

Tax Law Rulings as an Example of Support for Taxpayers

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Abstract

Tax law rulings are not an institution typical only for the Polish tax system, because they occur, in various forms, almost everywhere in Europe. Undoubtedly this reflects the fact that the legislator is able to see the specifics of the tax law – the area not only extremely complex and extensive, but first of all affecting the ownership right. Rulings give the taxpayers not only the chance to clarify doubts related to the text of regulations, but also create a sense of security and certainty – if taxpayers follow recommendations of the authority included in the ruling, they will not suffer any negative consequences of their own actions.

Keywords

tax; tax law rulings; taxpayer

1 Introduction

The canon of certainty is one of the canons of taxation formulated by Adam Smith (Gomułowicz, 2002: 35–36). As a weaker party in the relationship resulting from an obligation, taxpayers need to understand their duties and rights. They should also know when their act or omission would result in a tax liability, and consequently – a tax obligation. Moreover, the taxpayer should know when, where and in what amount the tax due should be paid. In the Polish legal system, in accordance with Act of 2 April 1997 (The Constitution of the Republic of Poland), taxes are imposed, tax subjects, tax objects and tax rates are identified, rules for tax credits and relieves, as well as categories of entities exempt from tax are set out in an act (Art. 217 of the Constitution).

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From a theoretical point of view, the canon of certainty is applied in Poland.¹ Taxes are imposed based on the act and taxpayers have an unlimited possibility to review their content. However, in practice, tax acts are subject to frequent amendments; sometimes, the same act is amended more than once in the same year. The lack of clarity and precision of tax law provisions is another issue. This is because tax law provisions that very seriously affect the personal financial position of the taxpayer should be clear and very specific (Burzec, 2012).

Tax law rulings, both individual and public, have already become a permanent and crucial element of the Polish tax law. They are treated as a material extension of the scope of protection of rights and economic freedoms of the taxpayer. Consequently, rulings are supposed to be an important, and thus stabilising element of the process of resolving disputes between taxpayers and tax authorities. Although the institutional solution pertaining to rulings is not free from defects, taxpayers recognise rulings as one of the most important safeguards for the protection of the legal rights of taxpayers.

The increasing degree of complexity might be indicated as a key reason for the growth of importance of tax law rulings.² The above is a consequence of both the growing complexity of economic relationships and phenomena, as well as fears of taxpayers seeking to circumvent tax law and avoid taxation (Andersson, 1965: 7).

2 International Background

Tax law rulings are not an institution typical only for the Polish tax system, because they occur, in various forms, almost everywhere in Europe (Morawski, 2012: 344 et seq.). There is no single model of binding tax information in Europe.³ This is because no uniform EU rules in this respect have been introduced. Such rules have been introduced only in case of the EU customs law that provides the opportunity to obtain binding information on the tariff classification of goods and their origin. In Denmark, no rulings are issued with respect to VAT, customs duties and inheritance. In the Netherlands, rulings are issued only for matters pertaining to international business structures. International taxation matters are also subject to rulings in France. In the Czech Republic and Slovakia, the scope of binding information issued is limited to transfer pricing issues. In all countries, the ruling system is undergoing continuous evolution. Optimal ways of balancing the fiscal interest of the state on the one hand, and, on the other hand, the interest of citizens related to the protection of their legitimate expectations related to acting based on trustworthy tax law rulings are being searched for (Morawski, 2012: 344 et seq.). Procedures for issuing rulings are highly differentiated. Rulings are usually the responsibility of tax authorities, but not always – for instance, in Sweden, an independent body has been established – the Council for Advanced Tax

¹ See Burzec, 2012.

² See Brzeziński, 1998.

³ See Rochowicz, 2012.

Ruling. Possibilities to appeal against rulings issued also differ. Taxpayers rarely have an in-court option to persuade the authorities to their views, since, apart from Poland and Sweden, such options are very limited. It is worthwhile to note that although tax law rulings can be considered a universal phenomenon in Europe, there are also countries where such an institution does not function. This refers, for instance, to the United Kingdom, Ireland and Luxembourg. While legal systems of these countries do not include a separate institution related to rulings, taxpayers are able to obtain clarifications from tax authorities. Consequently, in these cases, the legislator prefers direct communication between the taxpayer and the tax authority.

A limited duty to monitor binding tax law rulings issued by Member States has been imposed on the European Commission as of 1 January 2017 [Council Directive (EU) 2015/2376]. The Directive is one of the ideas to fight tax avoidance by enterprises. It requires Member States to automatically exchange information on advance cross-border tax law rulings and advance pricing arrangements. The duty to automatically exchange information on tax rulings has been introduced by Art. 76 of Act of 9 March 2017 on the exchange of tax information with other countries (*Journal of Laws*, 2017, item 648).

3 Public Rulings

Pursuant to Art. 14 § 1 of the Tax Ordinance, the minister competent for public finance shall attain at ensuring uniform application of tax law provisions by tax authorities, in particular by issuing, *ex officio* or upon application, their interpretation (public rulings), having regard to the judicial pronouncements of the courts, the Constitutional Tribunal or the Court of Justice of the European Union.⁴

It should be emphasised that public rulings cannot be considered norm-setting acts, since they do not contain norm-setting content, although they are abstract in nature. They are not administrative acts either, since they do to authoritatively decide about rights or duties of the addressee. It is also impossible to recognise them as a source of law or an internal act of administration of law (Etel, 2018). This is because an official interpretation cannot provide a basis for tax decisions towards citizens and other subjects of rights (Dębowska-Romanowska, 1998: 28). These rulings are not recognised as binding by tax authorities (Osada, 2017). Such a legal status results from the judgement of the Constitutional Tribunal of 11 May 2004 (Judgement of the Constitution Tribunal K 4/03, OTK-A 2004, no. 5, item 41.), which – in the previous legal context – repealed Art. 14 § 2 of the Tax Ordinance in part stipulating that rulings issued by the Minister of Finance are binding on tax authorities and fiscal control authorities, as inconsistent with Art. 78 and Art. 93 section 2 of the Constitution of the Republic of Poland. On the other hand, it is difficult to assume that tax authorities

⁴ See Filipczyk, 2012.

would not feel bound by the ruling issued by the Minister of Finance when applying tax law provisions in individual cases when the purpose of the ruling is ensuring uniform application of tax law by these authorities and they are the addressees of these rulings.⁵

In the Ordinance, the Polish legislator has introduced a principle of the primacy of public rulings over individual rulings. The aforementioned principle results in a refusal to issue the individual ruling where there is a public ruling applying to the factual state of affairs or future events described in the application. The director of the Bureau of the Domestic Fiscal Information may also, *ex officio*, confirm the expiry of the individual ruling, if such ruling is non-compliant with the public ruling issued in the same legal circumstances. The key purpose of introducing the principle of the primacy of public rulings was to control the number of applications for individual rulings.⁶

4 Individual Rulings

An individual ruling is an act issued to a specific recipient. The director of the Bureau of the Domestic Fiscal Information shall, upon application by the party concerned, issue in the party's individual case an interpretation of tax law provisions (individual ruling) (Art. 12b of the Ordinance). Individual rulings with respect to local taxes shall be issued by the *voit*, mayor (president of a city), *staroste* or marshal of a *voivodeship* (Art. 14j of the Ordinance). An application for individual ruling may concern the factual state of affairs or future events.

Legal regulations pertaining to written interpretations of tax law provisions were analysed in judicial decisions of the Supreme Administrative Court.⁷ In the justification of its resolution of 7 July 2014 (Supreme Administrative Court II FPS 1/14), the Supreme Administrative Court explained that the individual tax law ruling is a type of external unilateral activity of tax administration, as well as an act of authorised bodies of public administration, which does not demonstrate features of an authoritative decision and does not resolve the matter with respect to exercising tax rights and fulfilling tax liabilities by the party concerned. In particular, it should be emphasised that the subject of rights complying with the content of the ruling rather than issuing the ruling ensures the related legal protection. This is a non-authoritative activity, notifying of the binding law, and more precisely – of justified possibilities of the application thereof, leading to uniform application of and compliance with the tax law, presenting convincing arguments and certain propositions. At the same time, in the justification

⁵ See Dzwonkowski, 2018.

⁶ In 2016, 34,200 individual rulings were issued; in 2017, their number dropped by about one fourth. See businessinsider.com.pl, 2017.

⁷ See resolution of the Supreme Administrative Court of 7 July 2014, II FPS 1/14, ONSAiWSA 2015, no. 1, item 3. The resolution explained that "Provisions of Article 134 § 2 of the Act of 30 August 2002 – Law on proceedings before administrative courts (consolidated text: *Journal of Laws*, 2012, item 270, as amended) shall not apply in case of appealing against the individual tax law ruling to the administrative court."

of the judgement of the Constitutional Tribunal of 25 September 2014, K 49/12,⁸ when assessing the legal nature of rulings, it was concluded that individual tax law rulings do not themselves authoritatively determine rights or obligations of the taxpayer and do not determine its legal status. They are “road signs” or “statements of views” of fiscal authorities with respect to the legal issues at hand, and only subsequent autonomous decisions of the taxpayer (tax remitter or tax collector) have certain effects. Issuing the tax information in no case substantiates rights or liabilities of the taxpayer, because the tax object and the scope of tax liability, as well as the tax point and tax rate are set out in tax acts. Consequently, activities of tax authorities involving notifying of the “scope of application of law” may not result in, generate or substantiate any liability or an elimination or limitation thereof.

5 No-harm Rule

By its very nature, issuing an individual ruling should mean that the party concerned will have an opportunity to get acquainted with the views of the tax authority regarding the meaning of certain tax law provisions, taking into account the factual state of affairs presented in the application, and that the party concerned will have an actual opportunity to refer to these views in case of potential disputes with tax authorities.

Tax law rulings, both individual and public, are not a source of law and are not binding. After receiving the ruling, the taxpayer is not obliged to follow its provisions. However, following the provisions of the ruling ensures that the so-called no-harm rule is applied. It can be considered from two principal perspectives – narrow and wide.

The first one arises from Art. 14k of the Tax Ordinance. In accordance with this article, application of an individual ruling before a change thereof, stating the expiry thereof or before service to the tax authority of a copy of a valid pronouncement of an administrative court setting aside the individual ruling may not be detrimental to the applicant, as well as in the case when it has not been taken into account in the resolution of the tax case.⁸ To the extent related to applying a ruling which was changed, its expiry was stated or which was not taken into account in the resolution of a tax case, proceedings in cases involving fiscal offences or fiscal petty offences shall not be initiated and proceedings initiated in such cases shall be discontinued and no default

⁸ See Judgement of the Constitutional Tribunal of 25 September 2014, K 49/12; OTK-A 2014, no. 8, item 94. In the judgement, the Constitutional Tribunal concluded that “Article 14o § 1 of the Act of 29 August 1997 – Tax Ordinance (*Journal of Laws*, 2012, items 749, 1101, 1342 and 1529; *Journal of Laws*, 2013, items 35, 1027, 1036, 1145, 1149 and 1289; and *Journal of Laws*, 2014, items 183, 567 and 915), understood in such a way that the notion of “no [...] ruling issued” does not mean non-delivery thereof within the time limit referred to in Art. 14d of the Act in question, complies with the principle of the citizens’ trusts in the state and its laws, arising from Art. 2 of the Constitution of the Republic of Poland.”

⁸ A very similar principle is expressed in Art. 14k § 2 of the Tax Ordinance, pertaining to public rulings: “Application of a public ruling before a change thereof may not be detrimental to the person who applied it, as well as in the case when it has not been taken into account in the resolution of the tax case.”

interest shall accrue (Art. 14k § 3 of the Tax Ordinance). In accordance with the above, the narrow protection offered by the ruling is based on eliminating the possibility of initiating the fiscal penal proceedings against the taxpayer, who acted based on the ruling, and imposing no default interest on this taxpayer. The aforementioned reward is difficult to overestimate.

The wide protection arises from Art. 14m of the Tax Ordinance. Application of a ruling which was subsequently changed, its expiry was stated or which was not taken into account in the resolution of a tax case shall result in exemption from the duty to pay tax to the extent resulting from the event being the subject-matter of ruling if:

1. The obligation was not performed properly due to application of a ruling which was changed or which was not taken into account in resolution of a tax case; and
2. the tax effects connected with the event to which the factual state of affairs being the subject-matter of ruling corresponds occurred after the publication of the public ruling or after the service of the individual ruling.

6 Tax Clarifications

Tax clarifications and the established ruling practice are new institutions introduced into the Polish tax system as of 1 January 2017, by the Act of 16 December 2016 amending certain acts to improve the legal environment for entrepreneurs (*Journal of Laws*, 2017, item 2255, as amended).

Pursuant to Art. 14 § 1 point 2 of the Tax Ordinance, the minister competent for public finance shall attain at ensuring uniform application of tax law provisions by tax authorities, in particular by issuing *ex officio* general explanations of tax law provisions regarding the application of such provisions (tax clarifications), having regard to the judicial pronouncements of the courts, the Constitutional Tribunal or the Court of Justice of the European Union. Clarifications are primarily addressed to entitled obliged parties (taxpayer, tax remitter, tax collector). The content is what distinguishes public rulings from tax clarifications. This is because public rulings pertain to official interpretation of regulations, while the essence of tax clarifications involves linking the content of a provision to its application in practice with respect to model situations.

The introduction of the institution of tax clarifications as part of endeavours to improve the legal environment for entrepreneurs is aimed at offering an alternative for taxpayers, who had to apply for an individual ruling. Now, by following tax clarifications, they will be able to obtain legal protection faster. Publication of tax clarifications in the *Biuletyn Informacji Publicznej* (Public Information Bulletin) together with the date of their publication and ensuring the same legal protection in case of following these clarifications is to generate a measurable result involving a reduced number of applications for less important issues. The expected outcome is also to ensure greater efficiency of the tax authorities by reducing the number of individual rulings

issued.⁹ The application of tax clarifications by taxpayers is to offer solutions pertaining to legal protection as the one available in case of applying public or individual rulings.

7 Established Practice

The established ruling practice is defined in Art. 14n § 5 and § 6 of the Tax Ordinance. In accordance with the aforementioned provisions, the established ruling practice shall be deemed to be the explanations of the scope and manner of applying tax law provisions which prevail in individual rulings issued in the same factual states of affairs or with respect to the same future events and in the same legal circumstances, in the course of the settlement period, in which the taxpayer applied them and for 12 months before the beginning of this settlement period. However, in the case where the aforementioned period is governed by public rulings or tax clarifications issued, then, starting from the day of publishing of such public ruling or placing such tax clarifications, the established ruling practice shall be deemed to be, respectively, the explanation of the scope and manner of applying tax law provisions resulting from the public ruling or from the explanation of tax law provisions concerning the application of such provisions which are included in such tax clarifications (Wilk, 2017).

The main purpose of the new institution is extending legal protection for taxpayers applying the content of individual rulings issued and published in the *Biuletyn Informacji Publicznej* (Public Information Bulletin). “New regulations extend this protection to instances of application of individual rulings constituting the established ruling practice, also in the situation, where the taxpayer is not the addressee of any of them” (Nowak, 2017: 42–43). If, in a given settlement period, a taxpayer conforms to the established ruling practice of the authorities of the Domestic Fiscal Administration, protection arising from provisions of Art. 14k and Art. 14m shall apply respectively.

8 Planned Amendments

Intensive works are currently underway on drafting the bill of the new Tax Ordinance.¹¹ The draft bill retains, with some modifications, the institutions of individual and public rulings, as well as tax clarifications, recognising their role and importance in the existing tax law system.

The new solution involves the duty of the minister competent for public finance to issue, *ex officio*, information on the content of tax law provisions, in addition to public rulings and tax clarifications.

⁹ See justification of the bill on amending certain acts to improve the legal environment for entrepreneurs, Sejm printout no. 994, Sejm of the 8th term of office.

¹¹ General Taxation Law Codification Committee (Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego, KKOPP) established by the Regulation of the Council of Ministers of 21 October 2014.

Taking into account public rulings, the new solution is an opportunity to present legal questions to the Supreme Administrative Court by the Minister of Finance (Art. 505 § 3 of the new Tax Ordinance). Asking a legal question has to be justified by the occurrence of discrepancies in judicial decisions within the scope necessary to issue a public ruling. The right to present legal questions to the Supreme Administrative Court granted to the Minister of Finance confirms only a further strengthening of public rulings. At this stage, problems with the interpretation of provisions of substantive tax law should be ultimately solved. This will eliminate numerous disputes before administrative courts at the stage of verification of individual rulings, and will limit the development of diverging judicial decisions.

A new provision has also been proposed requiring the Minister of Finance to issue a public ruling without unnecessary delay in case of receiving a significant number of applications for individual rulings regarding the same factual states of affairs or future events, submitted in the same legal circumstances (Art. 506 of the new Tax Ordinance).

Taking into account individual rulings, primarily in order to ensure full centralisation of issuing such rulings, the option to issue such rulings by local tax authorities will not be available.

The Codification Committee has introduced a special consultation and conciliation procedure into the bill of the new Ordinance, allowing for consultation of the tax implications of the transaction, as well as defining the legal implications of the decision issued as a result of this procedure, referred to as the “decision on tax implications”. As part of this procedure, the applicant and the tax authority will be able, in the consultation process, to agree on tax implications of the activities of the applicant – before a potential dispute arises. In this procedure, the party obliged will be able to obtain a binding confirmation of tax implications of business events or processes described in the related application. The consultation procedure will include identifying the facts, evidence hearing, as well as discussions between tax authorities and taxpayers (e.g. pertaining to determining the transaction value, price level, etc.). The procedure will result in issuing an authoritative resolution (decision). These features differentiate it from the procedure for issuing an individual ruling.

9 Conclusion

The existence of various taxes and forms of taxation, frequent changes thereof, applicability of EU regulations and international law lead to an increase in the complexity of tax law, uncertainty as to its content, and thus also interpretation and application. This is a source of potential conflicts between interests of taxpayers and tax administration representing fiscal interests of the state. For these reasons, institutions of public and individual tax law rulings should be considered an important extension of the scope of protection of rights and economic freedoms of the taxpayer. Rulings are also a crucial stabilising element of the process of resolving disputes between taxpayers and tax authorities. They are also

one of the most important safeguards for the protection of legal rights of taxpayers. Without doubt, rulings provide taxpayers with the knowledge of the rules that together with the provisions of tax law co-create the potential legal situation of every addressee of the law. These entities develop their sense of legal certainty and legal security not only on the basis of tax acts, but also on the basis of how the tax administration applies the tax law.

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