Analyses and Studies
Analizy i Studia

CASP
Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

No 1 (3) | 6 June 2017 p. 1–19 ISSN 2451-0475

General Anti-Abuse Rule. Economic Aspects

Prof. Jadwiga Glumińska-Pawlic
Chairperson of the Chair of Financial Law
The Faculty of Law and Administration
The University of Silesia

Bartosz Kubista
The Chair of Financial Law
The Faculty of Law and Administration
The University of Silesia

The article covers the legal and tax aspects of the implementation of general anti-avoidance rule in Polish tax law, including the historical outline of the rule, its essence, and the usefulness of achieving the legislator's intended effects. The article deals with the disadvantages and advantages of the rule, its compliance with constitutional regulations, as well as the institution of GAAR protective tax opinions and the position of the Council on counteracting tax evasion.

Keywords: rule, artificial construction, avoidance, anti-avoidance, taxation

1. The Nature of the General anti-abuse rule

On 15 July 2016, Chapter IIIa was added to the act of 29 August 1997 Tax Ordinance (TO)[1], which incorporates the new version of the general anti-abuse rule into the Polish tax law system. The essence and core of the structure of the general anti-abuse rule were provided in Article 119a of TO stating that an operation performed mainly in order to obtain a tax benefit, which is contradictory with the objective and scope ratione materiae of the provision of the tax act under given circumstances, does not result in gaining the tax benefit, if the manner of the taxpayer's operation was artificial. This means that an operation that is questioned on the grounds of the tax law remains valid and effective on the grounds of the civil law but its tax consequences are redefined differently than what arises from the substance of a legal relationship that was evaluated by the tax authorities as artificial[2]. In consequence, the effectiveness of such a solution in terms of the law and taxation is completely forfeited since the model of the rule proposed in Chapter IIIa stipulates countering the operations and factual cir-

[1] I.e., Journal of Laws of 2017, item 201 as amended; hereinafter referred to as: TO. The rule was introduced by way of an act of 13 May 2016 amending the act – Tax Ordinance and some other acts (Journal of Laws, item 846).

[2] Cf. A. Mariański (ed.), Ł. Chmielecki, A. Krajewska, A. Nowak-Piechota, B. Rodak, K. Sołoniewicz, M. Sroczyński, A. Tim, M. Wolska-Bryńska, Ordynacja Podatkowa 2017. Poradnik dla praktyków [Tax Ordinance 2017. Guidebook for Practitioners], Legalis 2017/el.

cumstances having no reasonable economic justification other than lowering taxation[3].

In order for the rule to be applicable, the following prerequisites must be met simultaneously:

- There is an "artificial" element of the taxpayer's operation;
- The taxpayer's intention[4] is, first and foremost, to gain tax benefits;
- Under given circumstances, the tax benefit is contradictory to the objective and scope ratione materiae of the provision of the tax act[5].

Taxpayer makes artificial operations, if the existing circumstances allow (/dictate) to acknowledge that such an operation would not be performed by an entity using reasonable judgement and pursuing lawful goals other than obtaining a tax benefit contradictory to the objective and scope ratione materiae of the provision of the tax act[6]. The accepted model of evaluation of the artificiality of transaction, which is based on the criterion of a model rationally thinking third party, should be assessed critically though. Application of the rule in line with the currently binding wording does not require the tax authority to find out the facts that are inconsistent with the taxpayer's declarations. On the contrary – in order for the rule to be applied, the authority is not obliged to establish the factual circumstances at all and evaluates the facts in accordance with the model of behaviour of a reasonable taxpayer driven by economic goals – other than taxation-related ones[7]. Such a solution may lead to excessive discretion and subjectivity in using the rule.

In Article 119c, section 2 of TO, the legislator also indicates an open list of circumstances attesting to the artificiality of a transaction, assuming that evaluation of whether the operation is artificial or not should in particular take into account the existence of:

- unfounded divisions of an operation or
- economically unjustified engagement of intermediary entities or
- elements giving rise to factual circumstances identical or similar to the circumstances form before the operation or
- mutually cancelling or compensating elements or
- economic risk higher than the expected benefits – other than tax benefits – to the extent compelling to acknowledge that an entity using reasonable judgement would not perform such an operation.

As far as the taxpayer's intention to obtain a tax benefit is concerned, the legislator differentiates the taxpayer's situation and the tax consequences of the adoption of the rule depending on whether their operations were aimed exclusively at gaining a tax benefit or whether they were oriented at this but in a way that did not make it their main objective (though the taxpayer first and foremost strived to obtain it) and it was not their only goal[8]. An operation is deemed to be aimed mainly at obtaining a tax benefit, if the other economic goals of the operation, which have been indicated by the taxpayer, are found

[3] More in B. Kubista, Czy w polskim prawie podatkowym jest miejsce na klauzulę o unikaniu podwójnego opodatkowania? [Is There Any Place for the General Anti-Abuse Rule in the Polish Tax Law] (in:) J. Glumińska-Pawlic (ed.) Czy w Polsce istnieje system podatkowy? [Is There a Tax System in Poland?] Katowice 2016, pp. 93–95.

[4] Since in accordance with Article 119a, section 1 of TO, tax avoidance takes place in the case of operations that have been performed for the purpose of gaining a tax benefit, in order for the rule to be effectively applicable, the taxpayer must have been driven by the intention to obtain such a benefit; it was not a coincidence that such a benefit was obtained.

[5] G. Kujawski, Definicja unikania opodatkowania (obejścia prawa podatkowego) [Definition of Tax Avoidance (Circumvention of Tax Law)] (in:) Klauzula generalna unikania opodatkowania [General Anti-Abuse Rule]. Wolters Kluwer 2017, LEX 2017/el.

[6] Article 119c, section 1 of TO; cf. H. Dzwonkowski, Komentarz do art. 119a Ustawy Ordynacja Podatkowa [Commentary to Article 119a of the Tax Ordinance Act]. Legalis 2016/el.

[7] Cf. H. Filipczyk, Stosowanie klauzuli ogólnej przeciwko unikaniu opodatkowania – zagadnienia wybrane [Application of the General Anti-Abuse Rule – Selected Issues], "Monitor Podatkowy" 2016, No. 7, p. 13.

[8] Cf. H. Dzwonkowski, Komentarz do art. 119a Ustawy Ordynacja Podatkowa [Commentary to Article 119a of the Tax Ordinance Act]. Legalis 2016/el.

to be of too little importance. If obtaining a tax benefit was not the only objective of the taxpayer, the tax effects brought about by the operation are determined based on the circumstances that could arise, if an appropriate operation was performed; where an appropriate operation is one that could be performed by an entity under given circumstances, if it used reasonable judgement and pursued legal goals other than gaining a tax benefit that is contradictory to the objective and scope ratione materiae of the tax act.

The fact that the legislator mentions "given circumstances" allows to put forward that the "appropriateness" of an operation should be determined individually in each case. This provides the taxpayer with an opportunity to defend their stance by way of showing the tax authority an operation that would give rise to the smallest possible adjustment of tax[9]. The beneficial option of showing the tax authority an appropriate operation is not available to taxpayers who have implemented an artificial structure solely for the purpose of obtaining a tax benefit. In line with Article 119a, section 5 of TO, if an entity was not driven by any goals other than obtaining a tax benefit, the operations that it performed in order to avoid taxation would be disregarded for the purposes of taxation[10]. In principle, in such a case tax authorities must recreate a situation that would occur, if an artificial structure resulting in abuse was not created[11]. Hence the tax effects of the application of the rule take place either through: a tax authority's refusal to accept any tax effects of the taxpayer's operations; or a kind of "reclassification of an operation"[12]. As regards the fact that the nature of the obtained tax benefit is contradictory to the objective and scope ratione materiae of the tax act, it seems that this objective should be interpreted broadly, taking into account the socio-economic goal behind the introduction of a provision or the legal mechanism regulated by a provision of the tax act[13]. In order for the rule to be applied, it is thus necessary to also demonstrate that a given operation was performed *in fraudem legis* (i.e., in fraud of the law)[14]. As long as the given operation (even if artificial and aimed at gaining a tax benefit) does not betray the objective of the act of law, there are no grounds to question such a transaction[15].

2. History of the General Anti-Abuse rule in the Polish Tax System

Introduction of the general anti-abuse rule on 15 July 2016 was not the first attempt of the Polish legislator to adopt this mechanism. This regulation was first introduced to TO already on 01 January 2003[16]. It is enough to point out that the wording of the regulation introduced back then was much more laconic than it is now and was essentially expressed in Article 24b, section 1 of TO stating that "*when making decisions in tax cases, tax authorities and tax audit authorities will disregard the tax effects of legal operations, if they prove that no other significant benefit than*

[9] Article 119a, section 4 of TO indicates that if in the course of the proceedings the party indicates an appropriate operation, the tax effects are determined based on the circumstances that would arise, if this operation was performed.

[10] Cf. G. Kujawski, Skutki podatkowe unikania opodatkowania [Tax Effects of Tax Avoidance] (in:) Klauzula generalna... [General Anti-Tax...], op. cit., LEX 2017/el.

[11] Cf. M. Militz, J. Waśko, Rządowe rozwiązania w walce z nadużyciami w VAT [Government Solutions Countering VAT Abuse]. "Przegląd Podatkowy" 2016, No. 10, pp. 13–21.

[12] Explanatory statement for the government draft act amending the act – Tax Ordinance and some other acts, Publication of the Sejm of the 8th Term No. 367, p. 26. Cf. also Article 119a section 5 of TO and Article 119a, sections 2 and 3 of TO respectively.

[13] G. Kujawski, Definicja unikania opodatkowania (obejścia prawa podatkowego) [Definition of Tax Avoidance (and Circumvention of Tax Law)] (in:) Klauzula generalna... [General Anti-Tax...], op. cit., LEX 2017/el.

[14] Cf. Judgement of 24 November 2003 of the Supreme Administrative Court in Warsaw, Case Identifier FSA 3/03.

[15] Cf. A. Bartosiewicz, R. Kubacki, Gloss to the resolution of 24 November 2003 of the Supreme Administrative Court, FSA 3/03. "Glosa" 2004.

[16] Article 24b added through Article 1, point 18 of the act of 12 September 2002 amending the act – Tax Ordinance and some other acts (Journal of Laws of 2002, No. 169, item 1387).

lowering tax liability, increasing loss, raising the overpay or tax refund could be expected to be gained from performance of these operations." In line with the regulations applicable at that time, if parties taking a legal action described in section 1 obtained an expected economic result that a different legal act(s) is relevant to, the tax effects would be derived from the relevant act(s)[17]. It should be reminded that the stipulations of Article 24b of TO did not turn out sustainable. Owing to considerable controversy over the legal form of the rule, which was vividly expressed in the doctrine and the relevant literature[18], and due to increasing doubts as to conformity of the regulation with the stipulations of the Constitution of the Republic of Poland, the substance of the rule was considered by the Constitutional Tribunal that on 11 May 2004[19] passed judgement that Article 24b, section 1 of TO as applicable at that time was non-compliant with Article 2 in conjunction with Article 217 of the Constitution. The Tribunal indicated that Article 24b, section 1 of TO "*breaches the principle of the citizen's trust in the state and the law, which arises from Article 2 of the Constitution of the Republic of Poland, as well as the principle of economic freedom expressed as the freedom of shaping one's civil law relationships, that is, Article 22 of the Constitution of the Republic of Poland.*" The Constitutional Tribunal also stressed that Article 24b of TO does not meet fundamental constitutional standards of decent legislation and therefore violates the basic elements shaping the substance of the principle of the citizen's trust in the state and the law, which infringes upon Article 2 of the Constitution. The decision of the Tribunal cited above also referred to standards that a possible rule of a similar type should meet. In line with the indications of the Tribunal, such a rule should[20]:

- be clearly defined in the specific provisions of Tax Ordinance;
- be correct from the point of view of the language; logical, clear, and precise in a way that allows the citizen to foresee the consequences of their actions;
- allow maximum predictability of a decision made on the basis of the rule;
- avoid statements not allowing to assume that "their judicial interpretation will actually be consistent and precise" and ones that make "it possible to derive legislative entitlements of the bodies applying the rule from their wording";
- define the effects of tax decisions made on the basis of the rule, especially indicate whether the decisions will be declarative or constitutive in character;
- be free from solutions constituting unjustified intervention of tax authorities into the taxpayer's rights, in particular in the freedom to use various tax optimization methods.

Invalidation of Article 24b, section 1 of TO and the subsequent abrogation of Article 24b, section 2 of TO stopped the legislator from attempting to introduce a new rule for over ten years. Only upon explicit indication of the European Commission[21] and actions taken by Great Britain that introduced similar regulations in 2013 as well as issuance of guidelines presented as part of the outcome of the Supreme Audit Office's control[22],

[17] Article 24b, section 2 of TO as applicable in 2003.

[18] Cf. J. Ostrowski, Siedem rad na nowelizację Ordynacji podatkowej [Seven Pieces of Advice on Amendment of Tax Ordinance]. "Monitor Podatkowy" 2003, No. 1, p. 7.

[19] Case identifier K 4/03, LEX/el.

[20] Cf. also A. Mariański (ed.), Ł. Chmielecki, A. Krajewska, A. Nowak-Piechota, B. Rodak, K. Sołoniewicz, M. Sroczyński, A. Tim, M. Wolska-Bryńska, Ordynacja Podatkowa 2017. Poradnik dla praktyków [Tax Ordinance 2017. Guidebook for Practitioners], Legalis 2017/el. and B. Kubista, Czy w polskim prawie... [Is There Any Place...], op. cit., p. 97.

[21] See more: European Parliament Resolution of 25 November 2015 on tax rulings and other measures similar in nature or effect (2015/2066(INI)) issued in consequence of the *Luxleaks* affair that compelled national legislators to prioritize structural reforms, counter tax fraud, and implement counter measures against aggressive tax planning; see also the already mentioned Explanatory statement for the government draft act amending the act – Tax Ordinance..., op. cit., pp. 1–2.

[22] In the Information of 17 April 2015 about the results of the control: "Tax authorities' and tax audit bodies' supervi-

the Polish legislator was driven towards reinstitution of this mechanism into the Polish system of tax law and giving it a new shape that has been applicable since 15 July 2016.

3. The Polish Regulations versus the Regulations Applicable in Other Countries

The general anti-abuse rule is not a Polish development. From a historical point of view, for years the Western European states and Anglo-Saxon countries have been striving to implement solutions similar to the ones introduced in Poland on 15 July 2016 into their legal systems. The solutions adopted in German-speaking countries, Great Britain, and the United States reveal a similar approach of the legislations to countering tax avoidance as well as to structuring the rule. One of the precursors to the implementation of the rule resulting in similar effects to the ones arising from Article 119a of TO is undoubtedly the German legislator who already adopted similar solutions after World War I[23]. The solutions currently applicable in Germany in this respect[24] have not been considerably modified since then. However, the doctrine highlights the specific nature of the German rule that manifests itself through a "hybrid" character derived from a concept based on civil law, which influences tax law as well[25]. In the German reality, if a taxpayer takes action incommensurate with its economic goal, such a transaction can be questioned in the course of civil proceedings. Such a change also translates into a change of the tax and legal qualification of such an operation[26].

Similar regulations are provided for in Austrian law that states that it is the aim and economic character of a transaction that is taken into consideration for the purposes of tax law and not the legal circumstances. Therefore, if in the course of adoption of artificial structures, abuse of civil law takes place, such transactions will not have any effect on the grounds of tax law either[27]. It is worth noting that the United States also decided to implement the rule. Although formally these solutions were introduced in 2010[28], the issue of primacy of the economic substance of a transaction over legal character understood in strict terms has essentially remained valid since 1935 when the decision of the Supreme Court in the case Gregory v. Helvering[29] laid the foundations of the doctrine allowing the court to deny the taxpayer a tax benefit arising from a structure, if the structure itself does not give rise to any other than tax benefit (i.e., the economic substance doctrine) and in the course of tax proceedings, facts should be determined in accordance with their economic and not formal (i.e., legal) substance (i.e., the doctrine of primacy of the economic substance of a structure over its

sion over the correctness of settlements of entities with foreign capital with the state budget" (https://www.nik.gov.pl/plik/id,8681,vp,10800.pdf – accessed on 06 May 2017), the Supreme Audit Office declared that the non-existence of a rule countering tax avoidance "in the applicable law is a barrier to ensuring tightness of the Polish tax system."

[23] Section 4 of Reichsabgabenordnung, RGBl. 1919 I, p. 1993.

[24] Section 42 of Abgabenordnung, BGBl. 2007 I, p. 3150, "(1) It is not possible to circumvent tax law through abuse of the possibility of shaping the law. If the stipulations of tax law that counter tax circumvention are applicable, there are legal consequences arising from such stipulations. Otherwise, in case of abuse specified in section 2, tax liability arises as it would, if an operation appropriate/adequate for a given transaction was performed. (2) Abuse takes place, if inadequate legal form is selected, which as opposed to the appropriate legal form, allows the taxpayer or third parties to obtain tax benefits unforeseen by the law. If it is not possible to prove the existence of reasons behind an operation other than ones arising from the tax law, the tax becomes due in the amount that would be due, if transaction had an adequate legal form."

[25] Cf. G. Kujawski, Chapter 3.2. Austria, Niemcy i Szwajcaria [Austria, Germany, and Switzerland]. (In:) Klauzula generalna... [General Anti-Tax...], op. cit., LEX 2017/el.

[26] Ibid.

[27] Sections 21–24 of Bundesabgabenordnung (BGBl. 194/1961); cf. also W. Gassner, Austria (in:) Form and Substance in Tax Law, IFA Cahiers, vol. 87a, International Fiscal Association, 2002, pp. 149–150.

[28] Section 7701(o) Internal Revenue Code.

[29] US Supreme Court Ruling of January 7, 1935 Gregory v. Helvering, 293 U.S. 465 (1935).

legal form)[30]. As far as the American rule is concerned – just as the case with the Polish solution – important prerequisites for applying it are the non-tax-related taxpayer's goals (or in fact, the lack of them). However, the American provisions of the law do not require that artificiality of a structure adopted by a taxpayer be demonstrated, which clearly distinguishes this regulation from the Polish provisions of the law[31].

As mentioned above, the general anti-abuse rule was also introduced in Great Britain although quite late in comparison to other countries as it took place no sooner than in 2013[32]. In the British model, which probably inspired the Polish legislator to the largest extent[33], the rule is applicable to the following structures:

- where the main objective or one of the main objectives is to obtain a tax benefit and
- which could not be deemed rationally justified in the light of the applicable tax regulations (and the test is objective in character[34]);

whereas established practices that are accepted by tax authorities are not considered circumvention of the provisions of tax law[35]. The thing that distinguishes the British model from other ones is certainly the appointment of an advisory body in the form of the GAAR Advisory Panel[36] whose participation and opinion are required in the course of proceedings concerning application of the rule[37]. Additionally, the British tax authorities developed an array of guidelines that are intended to make it easier for taxpayers to assess the legitimacy of application of the rule under given circumstances[38].

4. Legitimacy of the Introduction of the General Anti-Abuse Rule into the Polish Tax System

Legitimacy of the re-introduction of the rule into the Polish system of tax law remains questionable. Fulfilment of the objectives justifying introduction of the rule within the framework of Article 119a et seq. of TO could have also been achieved with the legal measures that already existed before the rule was passed[39]. It is enough to indicate that the Polish system of law does not lack detailed provisions (i.e., small anti-abuse rules[40]) intended to counter tax avoidance[41]. In this respect, the following regulations should be mentioned in particular:

- Article 25 of the personal income tax act and Article 11 of the corporate income tax

[30] Cf. G. Kujawski, Chapter 3.4. Stany Zjednoczone [The United States]. (In:) Klauzula generalna... [General Anti-Tax...], op. cit., LEX 2017/el.

[31] Ibid.

[32] Finance Act of 17/07/2013 chapter 29, part 5 and annex No. 43.

[33] Cf. B. Kubista, Czy w polskim prawie... [Is There Any Place...], op.cit., p. 98.

[34] Cf. Article 207(2) of the Finance Act 2013, Part 5, Sections 206–215 ("General Anti-Abuse Rule"), defining abusive tax structures: "Tax arrangements are 'abusive' if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including-(a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,(b) whether the means of achieving those results involves one or more contrived or abnormal steps, and(c) whether the arrangements are intended to exploit any shortcomings in those provisions."

[35] G. Kujawski, Chapter 3.3. Wielka Brytania [Great Britain]. (In:) Klauzula generalna... [General Anti-Tax...], op. cit., LEX 2017/el.

[36] General Anti-Abuse Rule (GAAR) Advisory Panel.

[37] Finance Act of 17 July 2013, annex No. 43 and 43b.

[38] HM Revenue and Customs (HMRC) General Anti Abuse Rule (GAAR) guidance, HM Revenue & Customs, https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules#history – accessed on 06 May 2017.

[39] Cf. D. Adamski, Klauzula przeciwko unikaniu opodatkowania – powtarzanie zaklęć zamiast naprawy systemu [General Anti-Abuse Rule – Chanting Instead of Repairing the System]. "Analizy Forum Obywatelskiego Rozwoju" 2016, No. 3, pp. 7 and 8, http://www.for.org.pl/pl/a/3776Analiza-22016-Klauzula-przeciwko-unikaniu-opodatkowania-powtarzanie-zaklec-w-miejsce-naprawy-systemu – accessed on 05 May 2017.

[40] *Specific anti-abusive rule* (SAAR).

[41] Cf. M. Guzek, M. Stefaniak, Klauzula przeciwko unikaniu opodatkowania [General Anti-Abuse Rule], "Monitor Podatkowy" 2016, No. 11, p. 25.

act regulating transfer pricing and estimation of income in transactions between related parties;

- Article 10, section 4 of the corporate income tax act concerning mergers and divisions of companies;
- Article 22c of the corporate income tax act regarding exclusion of tax exemption in the case of dividends;
- Article 199a, section 2 of TO regarding fictitious transactions and Article 199a, section 3 of TO concerned with the entitlements of authorities to ask the common court to determine the substance of a legal relationship.

It is worth noting that so far tax authorities had attempted to question the legal and tax effects of tax optimization especially on the basis of the last of the provisions, that is, Article 199a, section 2 of TO, which allows to disregard the tax effects arising from an operation that is apparent in character. Nevertheless, the authorities' activity in this respect was verified by administrative courts that arrived at a conclusion that Article 199a, section 2 of TO is only applicable to an apparent legal act in circulation and not to a legal act performed exclusively for the purpose of achieving a desirable tax effect but bearing no characteristics of an apparent act[42]. This issue was the main argument of the advocates of a claim that the mechanism provided for in Article 199a, section 2 of TO was inadequate to counter tax avoidance[43]. The competences of the authorities were further broadened by Article 199a, section 3 of TO, which stipulates that if the evidence collected in the course of the proceedings, especially testimonies of the party, provided that they do not refuse to testify, give rise to doubts as to the existence or non-existence of a legal relationship or right producing tax effects, the tax authority is entitled to ask the common court to determine the existence or non-existence of the legal relationship or the right.

In this context, there were mechanisms sufficient to counter tax avoidance available to tax authorities even before the rule expressed in Article 119a of TO was introduced[44]. Thus a question arises whether implementation of Article 119a et seq. of TO into the Polish tax law system was justified. The question remains significant especially considering that the rule as currently applicable is also a source of serious constitutional reservations as regards the time limits of the adoption of the rule[45]. It is indicated in the doctrine that the provisions of the general anti-abuse rule – contrary to the regulations that have been implemented – cannot be interpreted in a way allowing their retroactive or retrospective application[46]. The gravest doubts are raised by the potential possibility of applying the rule to tax deductibles arising from depreciation allowances on the initial value of an asset purchased prior to the entry of the amendment of the Ordinance into force[47]. The doctrine also points out the risk of lowering the competitiveness of the

[42] Cf. judgement of 15 January 2016 of the Supreme Administrative Court, case identifier II FSK 3162/13, judgement of 13 July 2016 of the Regional Administrative Court in Gdańsk, case identifier I SA/Gd 369/16.

[43] Cf. K. Winiarski, Klauzula przeciwko unikaniu opodatkowania a obejście i nadużycie prawa podatkowego [General Anti-Abuse Rule versus Circumvention and Abuse of Tax Law]. "Przegląd Prawa Publicznego" 2015, No. 12, pp. 103–113. The uselessness of Article 199a, section 2 of TO in terms of countering tax avoidance was also pointed out by W. Nykiel and M. Wilk, Nieprzydatność art. 199a § 2 ordynacji podatkowej w walce z unikaniem opodatkowania a następstwa czynności pozornych [Uselessness of Article 199a, Section 2 of Tax Ordinance in Countering Tax Avoidance versus the Consequences of Apparent Operations]. "Przegląd Podatkowy" 2017, No. 2, pp. 17–23.

[44] More in: B. Kubista, Czy w polskim prawie... [Is There Any Place...], op. cit., pp. 104–106.

[45] Cf. H. Dzwonkowski, Komentarz do art. 119a Ustawy Ordynacja Podatkowa [Commentary to Article 119a of the Tax Ordinance Act]. Legalis 2016/el.

[46] Cf. M. Kolibski, K. Turzyński, Reguła intertemporalna klauzuli ogólnej przeciwko unikaniu opodatkowania w świetle standardów konstytucyjnych – polemika [The Intertemporal Rule for the General Anti-Abuse Rule in the Light of Constitutional Standards – a Polemic]. "Przegląd Podatkowy" 2016, No. 12, pp. 21–25.

[47] Cf. H. Filipczyk, Reguła intertemporalna... [The Intertemporal Rule...], op. cit., p. 20.

Polish economy due to the increase in uncertainty and imprecision of the Polish tax system[48]. These and other concerns combined with the existence of instruments that have been available earlier, which could (and did) serve the tax authorities to counter tax avoidance, make it questionable whether re-introduction of the general anti-abuse rule was needed in the first place.

5. Council for Counteracting Tax Avoidance

In order to alleviate the arbitrariness of the regulation, the Polish legislator – in accordance with international demands[49] – decided to appoint the Council for Counteracting Tax Avoidance[50] and introduce the mechanism of protective rulings that are intended to increase certainty and predictability of decisions and ensure that taxpayers have the possibility to obtain confirmation in advance that an operation is economically justified, just as the case with the model of a transfer pricing agreement or an application to issue an individual interpretation of the provisions of tax law. And so standards ensuring that taxpayers enjoy high levels of security have been introduced into the Polish anti-tax avoidance system, which were developed by other countries (i.e., protective tax rulings and an expert panel are only in place in France, Canada, and Australia). Based on the solutions applicable in France (i.e., *Comite de l'Abuse de Droit Fiscal*), Australia (i.e., the *General Anti Avoidance Rule Panel*), Canada (i.e., the *General Anti-Avoidance Rule Committee*) and the newest British solutions, it was proposed in an act to appoint a Council as an expert opinion-giving body whose main task would be issuing independent opinions as to the legitimacy of application of the rule in individual cases. The functioning of the Council is intended to contribute to an increase in objectivity of the authority making a decision regarding application of the rule and ensure social supervision over the process. According to the project promoters, there was a need to establish such a body owing to concerns as to the manner of application of the rule by the tax administration, which were expressed earlier in an explanatory statement to the already-mentioned judgement of the Constitutional Tribunal as well as in social discussions. Based on the Australian model, the Council included the representatives of various environments (among others, a retired judge of the Supreme Administrative Court, researchers, representatives of the Ministry of Finance, the Joint Commission of the Government and Local Governments, the National Chamber of Tax Advisors, the Ministry of Justice, and the Social Dialogue Council). The candidates were expected to meet high qualification requirements – the people appointed to join the Council must possess knowledge, experience, and authority as regards tax law, the financial system, financial markets, economic turnover or international economic law, which ensure that the Council's tasks are carried out properly.

If there are prerequisites for applying the rule in a given case, the Head of the National Revenue Administration (NRA) may seek the Council's opinion as to the legitimacy of applying Article 119a of TO in the given proceedings. This is because of the Head of NRA is authorised to commence tax proceedings or issue a decision to overtake part or the whole tax proceedings in order to carry out further action or to carry out tax

[48] Cf. M. Stefaniak, Klauzula przeciwko unikaniu opodatkowania – czy jest zagrożeniem dla podatników? [The General Anti-Abuse Rule – Is It a Threat to the Taxpayers?]. "Przegląd Podatkowy" 2014, No. 12, pp. 15–17.

[49] Cf. Tax Controversy and Dispute Resolution Alert: General anti-avoidance rules: What are the key elements to a balanced approach, June 2002, pp. 2–3, http://www.pwc.com/gx/en/tax/newsletters/tax-controversy-dispute-resolution/assets/pwc-general-anti-avoidance-rules.pdf (accessed on: 05/09/2016).

[50] More in J. Glumińska-Pawlic, Rola Rady do Spraw Przeciwdziałania Unikaniu Opodatkowania w kształtowaniu polityki przeciwdziałania międzynarodowemu unikaniu opodatkowania [The Role of the Council for Counteracting Tax Avoidance in Shaping the Policy of Countering International Tax Avoidance]. (In:) D. Gajewski (ed.) Międzynarodowe unikanie i uchylanie się od opodatkowania – zagadnienia wybrane [International Tax Evasion and Avoidance – Selected Issues]. Warszawa 2017, pp. 59–71.

and customs investigation, if – in the cases regarding:

- estimation or determination of tax liability;
- determination of tax loss;
- assertion of overpayment of tax or determination of overpayment or tax refund;
- responsibility of the taxable person for tax not withheld by the taxpayer;
- the scope of responsibility or entitlements of an heir;

– a decision to apply the rule may be made.

Whereas in the case of taxes falling within the competencies of the local tax authorities, tax proceedings commence or are overtaken by the Head of the NRA on request of a relevant body. This solution deserves positive evaluation since authorization of the local tax authorities to initiate commencement or overtaking of proceedings means that the financial autonomy of the local government is respected. Overtaking proceedings in progress takes part by way of a non-actionable decision that is delivered to the party and the tax authority, which was competent to handle the case earlier, or a tax and customs supervision body. The decision regarding commencement or taking over of tax proceedings describes the extent to which the Head of NRA will run the proceedings. The general anti-abuse rule is intended to be applied by way of issuing a decision regarding determination of the correct tax liability for a given tax year or other settlement period as well as regarding other cases concerned with determination of liabilities or returns. The competences of the Head of NRA encompass determination of the amount of tax liabilities or issuance of another decision regarding taxpayer's settlement in a specified settlement period, if the rule is applied within the framework of this decision. If in the course of proceedings, (based on analysis of evidence or in connection with a submitted adjustment) the Head of the National Revenue Administration concludes that there are no prerequisites to apply the rule, they will dismiss the proceedings concerned with the application of the rule. In such a case, the amount of tax liability (with the rule not applied) can be communicated by way of decision of a competent tax authority or tax and customs audit authority in line with the generally applicable principles.

In the course of proceedings, the Head of NRA may ask the Council for Counteracting Tax Avoidance for an opinion as to the legitimacy of applying Article 119a of TO. The opinion of this independent expert body may be issued in first instance proceedings or the appeal proceedings. In first instance proceedings, only the authority is authorized to lodge an application, if it notices legitimate prerequisites for applying the rule. The draft act stipulates that the authority is obliged to submit analysis of and its stance towards the prerequisites for applying the rule along with the application it lodges. Whereas the act that was already passed only stipulates (in Article 119i) that the Council may approach the party and the Head of NRA and request that they disclose information and provide explanations as regards the case for which the Head requested the Council's opinion on. What is more, the party and the Head of NRA may submit their own stance in writing to the Council on their own initiative and the party may also provide the Council with additional documentation. It seems that removal of the obligation of the Head of NRA to provide the Council with their own stance is not a good solution offered by the legislator, taking into consideration the deadlines the Council must meet to issue an opinion.

On the party's request made as part of the appeal against the decision issued for a case concerned with the application of the rule, the Head of the National Revenue Administration is obliged to ask the Council for an opinion, unless such an opinion has been issued earlier. When requesting an opinion, the Head of the National Revenue Administration hands over case files to the Council and immediately informs the party about requesting the opinion. The decision of the first instance authority should contain a letter of rights to apply for the opinion of the Council for Counteracting Tax Avoidance. Even if the taxpayer lodges no application, the authority conducting proceedings may apply to the Coun-

cil for an opinion until the proceedings are terminated. However, obtaining such an opinion is not obligatory. On invitation of the Chairperson, the representative of the Head of NRA and the party, their representative or legal representative may take part in the Council's meeting (or in part of the meeting) devoted to expressing an opinion as to the legitimacy of applying Article 119a. Invitation of the Head of NRA to take part in the meeting requires sending the same invitation to the party as well. During a meeting, the Council expresses their stance as to the legitimacy of applying Article 119a in an individual case by an absolute majority of votes with at least half the composition of the Council present.

The Council issues a written opinion as to the legitimacy of applying Article 119a along with an explanatory statement without undue delay and no later than within 3 months from the day the Council received case files. The deadline takes into account deadlines set by the Council for the party or the Head of NRA to provide information and explanations concerning the case. The opinion is delivered to the Head of NRA and the party and following removal of data identifying the party and other entities indicated in it, the opinion is immediately published in the Public Information Bulletin on the website of the body servicing the competent Minister of Public Finance. A Council member that does not agree with the stance expressed in the Council's opinion or its explanatory statement may express a separate stance and provide a written explanatory statement for it. Members of the Council may express a joint separate stance. Separate stances are delivered along with the Council's opinion. After the opinion is issued, the Council returns case files to the competent Minister of Public Finance. The fact that the time limit must be observed is justified by the fact that giving opinions on the case by the Council is neutral for the lapse of the term of prescription of a tax liability. This term is neither interrupted nor prolonged in any way. Therefore, it was necessary to provide means for the body to make a decision on the case despite possible absence of the Council's opinion within the defined deadline, which cannot be excluded, especially considering the fact that a tax authority has no influence over the timeliness of the Council's opinions. If an opinion is not issued within the deadline, it is assumed that the Council's opinion advocated legitimacy of applying the rule in a case. This rule, however, does not apply, if an opinion was requested by the party, which is intended to ensure protection of the party interested in receiving the opinion against the unpunctual operation of the Council.

The act provides for instruments that can be used to discipline the members of the Council so that they issue an opinion in a timely manner, which include the following: the competent Minister of Public Finance has the right to dismiss a member of the Council, if they contribute to missing the deadline for issuing an opinion requested by the party; the Chairperson of the Council is obliged to inform the Minister each time the Council misses the deadline for issuing an opinion and about the reasons for that as well as indicate the Council members that have contributed to missing the deadline; and taking away remuneration for a project of explanatory statement for the opinion, if it is issued after the deadline.

6. Protective Rulings versus Individual Interpretations of Tax Law

6.1. Individual Interpretations of Tax Law

The rules for issuing written interpretations by tax authorities as to the scope and manner of application of tax law in individual cases of taxable persons, taxpayers, and collectors were provided for in Chapter 1a, Section II of TO. Throughout the time the act has been applicable, these provisions of the law have been amended many times and each time was surrounded by major controversy. Although it was advocated in the relevant literature that the Ordinance should guarantee protection of the legal rights of the taxpayer

against arbitrariness of tax authorities' activity[51] and contain no solutions created by the Ministry of Finance mostly for the convenience of tax administration, which would be chiefly intended to secure the interests of State Treasury[52], these calls were disregarded by the legislator that introduced further changes that were not always beneficial for the taxpayers.

Currently, in line with Article 14b, section 1 of TO, individual interpretations of the provisions of tax law are issued by the Director of the National Treasury Information (NTI) on request of an interested party for their individual case. Application for an individual interpretation may be concerned with the existing circumstances or future events. Whereas the subject matter of the application may not be the provisions of tax law that regulate the competence, powers, and obligations of tax authorities. An entity lodging an application is obliged to exhaustively describe the existing factual circumstances or a future event as well as present their own stance as to the legal evaluation of the factual circumstances or the future event and – on pain of criminal responsibility for false statement – submit a declaration that on the day of lodging the application, the elements of the factual circumstances covered by the application for issuing an interpretation are not the subject-matter of ongoing tax proceedings, tax audit or tax and customs audit and that the relevant extent of the case was not settled by way of decision or order of a tax authority. If a false statement is made, the individual interpretation that has been issued produces no legal effects.

Director of the National Treasury Information does not issue individual interpretations for the elements of the factual circumstances that on the day of lodging an application are the subject-matter of ongoing tax proceedings, tax audit, tax and customs audit or if the relevant extent of the case was settled by way of decision or order of a tax authority. The same is the case with situations where there is justified presumption that they may be the subject-matter of a decision issued based on the application of Article 119a or constitute abuse of the law provided for in Article 5, section 5 of the Value Added Tax Act. The Director of NTI, who is entitled to issue individual interpretations, asks the Head of National Revenue Administration for an opinion about these cases. An individual interpretation contains a comprehensive description of the factual circumstances or future event presented in the application as well as an evaluation of the applicant's stance along with a legal explanatory statement for this evaluation. The authority may decide not to provide a legal explanatory statement, if the applicant's stance is completely correct. Whereas in the case of a negative evaluation of the applicant's stance, an individual interpretation contains an indication of an appropriate stance along with a legal explanatory statement. The interpretation contains a letter of rights to file a complaint to the administrative court. The interpretation is issued without undue delay but no later than within three months from the day of receiving the application.

In line with Article 14da of TO, the competent Minister of Public Finance of their own motion may change the general interpretation that has been issued or tax explanations, if he concludes that they are incorrect, taking especially into account the judicial decisions of the courts, the Constitutional Tribunal or the Court of Justice of the European Union.

The Head of the National Revenue Administration of their own motion may:

- change the individual interpretation that has been issued, if he concludes that it is incorrect, taking especially into account the judicial decisions of the courts, the Constitutional Tribunal or the Court of Justice of the European Union;
- revoke an individual interpretation that has been issued and dismiss the case con-

[51] Cf. A. Komar, Ordynacja podatkowa na cenzurowanym [Tax Ordinance under Observation]. "Przegląd Podatkowy" 1995, No. 11, pp. 3–4.

[52] Cf. R. Mastalski, Ordynacja podatkowa. Charakter i cel regulacji [Tax Ordinance. Character and Purpose of Regulation]. "Przegląd Podatkowy" 1995, No. 12, p. 4.

cerned with issuing an individual interpretation, if on the day of its issuance there were prerequisites for refusal to initiate the proceedings regarding issuance of an individual interpretation.

Whereas the Director of the National Treasury Information of their own motion may:

- change an individual interpretation in the course of examination of a letter of formal notice calling for removal of breach of the law;
- determine that an individual interpretation has expired, if it is inconsistent with a general interpretation issued under the same legal circumstances;
- revoke an individual interpretation that has been issued and issue a decision, if a general interpretation was issued for an identical case;
- change this decision, if the general interpretation indicated in the decision has changed;
- revoke the above-mentioned decision, if the factual circumstances or future event presented in the application do not correspond with the subject-matter of the general interpretation indicated in the decision and examine the application for an individual interpretation.

Alteration of an individual interpretation takes place with reference to the future event or factual circumstances which were described in the application and served as basis for the altered interpretation. Revocation or determination of expiry of an individual interpretation and alteration or revocation of a decision in question take place by way of decision that can be complained against.

An application for an individual interpretation is payable PLN 40 and this amount should be paid within seven days from the day of lodging the application. If a single application is concerned with issuing an individual interpretation for separate factual circumstances or future events, a fee is collected for each separate set of factual circumstances or each future event. The fee for the application for issuing an individual interpretation is refundable only if:

- the whole application is withdrawn;
- part of the application referring to a separate set of factual circumstances or future event presented in it is withdrawn – in the respective part;
- payment is made in excess – in an appropriate amount.

The undue fee is refunded not later than within seven days from the day the proceedings regarding issuance of an interpretation terminate. Complying with the individual interpretation before it was changed, found to have expired or prior to delivery of a copy of a final and unappealable judicial decision of an administrative court revoking the individual interpretation to a tax authority may not harm the applicant, which is also the case if it is not taken into consideration in the settlement of a tax case. To the extent to which the interpretation had been complied with in part that was changed, found to have expired or if the interpretation was not taken into consideration in the settlement of a tax case, proceedings regarding tax offences or crimes are not opened and proceedings that have been opened are dismissed and no late payment interest accrues.

6.2. Protective Rulings

In order to secure the interests of the taxpayer, in Chapter 4 of Section IIIA of TO, the legislator introduced a possibility for the interested party to obtain a protective ruling issued by the Head of the National Revenue Administration (Article 119w). The interested party's application (or parties' joint application) may be concerned with a planned, commenced or completed operation. It should contain data important from the point of view of the tax effects of the operation, in particular:

- data identifying the applicant;
- indication of the entities making the operation;
- a comprehensive description of operations along with an indication of the relationships between entities, which are described in Article 11 of the corporate income tax act and Article 25 of the personal income tax act;

- indication of the purposes that the operation is or was supposed to achieve;
- an economic justification of the operation;
- description of tax effects, including tax benefits, which result from the operations covered by the application; and
- presentation of own stance on the case.

Documentation concerning the operation may be attached to the application, especially the originals, copies or drafts of agreements. The Head of the National Revenue Administration may ask for explanations in case of doubts arising over the data provided in the application or organize coordinating discussions in order to explain these doubts. If the application does not meet the requirements indicated above or other requirements defined by the provisions of the law, the authority will not examine it.

The Head of the National Revenue Administration issues a protective ruling without undue delay but not later than within six months from the day of receiving the application, if the circumstances presented in the application indicate that Article 119a of TO does not apply to the operations in question. The deadline takes into account the deadlines and periods provided for in the provisions of the tax law for performing certain operations, periods of stay of proceedings, and periods of delays caused by the party or by reasons beyond the authority's control. Through appropriate use of the mechanism of the "silent" individual interpretation, if the six-month deadline is missed, fiction that the application was granted is accepted, which is the so called "silent" opinion (Article 140 in conjunction with Article 119zf). If, however, the circumstances presented in the application indicate that the cited provision of the law is applicable, the authority refuses to issue a ruling and at the same time points to the circumstances attesting to the fact that Article 119a may be applicable to the operation. Refusal to issue a protective ruling should contain a letter of rights to file a complaint to the administrative court. The fact that an application for a protective ruling has been lodged does not prevent checks, tax audits, tax and customs audit or institution of tax proceedings. An application for a ruling is payable PLN 20,000 and this amount should be paid within seven days from the day of lodging the application. The amount of the fee is justified by a high level of complexity of the proceedings and the necessity to make larger outlays for running the proceedings. This is because the proceedings are supposed to cover not only the provisions of the Polish tax law but also – owing to involvement of non-residents in the legal structures described in the application – knowledge of the tax legislation of other countries is required as well as analysis of documents and agreements, including ones drawn up in foreign languages. This results from, among other things, internationalization of the patterns of tax avoidance. It is hard to deny that the amount of the fee payable for such a ruling will limit interest in this option[53]. The fee may be refunded only if the application is withdrawn (in half) and if a fee higher than the due one was paid (in the appropriate amount) not later than within 7 days from the day of termination of the proceedings concerned with issuance of a protective ruling. The applicant also covers the costs of the proceedings, including the witnesses, experts, and translators' travel and other expenses as set out in the provisions of Section 2, title III of the act of 28 July 2005 on court costs in civil proceedings[54] and experts and translators' remuneration.

A protective ruling issued by the Head of the National Revenue Administration should contain, in particular, a comprehensive description of the operation that the application is concerned with, evaluation stating that Article 119a is not applicable to this operation, and a letter of rights to file a complaint to the administrative court. The Head of the National Revenue Administration of their own motion may change the protective ruling that has been issued or the re-

[53] See L. Etel, Cztery klauzule przeciwko unikaniu opodatkowania [Four Anti-Tax Avoidance Rules]. (In:) D. Gajewski (ed.) Międzynarodowe unikanie i uchylanie się od opodatkowania – zagadnienia wybrane [International Tax Evasion and Avoidance – Selected Issues]. Warszawa 2017, pp. 34–35.

[54] Journal of Laws of 2016, item. 623 as amended.

fusal to issue a protective ruling, if it is inconsistent with the judicial decisions of the Constitutional Tribunal or the Court of Justice of the European Union. The new procedure for issuing protective rulings in individual cases is not to be limited only to interpretation of the provisions of tax law but should take a broad look at the possibility of applying the general anti-abuse rule, taking also into consideration the economic aspects of the planned operations covered by the rule and relations between the economic and tax benefits. Thus the subject-matter of the ruling is not evaluation of the applicant's stance but evaluation whether there are prerequisites for adopting the rule under the circumstances presented in the application[55]. An entity that has obtained a protective ruling is protected to the extent covered by the ruling until it is revoked or changed. Such protection consists in the impossibility of applying the rule. The same protection is available to an entity whose application has not been examined within the deadline. It should be noted that relevant provisions regulating the procedure of issuing interpretations of the provisions of tax law, general principles governing tax proceedings as well as other provisions regulating tax proceedings concerning, among others, powers of attorney, notifications, calculating deadlines, and the indicated provisions governing the procedure for issuing individual interpretations apply to the proceedings concerned with issuing the ruling. This procedure contains elements of two procedures currently applicable on the grounds of TO: the procedure for entering into transfer pricing agreements (Article 20a et seq.) and the procedure for issuing individual interpretations of tax law (Article 14a et seq.).

In conjunction with the fact of the amendment of TO of 13 May 2016 entering into force, which introduced the provisions countering tax avoidance, especially Article 119a, section 1 and 119e, point 1, doubts arose whether taxpayers that obtained an individual interpretation of the provisions of tax law earlier may use the protection provided for in Article 14m, sections 1 and 2 and Article 14k, section 1 of TO, which arises from compliance with this interpretation. It should be reminded though that in the interpretation the applicant receives information exclusively on the view of the authority about a given case and then takes certain actions on the grounds of tax law independently. By issuing an individual interpretation, the authority does not express their opinion about the effects of possible audit or tax proceedings carried out in the future but merely states whether the applicant's stance is correct and indicates the legal basis. It is the taxpayer's right to request that the authority issue an individual interpretation of the provisions of tax law in order to obtain a stance about a certain legal action that is being planned and the authority's stance may serve the taxpayer as certain legal advice that is not only a guarantee but it is also informative. The applicant may be interested in the tax effects of their potential behaviour that is being planned and which will be undertaken or not depending on the outcome of the individual interpretation.

However, in the context of the general anti-abuse rule, it has become common practice of the Minister of Development and Finance to refuse to initiate proceedings in cases concerned with taxpayer's use of the legal protection arising from an individual interpretation. In the explanatory statements for the refusals, the authority indicates that there is no possibility to examine the application for the issuance of an individual interpretation based on the application of the provisions of Section II, Chapter 1a of Tax Ordinance – Interpretations of Tax Law due to the fact that confirmation that the provisions of Articles 119a and 119e of TO do not apply in a given case is not covered by the scope of the procedure regulating issuance of individual interpretations since it is covered by a new procedural mode and the Minister can evaluate whether Article 119a of Tax Ordinance is applicable in the situation presented by the taxpayer or not within

[55] From the explanatory statement for the government draft act amending the act – Tax Ordinance and some other acts, Publication of the Sejm of the 8th Term No. 367, pp. 37 et seq.

the framework of this new mode. In the opinion of the authority, it is impossible to provide such information within the framework of the mode of individual interpretation since it is reserved for protective rulings issued on the basis of the provisions of Chapter 4 of Section IIIA of TO and there is no room for free replacement of modes defined for specific types of cases. Moreover, Article 119y of Tax Ordinance directly provides for the mode of issuing a protective ruling.

Such a standpoint of the Minister of Development and Finance indicates that he intends to avoid issuing individual interpretations, which are supposed to serve as real substantive and legal protection of the taxpayer and not just information, in favour of protective rulings[56]. On the one hand, this means that the legal protection of the taxpayer is weaker and, on the other hand, raises doubt whether the Minister is not driven by the willingness to increase budget revenues by inducing the taxpayers to apply for a protective ruling payable PLN 20,000 instead of an individual interpretation of the provisions of tax law payable PLN 40.

7. The Advantages and Disadvantages of the Regulations that Have Been Introduced

Since the general anti-abuse rule entered into force on the grounds of the Polish tax law, there has been considerable ambivalence towards it. According to the government, the biggest advantage of the regulation is the chance to systematize the system of tax law and set acceptable boundaries of tax optimization while at the same time reinforcing the autonomy of tax law with respect to civil law[57]. It should also be evaluated positively that the mechanism of protective rulings has been introduced, which will allow to increase certainty of the law and taxpayers' safety[58]; unfortunately, since the cost of obtaining such rulings is relatively high and amounts to PLN 20,000, the accessibility of the regulation is limited and it can be used only by the biggest taxpayers. The fact that the legislator decided not to include reference to Article 14m of TO in Article 119zf of TO also remains a shortcoming and so the no-harm principle does not directly apply to protective rulings[59].

Taxpayer's safety should also increase due to the appointment of the Council for Counteracting Tax Avoidance; although it is a shame that the Council will only give non-binding opinions that do not guarantee that the taxpayers are as safe as if they obtained an individual protective ruling[60]. Doubts also arise as to the optional character of the Council's opinions in the course of the first instance proceedings concerning the rule and obliging the Head of the National Revenue Administration to request the Council's opinion, only if an appropriate application is lodged by the party along with an appeal against the decision, which may affect the lengthiness of the proceedings.

One of the disadvantages of the rule is definitely the use of an imprecise term – "artificial" transaction that, in fact, the whole structure of this mechanism is based on[61]. The definition provided in Article 119b, section 1 of TO, even if jux-

[56] Cf. judgement of 13 January 2017 of the Regional Administrative Court in Kraków (case identifier I SA/Kr 1380/16) and of 11 April 2017 (case identifier I SA/Kr 115/17).

[57] Cf. explanatory statement for the government draft act amending the act – Tax Ordinance and some other acts, Publication of the Sejm of the 8th Term No. 367, p. 5.

[58] Cf. H. Filipczyk, Stosowanie klauzuli... [Application of the General...], op. cit., p. 14.

[59] See more: Ł. Matusiakiewicz, Opinie zabezpieczające przed stosowaniem przepisów o przeciwdziałaniu unikaniu opodatkowania [Protective Rulings Securing against the Application of the Provisions Countering Tax Avoidance], LEX 2016/el.

[60] A. Mariański (ed.), Ł. Chmielecki, A. Krajewska, A. Nowak-Piechota, B. Rodak, K. Sołoniewicz, M. Sroczyński, A. Tim, M. Wolska-Bryńska, Ordynacja Podatkowa 2017. Poradnik dla praktyków [Tax Ordinance 2017. Guidebook for Practitioners], Legalis 2017/el.

[61] Cf. P. Rochowicz, Klauzula jak karciany joker [Rule Like the Joker in Cards]. "Rzeczpospolita – Prawo co dnia" 2016, No. 7, p. 15.

taposed with an open list of cases that the legislator deems particularly "artificial", does not offer a clear picture and will certainly raise considerable doubts as to interpretation. It should also be stressed that the legislator's mistakes made in the previous regulations have not been eliminated in the wording of the rule as it is now. The fact that for the sake of evaluation of similarity of behaviour the authorities refer to the hypothetical "reasonable third party" does not ensure maximum predictability of decisions made based on the rule, which is contrary to the requirements set out in the decision of the Constitutional Tribunal regarding Article 24b of TO. In particular, fierce controversy is created by the legislator's solution of intertemporal influence of the rule in the light of constitutional standards in connection with Article 7 of the act of 13 May 2016 amending the act – Tax Ordinance and some other acts. In accordance with the regulation cited above, "the provisions of Articles 119a–119f of the act altered by Article 1 apply to a tax benefit obtained after the amendment act entered into force." It is said in the doctrine that such an intertemporal solution allows to use the rule to affect actions taken also before Article 119a et seq. of TO entered into force[62]. As an example of retroactive regulation[63], such a solution raises reasonable doubt as to the conformity of Article 119a of TO in conjunction with Article 7 of the amendment act[64]. Since certainty of the law means, among others, that there is no room for retroactive regulations, the time boundaries of such certainty of the law should be drawn by the moment of natural end of the tax benefits awarded in the past before the legislator's tax policy (followed by the previous government) has changed, which is why the general anti-abuse rule cannot be interpreted in a way allowing its retroactive or retrospective application[65].

It is also a shame that despite international guidelines[66], the Polish legislator has not decided to develop and publish clear straightforward guidelines for the taxpayer or indications of examples of application of the rule. This exposes many taxpayers to uncertainty regarding their situation at least until the first opinions of the Council and protective rulings are published. Whereas it is positive that the Polish rule conforms to the requirements of the EU law, especially the new Directive of the Council 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices, which contains regulations on countering fake transactions whose main purpose is to obtain tax benefits contrary to the objective of the tax act.

As far as evaluation of the currently adopted regulation is concerned – although it is undoubtedly more extensive and refined than the previous one – it is hard to challenge an opinion that not all of the drawbacks and doubts indicated already in the decision of the Constitutional Tribunal of 11 May 2004 have been removed. On the other hand, if the objections of the Constitutional Tribunal are taken into consideration and the definition is made more precise, the mechanism loses the characteristics of a general rule.

8. The Influence of the Rule on the Phenomenon of Tax Avoidance

In line with the intentions of the Polish legislator, the rule is supposed to systematize the system of tax law and by its wording and practice of use set

[62] Cf. H. Dzwonkowski, Komentarz do art. 119a Ordynacji Podatkowej [Commentary to Article 119a of Tax Ordinance]. Legalis 2016/el.

[63] More on retroactive regulations and the constitutional conditions for acceptance of such an intertemporal solution (see judgement of the Constitutional Tribunal of 18 October 2006, case identifier P 27/05, Legalis/el.).

[64] Cf. more in H. Filipczyk, Reguła intertemporalna... [The Intertemporal Rule...], op. cit., pp. 7–20.

[65] M. Kolibski, K. Turzyński, Reguła intertemporalna... [The Intertemporal Rule...], op. cit., pp. 21–25.

[66] Cf. Tax Controversy and Dispute Resolution Alert: General anti-avoidance rules: What are the key elements to a balanced approach, June 2002, pp. 2–3, http://www.pwc.com/gx/en/tax/newsletters/tax-controversy-dispute-resolution/assets/pwc-general-anti-avoidance-rules.pdf – accessed on 5 May 2017.

the boundaries of acceptable tax optimization[67]. It is expected that the introduction of the general anti-abuse rule will translate into an increase of State budget revenues by PLN 50 million in 2017 and by 100 million in 2018 and subsequent years[68]. The project promoters' reasoning is simple and presupposes the effectiveness of verification of activity intended to avoid taxation; estimation of the tax base in line with the actual substance (which is subject to taxation with a higher rate) of the legal relationship that has been questioned; and at the same time prevention by way of convincing taxpayers not to use similar solutions in the future.

Disregarding the project promoter's optimism with respect to the amendment of the Ordinance, we should consider whether the introduction of the rule will actually lead to countering tax avoidance that the legislator sees as a pejorative phenomenon. Due to the imprecise nature of the adopted regulation, its introduction might harm the entities that did take action intended to avoid taxation but whose business operations will be assessed negatively by tax authorities (that will be the ones to evaluate the pattern of behaviour of the "reasonable third party" and consistency of the taxpayer's behaviour with this pattern[69]). Considering the substantial cost of obtaining the protective ruling, the lack of certainty of the law in this respect is flagrant. The rule is undoubtedly an interference with the freedom of economic activity conducted by Polish taxpayers that have been divested of the possibility they were allowed earlier, which consisted in shaping their interests in such a way that guaranteed the possibility of paying the lowest taxes based on the applicable provisions of the law.

Although the Council for Counteracting Tax Avoidance is unquestionably intended to guarantee justice in the course of proceedings where the general anti-abuse rule is applied, the attempts to limit this position remain questionable. First and foremost, the fact that it is optional for the Head of the National Revenue Administration to request the Council's opinion in the first stage of the proceedings should be assessed negatively. Whereas obliging them to request the opinion only if an appropriate application is lodged during appeal to a decision may in fact unnecessarily prolong the proceedings. Obviously, it is easy to predict that each taxpayer that is dissatisfied with the decision of the authority will seek help and request that the Council issues an opinion that they will be able to use as possible proof in proceedings before the administrative court. It is also a serious problem that the Council's opinions are not binding – if the Council issues a negative opinion about applying the rule, the authority is only obliged to take a stance towards the opinion in their explanatory statement regarding the decision[70]. Such a regulation may reduce the Council's role to a body devoid of actual authority and merely legitimizing the activity of the Head of the National Revenue Administration who will determine its character, that is, if it is an advisory body, one that protects the interests of an honest taxpayer, one that has actual influence over the decisions or whether it is yet another façade institution raising unnecessary hopes among honest taxpayers that use the credits, exemptions, deductions, restructuring transactions or various legal forms of running a business and forms of taxation, which have been made available by the legislator.

It remains unknown whether the introduction of the rule will not lead to forcing taxpayers to move their business centres to other countries

[67] Explanatory statement for the government draft act amending the act – Tax Ordinance and some other acts, Publication of the Sejm of the 8th Term No. 367, p. 19.

[68] Ibid., p. 49.

[69] It should be considered whether the freedom that tax authorities have been permitted is not too extensive. In fact, the Constitutional Tribunal demonstrated earlier that the "Legislator may not use imprecise wording of the provisions of the law to award too extensive freedom to the authorities that will be applying them when establishing in practice the scope ratione personae and ratione materiae of the limitations on the constitutional freedoms and rights" (cf. Judgement of 08 December 2009 of the Constitutional Tribunal, case identifier K 7/08).

[70] This arises from Article 210, section 2c of TO.

using less restrictive solutions in this respect. It would not be the first time to witness the adoption of the leapfrogging strategy by taxpayers who transfer their businesses to countries that guarantee the greatest effectiveness in terms of taxation. Time will tell whether the introduction of the rule will translate into actual increase of budget revenue while the authorities refrain from interfering with the taxpayers' activity, if they are not oriented at tax avoidance, and use the rational third party test in a sensible and balanced way, taking into consideration the Article 2a of TO[71], which stipulates that any insurmountable doubts as to the substance of the provisions of tax law are dealt with to the benefit of the taxpayer.

[71] Cf. D. Adamski, Klauzula przeciwko unikaniu opodatkowania – powtarzanie zaklęć zamiast naprawy systemu [General Anti-Abuse Rule – Chanting instead of Repairing the System]. "Analizy Forum Obywatelskiego Rozwoju" 2016, No. 3, p. 7, http://www.for.org.pl/pl/a/3776,Analiza-22016-Klauzula-przeciwko-unikaniu-opodatkowania-powtarzanie-zaklec-w-miejsce-naprawy-systemu – accessed on 05 May 2017.

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CASP
Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

· PUBLISHER ·
Centre for Analyses and Studies of Taxation SGH · Al. Niepodległości 162 · Warsaw 02-554 · Poland
Dominik J. Gajewski (General Editor) · Grzegorz Gołębiowski · Tomasz Grzybowski (Managing Editor)

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