands of taxpayers face the threat of repression for unknowingly participating in tax fraud. The authorities – both tax bodies and courts – generally do not believe that they did not know what they were taking part in. It is completely irrelevant that they have likely been deceived at a mass scale, and even the voluminous commentaries on the provisions of the law on value added tax – so frequently cited in judgments – have not even once mentioned VAT fraud cases that have been taking place in Member States of the European Union for twenty years.

3.

For many years to come, (most?) VAT taxpayers will be (literally and figuratively) paying for having believed the mystifications and getting involved in tax fraud that is ubiquitous in the Member States of the European Union. Between 2004 and 2015,

[3] Not only senior officials of the finance departments participated in these training sessions and congresses, but also judges and scientists, while the highlights of the presentations were selected judgments of administrative courts and the CJEU, which allegedly confirmed the advantages of the tax and guaranteed that taxpayers would benefit from it.

perhaps even hundreds of thousands of taxpayers received and (unfortunately) also accepted offers to enter into lucrative transactions (and use the 'blessings of the Community market'), especially through intra-Community trade in goods or services. Trade intermediaries were in the most urgent demand in line with the principle: "Buy the merchandise and I will show you the buyer in another EU country who will buy it from you." Other offers were concerned with becoming part of a domestic supply chain, obviously in the form of direct delivery from the manufacturer, that is, where there is no need to have a warehouse. There are few who would not like to get the margin for practically nothing, because the goods were either actually or only 'on paper' directly traveling to the next recipient. The demand for such intermediation was mainly explained by the beneficial impact of joining the common European market.

The scale of these phenomena was so large that it officially increased GDP, but in fact, tax returns started to get bigger and bigger rapidly – and in a few years they were about PLN 30 billion higher annually (i.e., they increased from PLN 60 billion to over PLN 90 billion) and were quickly approaching the exorbitant amount of PLN 100 billion per year. It was the only 'real money' and, in addition, it came from the – as they call them – honest taxpayers: the rest was nothing but fiction or the so-called optimisation transactions, whose sole purpose was for the actual beneficiaries of these operations to obtain tax benefits. Unfortunately, many taxpayers ceased to distinguish (and that was the goal) business transactions from the 'optimising', or even purely fictional ones.

All of this was happening under the pressure exerted by the aggressive propaganda of the 'economic success of European integration' and the absolute superiority of the new EU version of value added tax over the old one that was terribly bad-mouthed at that time. After all, the new one was supposed to be 'beneficial for taxpayers', however, it was not usually specified which taxpayers were supposed to actually benefit. Almost all the media and even universities (though not all) spoke with one voice to convince taxpayers that not only do they face no tax risk with the new, better version of VAT, but the opposite is true: it (supposedly) entailed nothing but advantages.[4]

So, let us address the most important question: why were taxpayers misled so consistently and effectively? The answer is probably quite simple: to make double money at their expense. For the first time when they got involved in these scams – where the benefits were enjoyed by the actual beneficial owners who had been hiding behind their backs – and for the second time when the taxpayers who were the victims of these scams started to have serious problems with the tax authorities.

The VAT taxpayers who have unknowingly been entangled in VAT fraud since 2004, are slowly but effectively losing all hope. Although a significant part of the cases became statute-barred, it offers little consolation to the ones who have had their limitation period suspended or discontinued (as there are still cases pending from before even ten years ago). There are no illusions: the doctrine claiming that the 'lack of awareness of participation' in this practice is relevant, if the taxpayer has exercised 'due diligence' – which has been repeated persistently over the years – is not very important (or not at all), though it is (unfortunately very rarely) used in courts. Not many will seriously advocate it in public anymore, although taxpayers repeat these statements in procedural documents. And what other option do they have? They want to believe that the authorities are supposed to prove that they have acted in bad faith, that is, that they have deliberately agreed to participate in fraud, while their lack of awareness of participation in fraud has not been caused by recklessness or ne-

[4] Out of pity, I will not cite the titles of seemingly scientific studies that have uncritically praised this version of value added tax. There was no room for the sceptics to speak, and the timid warnings against fraud arising from the EU version of this tax were immediately pushed back with a depreciating epithet of 'an opponent of European integration'. New experts in this tax have emerged and kept on praising its advantages. They had two things in common: first of all, it was their debut in the field, and secondly, they had connections with the business involved mainly in tax avoidance, which, unfortunately, did not cause the majority of taxpayers to worry.

glect (that is, they have been 'duly diligent'). Does it make sense to repeat this mantra over and over again? For the time being, no one has had a better idea and it is unlikely to change.

4.

From today's perspective, the path that has already led to the current disaster is now fully distinct for most victims of the EU version of this tax. We have witnessed three stages of the disaster, which serve as an example of an unprecedented mystification that has unfolded at quite a historic scale.

The first stage – as has already been mentioned – consisted in aggressively persuading taxpayers that the EU version of VAT was 'safe' for them and 'simple' on top of that (2004–2010). Over these years, the public was worked on and told that it was a 'civilised tax' and predictable; involved no risks whatsoever; there had (supposedly) been no major fraud; and intra-Community mass trade in equally mass goods delivered directly from the manufacturer (within the framework of chain transactions) was back then an example of a 'modern, free market economy' that allowed anyone to earn their commissions, if only they wanted to. If anyone asked the rather obvious question why small companies were involved in the supply chain (and allowed to profit from that), and the number of intermediaries made one wonder to say the least, the answer was that "this is what trade in the European Union looks like, and you know nothing of modernity".

Other, more or less credible, statements were also repeated and 'authenticated' with real money paid out to the intermediaries. Taxpayers had mostly adapted to the new circumstances because it occurred to few (or to no one?) that it was possible to mislead everyone so insolently as, after all, not only the 'opinion-forming media' but also the correct literature with an international renown, on top of that, were involved in all this.

In the second stage (i.e., 2011–2015), it was no longer possible to argue that there was no mass tax fraud generated by the EU version of the tax, but this time it was said that taxpayers were (supposedly) safe, if they had unknowingly participated in fraud but exercised due diligence on a daily basis while paying the tax. The message was more or less as follows: tax carousels or other fraud were some kind of 'oppositional propaganda hostile to the authorities'[5] and, if they existed at all, they were 'marginal phenomena', and the taxpayers should buy some sort of an umbrella in the form of 'internal security procedures' or responsible advice; preferably they should buy services from reputable patrons who had 'excellent relations' with the authorities.[6]

The third stage started in 2016 and still continues. It has turned out that neither the authorities, nor courts believed that anyone could have unknowingly participated in tax fraud, and even if that was the case, their lack of awareness was caused by their undue diligence, because this 'doctrine' was internally contradictory and essentially a treachery: if it had not occurred to someone that they had been involved in a scam, it must have been due to recklessness or neglect, because if someone had diligently chosen and verified their contractors, they would have reasonably suspected that they had been participating in fraud. Besides, in the current version of the correct trend, "everyone was very well aware" of the common fraud, and taxpayers are unbelievable to claim that they unknowingly had no idea about it. At this stage, taxpayers have paid (and continue to pay), especially renowned tax specialists, for their naive belief in the advantages of the EU version of the tax – as defence against 'the greedy tax office' must obviously have its price. And they will be paying – what other choice do they have? After all, the international scenario of cashing in on taxpayers has been known for at least a dozen years: first, they are given 'beneficial' and 'safe' optimisation mechanisms which enable them to earn on

[5] Even the Minister of Finance of that time claimed so.

[6] The media support for this make-believe was equally effective, and an abundance of prizes and distinctions was awarded by the so-called opinion-forming media for merit related to this version of VAT and knowledge of it.

taxes (which is a bait); then they are offered instruments to ensure their safety; and then profit is reaped from their problems, which are disputes with the authorities they will inevitably get involved in. Thus, the naive ones are already paying up to three times for having taken the bait.

Will anyone, even if only morally, be stigmatised for organising or participating in this scheme? Have no illusion: its authors are now hard at work on 'tightening the tax' (obviously, not for free), especially through 'IT instruments'.

5.

In the course of the ongoing tax audits, customs-tax audits, and court and administrative proceedings concerning this tax, taxpayers often emphasise their deep bitterness. They speak up to ask – during court trials as well – why they have heard for so long the deceptive claims that the EU version of VAT was not only 'simple' and 'predictable', but above all, 'safe' and even 'friendly' for taxpayers. They cite examples of the already mentioned intrusive propaganda that they have been exposed to since 2004; they quote voluminous articles and comments praising this tax. Indeed, none of the publications that belong to the correct literature has mentioned so far that all the significant provisions on the so-called intra-Community trade are mainly a trap for the gullible ones and a way to obtain easy benefits by the ones that are referred as the 'untouchable'. In order for the latter to be able to obtain these benefits, tens of thousands of honest but naive taxpayers have been involved particularly in 'chain transactions' as well as in other schemes of this kind, which allow the insiders to obtain VAT returns fraudulently.

Another trick of this kind was the so-called national reverse charge which allowed any taxpayer to obtain a tax refund: it was no longer even necessary to export anything abroad or to provide services 'outside the territory of the country'. Certainly, the insiders obtained input tax refunds by virtue of that and were mostly elusive; while the executive authorities bullied their victims at a mass scale, claiming that they had knowingly participated in tax fraud.

The most serious accusations are already being made against those who did not tell the truth when they talked or wrote about this tax. Another question is also raised: were they incompetent or did they act in bad faith? One must agree with the belief that is already widespread among the honest businesspeople that since 2004 they have fallen victim of the greatest conspiracy in history: first, they were talked into, often not for free, participation in 'optimised transactions', to have been thrown later to the wolves, because they had 'participated in fraud', and now they have to let those who will be defending them reap profit.[7]

6.

There are different estimates of the total amount of tax debts (the more conservative ones) owed by the VAT taxpayers, covering both the disclosed and the not disclosed arrears (while the authorities only inform about the formally disclosed ones) and the interest due. The most conservative one amounts to about PLN 143 billion (including PLN 33 billion as interest), which is more than 80% of the current income from this tax (not inflows but the difference between the inflows and returns). Under the EU version of VAT (2004–2013) this ratio was no better, but the formally disclosed tax arrears represented a much smaller proportion of the total arrears than at present (even less than 50%). What has changed over the past five years is

[7] Frequently, the address has not changed: those who offered optimising solutions are the same ones who now present themselves as the 'defenders of taxpayers against the greedy tax office'. The victims of this conspiracy are in the right, while it is likely that the members of the political class were involved in the whole thing as well. Anyone can read the attacks of politicians and the 'liberal media' on the Internet, which emerged during and after the hearings held by the committee of inquiry dealing with the fraud cases. I would like to recall that it took place in 2018, that is, at the time when no one would dare to publicly claim anymore that 'VAT at its best' was 'safe' and 'beneficial' for the honest taxpayers.

a substantial increase in the tax arrears that have been formally disclosed (mainly due to the activity of tax authorities). In publications representing the correct trend, it has been 'discovered' that for years VAT arrears have been increasing much faster compared to other taxes, despite the fact that this is widely available information, so it comes as no revelation to people who deal with this tax. According to the authors of these discoveries, this means that the tax has been tightened 'only on paper', i.e., it is fiction. Please remember that in the past on several occasions the same publications considered elimination of taxation with this tax (i.e., the reverse charge) to be a way of tightening the system (which is absurd), and now it is seen as a measure 'on paper' (but then it was not). International lobbying supported by the leftist and rightist politicians was behind the dismantling of this tax, including by means of the 'reverse charge', so there is no need to criticise the 'independent literature', which, after all, has the right to voice opinions consistent with the 'dominant', that is, the correct narrative. In this case, it obviously has nothing to do with the so-called profitable views.

In reality, these arrears are likely to be higher since taxpayers' debts consist of two parts: the arrears and interest on the arrears (and the total amount is not communicated to the public), but the taxpayers are unable to pay their arrears exclusively – each PLN 1 proportionally pays off both debts (and there is no other way around it).

Let us then explain what the disclosed tax arrears are; firstly, they arise from the final decisions of the tax authorities and, secondly, from the tax returns (adjustments), if the debts have not been fully paid off. The second source of the revealed arrears is much less important; disclosure of the arrears by way of filing a tax return or an adjustment of a tax return is, in fact, a voluntary action that is coordinated with the taxpayers' payment capacity. Conservative estimates suggest that most of the latter are gradually paid off (with interest), and besides, they only represent a small portion of the disclosed arrears, whereas the majority of the arrears arise form the final decisions of the tax authorities; far and wide those are practically never repaid. One might even risk claiming that if 10% of all the formally disclosed arrears are collected (voluntarily and compulsorily), one should be very pleased. Collectability is usually much lower because it is not so difficult to evade paying these arrears. Today, up to 98% of the arrears arising from the final decisions are uncollectable, which applies to the interest as well.[8]

What has changed since 2016? We know that the tax authorities' activity has intensified, i.e., the proportion of the disclosed tax arrears has increased as a result of a raised number of tax re-assessments. However, this has not had any direct impact on the increase in budget revenue, as having such an impact was impossible. We know that according to the correct narrative, tax 'collection' has been more successful, which is understood as coercive enforcement by the tax authorities. These are nothing more but official make-believes, because the maximum amounts that can be annually obtained that way (from arrears and interest) do not exceed 2% of the current income (and most often less than 1%). The actual increase in budget revenue from this tax is obtained as a result of:

- essentially voluntary payments by taxable persons made on the basis of equally voluntary tax returns (as no one can file tax returns on behalf of the taxpayers);
- refunds of this tax made by the tax authorities: the tax authorities are in charge of the situation in this case as they will only reimburse as much as they want, unless the number of tax returns submitted is as large as in Poland between 2009 and 2019: some of these returns are then made with no verification, because there is no time and not enough people to do it. If the annual number of returns exceeds 1 million (we have had more than 1.4 million), verification of the majority of those is pure fiction. A correctly recorded false invoice is no different

[8] If that might serve as consolation, I would like to add that the undisclosed arrears (and the interest due on them) are 100% uncollectible. They 'silently' expire over the limitation periods, and no one pays them any heed.

from the real one, and its fictitious character must be proven, which can only be achieved based on evidence presented within the course of lengthy proceedings carried out by the tax authorities.

So where did the increase in budget revenues from this tax (from PLN 127 billion to PLN 183 billion) come from between 2017 and 2019? Partially from accounting procedures (VAT returns from 2017 that were paid out before 2016 picked up pace), but these were insignificant amounts. In line with the consistent, but officially difficult to verify, opinion shared by the honest taxpayers, the public authorities' consent for tax evasion has been withheld to some extent. Earlier, everyone knew 'what it was all about': the Polish State was giving money away in the form of refunds and no one was particularly interested in preventing that or stopping those who were allowed to take it. However, it quickly turned out that the 'unauthorised' ones could also reach out for the money, because the authorities were giving it away without checking who was going to get it.[9]

Clearly no one is afraid of IT instruments, and claiming that they have had any impact on the increase in budget revenues is part of the lobbying of this industry. The literature relevant for this topic belongs to the correct trend undisputedly. In which year did the budget revenue from this tax increase the most? I would like to recall that these instruments, and, in particular, the overrated JPK_VAT, were popularised later (from 2018 onwards). So, what happened in 2017? The only important event was the introduction of high fines for the forgery of invoices as of 1 March 2017 and VAT return fraud committed with the use of these invoices (i.e., 'the use of a false invoice'). This made an impression: accounting offices started to terminate contracts with 'optimisation companies' at a mass scale. However, the preventive effect only lasted for two years, because the increase in revenues in 2019 (on a year-to-year basis) was just over PLN 8 billion, which is nominally as much as in 2014.

Following elimination of the reverse VAT in domestic trade and introduction of the mandatory split payment, the number of VAT returns submitted should decrease at the end of 2019. Certainly, the amount of the disclosed tax arrears will increase, because they are and will remain uncollectible.[10]

The tax arrears will mainly be found in entities that have been (including knowingly) involved in tax fraud. Today, they are defended even by the ones who have greatly contributed to the creation of the correct trend in the literature on this tax, in particular claiming that the EU version of this tax is exceptionally 'safe' and 'friendly' for taxpayers for more than a decade. And now the State is having the fraudsters' heads delivered on a silver platter.

7.

It is time to reach conclusions: bad faith in the process of shaping the provisions of the law on VAT arises from the omnipresent and intrusive lobbying that has been influencing tax legislation for years, which, however, does not solely serve the business interests of potential or actual beneficiaries, although that is mostly the case. Law that is made with bad faith inherently causes decrease in budget revenues and harms honest taxpayers.

[9] In order to earn even several hundred thousand PLN a month, it was enough to have a 'company in your laptop' and 'trade' in goods covered by the reverse VAT, because this made you entitled to a refund. Although this privilege was devised for the big fish, the little ones with connections in the political class laughed all the way to the bank, too.

[10] The money that had been fraudulently obtained was obviously long ago transferred out: it was done by specialists – who are predominantly 'untouchable' for the authorities and most likely have 'excellent relations' with them as well – also through the intermediary of the optimisation business.

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