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Experience in Terms of Interpretation and Application of the General Anti-Avoidance Rule (GAAR)

Jadwiga Glumińska-Pawlic*

The article elaborates on the legal and practical aspects of the application of the General Anti-Avoidance Rule (GAAR). For tax proceedings to be taken over and for a decision regarding tax assessment to be issued by the Head of the National Revenue Administration, it must be examined whether the conditions specified in Article 119a of the Tax Ordinance have been met. It is extremely important to establish the mode of operation and the order of consideration of individual conditions. This applies both to the Head of the National Revenue Administration and the Council for Prevention of Tax Avoidance that issues opinions on the legitimacy of the application of Article 119a in proceedings.

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* Ph.D., Habilitated Professor of legal sciences • University of Silesia in Katowice •
✉ jadwiga.gluminska-pawlic@us.edu.pl • ORCID: 0000-0002-2256-4558

Introduction

The anti-avoidance rule was introduced into the system of Polish tax as of 15 July 2016 in connection with the amendment to the Tax Ordinance Act.[1] The project promoters intended to ultimately regulate this institution in the Polish legal order as the attempt to do so made in 2002[2] was subject to the assessment of the Constitutional Tribunal (CT) that on 11 May 2004 judged[3] the provision on the rule to be inconsistent with Article 2 in conjunction with Article 217 of the Constitution of the Republic of Poland. In that judgement, the CT also specified the standards that such a rule should possibly meet.

The accession of our country to the European Union compelled changes in tax law that should be striving to take into consideration the risk posed by tax evasion. This problem was highlighted by the European Commission in its Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)[4] as regards direct taxes. One of

[1] Act of 29 August 1997 – Tax Ordinance (Journal of Laws of 2023, item 2383).

[2] It consisted in adding Article 24b to the Tax Ordinance (see Article 1(18) of the act of 12 September 2002 amending the Tax Ordinance and some other acts – Journal of Laws of 2002 No. 169, item 1387).

[3] K 4/03 (Journal of Laws of 2004 No. 122, item 1288).

[4] OJEU L of 2012 No. 338, p. 41.

the recommended solutions was to adopt a general principle suited to both national and cross-border situations, which would be operative not only within the EU. The Commission's view was that tax planning has traditionally been regarded as a permitted practice, however, over time tax planning schemes have become increasingly sophisticated and have led to the transfer of taxable revenues to jurisdictions engaging in harmful tax competition. The EU Member States have been obliged to inform the Commission within three years of taking measures to implement this recommendation. The revealed cases of abuse prompted the European Parliament to adopt a resolution on 25 November 2015 calling for structural reforms, fight against tax fraud, and implementation of measures countering aggressive tax planning.[5] The Parliament concluded that although direct taxation did not fall within its remit, artificial enlargement of the national tax base to the detriment of other states should in fact be subject to public supervision. The existing status quo could not be maintained, and thus resolute action had to be taken in order to address the pan-European problem of tax evasion and tax avoidance. The standard should be to introduce a general anti-tax avoidance rule or have a developed line of case law combating tax fraud.

Reinstatement of the rule in the Polish legal order

These actions have led to works on the reinstatement of the rule and, as a consequence, submission of a government bill amending the Tax Ordinance. The explanatory statement to the bill[6] indicated that the purpose of the rule should be to set out the limits to permissible optimization, strengthen the autonomy of tax law in relation to civil law, and discourage taxpayers from following tax avoidance practices. There has been Section IIIa introduced into the Tax Ordinance,[7] which contains provisions on the said rule, based on the definition of an act performed by a taxpayer primarily in order to achieve a tax advantage that under given circumstances defeats the object or purpose of a provision of a tax act. Such an act should not be conducive to a tax advantage, especially if the taxpayer's way of conduct is artificial. The model of the rule was thus intended to fight against acts and facts that from a rational point of view had no other economic justification than reduction of the tax burden (Kubista, 2016, pp. 93–95). The taxpayer's conduct was to be deemed artificial, if based on the existing circumstances, it was possible (or compelling) to assume that it would not be followed by an entity acting reasonably and pursuing lawful purposes other than achieving a tax advantage contrary to the object and purpose of a provision of a tax act (Article 119c, section 1 of the Tax Ordinance; cf. Dzwonkowski, 2016). It should be noted that the rule had been introduced even before the Council Directive (EU) 2016/1164[8] entered into force and its scope was extended, which allowed for applying it also when obtaining a tax advantage was only one of the objectives and elements of the transaction, and not the sole purpose. Taking into account the solutions adopted, the relevant literature immediately pointed out that certain expressions contained in Article 119a of the Tax Ordinance might present many problems in terms of interpretation (see Glumińska-Pawlic, 2018, p. 57 et seq.). In particular, the following wording was problematic: 'primarily', 'the mode of conduct is artificial' (section 1), 'an appropriate act has been performed' (section 2), 'would be acting reasonably' (section 3). It was also indicated that the adopted model of assessing whether a transaction was artificial or not (based on the criterion of a model of a ration-

[5] See the European Parliament resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect (2015/2066(INI)) (OJEU C of 2017, No. 366, p. 51).

[6] See the explanatory statement to the government bill amending the Tax Ordinance and some other acts, 8th term of office, print of the Sejm No. 367, p. 5 et seq.

[7] Act of 13 May 2016 amending Tax Ordinance and some other acts (Journal of Laws of 2016, item 846).

[8] Directive of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJEU L of 2016 No. 193, as amended), hereinafter referred to as the ATAD Directive.

ally thinking third party) may lead to excessive discretion and subjectivity, while the tax authority was authorised to make factual findings inconsistent with those declared by the taxpayer in accordance with the model followed by a reasonable taxpayer acting based on economic grounds other than tax purposes (cf. Filipczyk, 2016, p. 13).

Considering doubts that had been raising as well as the stipulations of Article 6(1) of the ATAD Directive, the wording of the rule was modified to adapt it to the EU regulations. The act of 23 October 2018 amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance, and some other acts[9] gave a new wording to Article 119a, section 1 providing that "an act does not result in the achievement of a tax advantage, if the achievement of that advantage, which under given circumstances defeats the object or purpose of a tax act or a provision thereof, has been the main or one of the main objectives behind performing the act, and the mode of action was artificial (avoidance of taxation)".

By way of introducing and then modifying the anti-tax avoidance rule and in order to minimize its effects and to mitigate the arbitrariness of regulations related to its entry into force, the Polish legislator – yielding to international demands (PWC, 2012, pp. 2–3) – has decided to appoint a Council for Prevention of Tax Avoidance (see Glumińska-Pawlic, 2017, pp. 59–71) and adopt an institution of advance opinions aimed at increasing the certainty and predictability of decisions. As a result, taxpayers have had a high degree of legal security ensured within the Polish tax law system, which was achieved by introducing standards developed by other countries.

GAAR application scheme

In order to issue a decision based on the provision regarding the rule and apply it in practice, both the Head of the National Revenue Administration and the Council for Prevention of Tax Avoidance need to examine whether the conditions specified in Article 119a of the Tax Ordinance are fulfilled.

Conditions for the application of the rule

According to the wording of Article 119a, section 1 of the Tax Ordinance, the application of the anti-avoidance rule is possible if the following conditions are met simultaneously:

- a tax advantage has been achieved;
- an act has been performed primarily in order to obtain the tax advantage (i.e. it that was the main objective or one of the main objectives of performing the act);
- the mode of conduct was artificial;
- the achievement of the tax advantage defeats the object and purpose of a provision of a tax act.

The tax consequences of an act are determined on the basis of such a state of affairs that would have occurred if an appropriate act had been carried out and the appropriate act is considered to be an act which could be performed under the circumstances in question, if an entity acted reasonably and were guided by lawful purposes other than to obtain a tax advantage defeating the object or purpose of a tax act or a provision thereof and their mode of conduct were not artificial. An appropriate act may also be failure to take action (section 3). If in the course of proceedings a party indicates an appropriate act, the tax consequences are determined on the basis of the state of affairs that would have occurred, if this act had been performed.

Tax advantage

Taking into account the conditions set out in the said provision, when applying the rule in practice, doubts arise as to in what order the conditions should be examined and whether the order of examination is relevant. As regards the condition of achieving a tax advantage, it should be noted that it may be both a reduction in the amount of tax li-

[9] Journal of Laws of 2018, item 2193.

ability or a situation where tax liability does not arise. In turn, when assessing an act performed in order to obtain a tax advantage, one should consider the provisions of Article 119d of the Tax Ordinance. According to that provision, an act is considered to have been taken primarily for the purpose of obtaining a tax advantage when the other economic objectives indicated by the taxpayer can be deemed to be of little importance. Analysis of this provision clearly indicates that it is important to define the purpose of the act performed, that is, a certain method of conduct which is assessed from the perspective of the applicability of Article 119a of the Tax Ordinance. In evaluating whether a measure was taken primarily for the purpose of obtaining a tax advantage, it is therefore decisive whether that tax advantage outweighs the other economic benefits indicated by the taxpayer to such an extent that the other objectives ought to be found insignificant. Article 119d of the Tax Ordinance should not be considered a provision preventing the application of the anti-tax avoidance rule in a situation where the taxpayer indicates the aims they were striving towards when they decided to undertake specific activities. As a matter of fact, such an interpretation of Article 119d would mean that Article 119a of the Tax Ordinance could only be applied if the taxpayer's sole purpose were to achieve tax benefits. Whereas – as clearly indicated in Article 119a, section 5 – when the Head of the National Revenue Administration applies the anti-avoidance rule in such a situation, they are not obliged to look for an appropriate act and determine tax consequences based on it, but they accept tax consequences on the basis of such a state of affairs that would have occurred, had the act not been performed at all.

Artificiality of the mode of conduct

When analysing whether the mode of conduct was artificial, it should be noted that the features of artificiality are indicated in Article 119c of the Tax Ordinance. The taxpayer's conduct is to be deemed artificial if, under the existing circumstances, it should be assumed that it would not be followed by an entity acting reasonably and pursuing lawful purposes other than achieving tax advantage contrary to the object and purpose of a provision of a tax act. Section 2 of the above-mentioned provision stipulates that evaluation whether the mode of conduct was artificial or not may be influenced, among others, by the following:

- unjustified division of operations; or
- involvement of intermediary entities although not economically justified; or
  - elements leading to the occurrence of a state identical or similar to the state existing before performing the act; or
- elements which cancel each other out or compensate for each other; or
  - economic risk outweighing the expected non-tax benefits to an extent compelling to assume that a reasonable entity would not have followed such a course of action; or
- the obtained tax advantage is not reflected by the economic risk incurred by the entity or its cash flows; or
- profit before tax is insignificant compared to a tax advantage that does not directly result from the economic loss actually incurred; or
- involvement of an entity that does not carry out actual business activity or does not perform a significant economic function or has its registered office or residence in a country or territory specified in the provisions issued based on acts of income tax law.

Tax advantage defeating the object and purpose of the provisions of a tax act

The term 'object and purpose of a provision of a tax act', which has not been defined in the Tax Ordinance, requires elaboration as it may be a pivotal element distinguishing permitted optimization from tax avoidance. By introducing a tax, the legislator presumes it will meet the fiscal objective and ensure certain budget revenues. The object of

a tax act is pre-defined in its very title and then elaborated upon within the regulations that shape its design. The purpose of a tax act is to impose tax on taxpayers' assets, income, revenue, or consumption. When interpreting the individual provisions of an act in the context of tax avoidance, one should bear in mind such an understanding of the purpose and object of the act of law (Zagórski, 2023). Therefore, a legal act performed primarily to achieve a tax advantage contrary to the object and purpose of a tax act defeats the intention of the legislator that has shaped the scope and amount of tax. If a taxpayer undertakes artificial actions that result in the achievement of a tax advantage which is inadequate to the effects of economic events, then it might suggest that it defeats the object or purpose of a tax act or a provision thereof (Kondej, 2021, pp. 33–34). One should, therefore, follow the relevant literature in endorsing the view that the economic objective of a tax act may not usually be achieved by performing an act that has neither any economic substance nor economic justification and is clearly inadequate to carry out activities under the existing economic circumstances (Kuźniacki, 2020, p. 29). Thus, the taxpayer's act is not contrary to the object and purpose of a tax act if it is not considered in connection with the artificiality of their mode of operation. Conversely, if the operation is not artificial, it means that the condition of defeating the object and purpose of a tax act[10] is not met. The assessment of whether the taxpayer's act is contrary to the object and purpose of a tax act is essentially non-legal in nature, because it refers to the legislator's intentions as regards creating the tax system.

The provisions of the Tax Ordinance do not define the concept of defeating 'the object and purpose of a tax act', which does not, however, mean that this condition is non-normative in nature. According to the relevant literature, the essence of GAAR is to recognize – through legal fiction – facts outside the scope of the fiscal-legal reality as facts of a different kind falling within the actual fiscal-legal reality (Brzeziński, 2013, p. 169). On this basis, a model of a reasonable taxpayer's conduct is created through the vehicle of legal fiction. However, the condition of contradiction should not be analysed in connection with the criterion of artificiality (Jankowski, 2020) because in the case of the substantial legal conditions for GAAR to be applicable, this leads to undesirable result of 'merging' the individual conditions into one (*vide*: the condition of a contradiction can only be considered in connection with the artificiality of the mode of operation). According to the second concept, the essence of GAAR is to determine the tax consequences based on the existing facts, but in the light of the rules applicable to the facts that have not materialized, but which under certain circumstances should be deemed adequate for determining the tax consequences (Ladziński, 2019b, p. 26). In this case, application of GAAR consists in co-shaping the scope of application (of the hypothesis) of the legal norm in force, and not in creating a new disposition, which has not been set out by the legislator. Evaluation of the taxpayer's operation in the light of GAAR should always involve analysis of their conduct in the context of specific provisions of substantive law, which only jointly form a general systemic principle that is not, however, axiological (or non-normative) in nature, but results from specific provisions of substantive tax law. One may agree that such an understanding of the condition of contradiction is reflected in the literal wording of Article 119a(1) of the Tax Ordinance. A 'provision of a tax act' is a specific regulation that, as a consequence of the taxpayer's actions, has been applied artificially or has not been applied by the taxpayer, which resulted in them obtaining a tax advantage. In turn, the 'object and purpose' is a systemic principle deciphered from these provisions (or the so-called spirit of tax law) (Kondej, 2016, pp. 5–6).

Appropriate act

It is generally accepted that an appropriate act is the one that an entity could perform under the given circumstances. The fact that the legislator has

[10] Some representatives of the doctrine validate this view (Ladziński, 2019a, pp. 114–115).

used the phrase 'under the given circumstances' allows for assuming that its appropriateness should be determined on a case-by-case basis and that ought to ensure that the taxpayer has an opportunity to try to defend their position. If in the course of the proceedings a party indicates to the tax authority an act that may involve the smallest adjustment of tax, then according to Article 119a, section 4, the tax consequences are determined on the basis of facts that would have occurred if this act had been carried out. This provision is a certain kind of a guarantee for the taxpayer because the tax authority is obliged to accept the appropriate act indicated by the party to the proceedings.[11] Whereas when the Head of the National Revenue Administration applies the anti-avoidance rule, they are not obliged to look for an appropriate act and to determine tax consequences based on it, but they accept tax consequences on the basis of such a state of affairs that would have occurred, had the act not been performed at all. Therefore, the economic objectives indicated by the taxpayer should be compared to the act(s) contested by the Head of the National Revenue Administration. Thus, these should not be objectives that would be achievable if the taxpayer performed the appropriate act.

As of 1 January 2019, the amendment to the Tax Ordinance of 23 October 2018[12] added a regulation to Article 119a, section 3, indicating that failure to act may also be an appropriate act. One should note that this solution was intended as a clarification and was not of a normative character. Such a thesis is confirmed in the explanatory statement to the bill amending the Corporate Income Tax Act, which states that: "The current wording of Article 119a, section 3, of Tax Ordinance may incorrectly suggest that an appropriate act is actually taking action in every case. In the opinion of the project promoter, an entity acting reasonably and guided by lawful purposes other than obtaining a tax advantage contrary to the object or purpose of a tax act or a provisions thereof could also – within the framework of an appropriate act – take no action whatsoever". In view of the above, it is proposed that "it is merely made clear in editorial terms that an appropriate action may also be failure to act". This solution is obviously consistent with the civil-legal concept of operation, which is reflected, for example, in Articles 5 and 443 of the Civil Code.[13] And although the desire to obtain a tax advantage does not have to be the sole objective of a reasonable entity, evaluation of their conduct may, however, lead to the conclusion that, in a given specific situation, an entity acting reasonably and guided by legitimate objectives other than achieving a tax advantage would not perform any act.[14] At the same time, the intention of the legislator was also to indicate that the 'appropriate' act to be established based on Article 119a, section 3, must not be an 'artificial operation'.

Conclusion

The essence of GAAR is to challenge (and verify) the tax effect achieved by the taxpayer as a result of them performing a legal act, which the legislator calls a tax benefit. It is, therefore, essential to establish whether a tax advantage has been obtained, and next, to examine if that advantage is contrary to the object and purpose of the provisions of a tax act. Afterwards, one should consider whether it is useful to analyse the other conditions as they are closely correlated with the above ones. It is because Article 119c states that a mode of operation is not artificial, if under the existing circumstances, it is presumable that an entity acting reasonably and pursuing legitimate objectives would follow that mode of operation mostly for legitimate economic reasons. Such reasons do not include the goal of obtaining a tax advantage defeat-

[11] See judgement of the Regional Administrative Court in Warsaw of 23 June 2022 (ref. No. III SA/Wa 2998/21).

[12] Journal of Laws of 2018, item 2193.

[13] Act of 23 April 1964 (i.e. Journal of Laws of 2023, item 1610).

[14] Cf. explanatory statement to the bill amending the Personal Income Tax Act, the Corporate Income Tax Act, the Act amending Tax Ordinance, and some other acts – the 8th term of office, print of the Sejm No. 2860, p. 59.

ing the object or purpose of a tax act or a provision thereof. The act under examination may consist of a number of different acts that had to be performed in order to obtain the tax advantage. However, the act is of secondary importance; the focus is on the tax advantage, whereas the act itself (or lack of it) is determined only for the sake of assessing the purpose of operation and its artificiality.

Evaluation of the functioning of the anti-tax avoidance rule in practice leads to a conclusion that – at least to date – the highest number of decisions regarding tax assessment issued at first instance by the Head of the National Revenue Administration pursuant to Article 119a of the Tax Ordinance is concerned with the cases from the years 2016–2017, i.e. the period after its provisions have become applicable. Statistically, a majority of the cases involved Personal Income Tax (50) and Corporate Income Tax (28). Cases regarding the other taxes were marginal; there were only nine decisions issued in the period in question. It should be emphasized that the rule itself and the proceedings based on the rule which were taken over by the Head of the National Revenue Administration have not significantly affected the 'tightening' of the tax system. However, the fear of applying the rule and introduction of other instruments in tax acts resulted in a noticeable increase in budget revenues in the years 2017–2019 compared to the previous period. Nevertheless, it is difficult to say to what extent taxpayers' awareness of the possibility of applying the rule has influenced the increase in budget revenues.

Reflection is also needed as to whether the introduction of the rule has actually contributed to combating the phenomenon of tax avoidance, which the legislator perceives as pejorative, or perhaps its adoption has hurt entities that did not act with the intention of avoiding taxation, but whose business dealings were negatively assessed by the tax authorities.[15]

[15] For more elaboration on the topic see Glumińska-Pawlic, Kubista, 2017, pp. 19–20.

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· CONTACT ·
analysesandstudies@sgh.waw.pl · analysesandstudies.sgh.waw.pl · casp.sgh.waw.pl