

Flexibility of Tax Law Provisions and Legal Definitions

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Abstract

Simultaneously using legal definitions and vague wording in tax law provisions was subject to analysis in the article. These are namely the situations where while structuring the legal definition, the tax lawmaker simultaneously uses vague wording. It creates interesting interpretative problems and difficulties regarding tax law application for both tax theory and practice. The author indicates that the Polish tax legislator does not use the determinants which would allow to properly create legal definitions, at the same time making use of vague expressions. Hence, the aim of the article is to tell these determinants.

Keywords

legal definitions in tax law; vague wording in tax law; determinants

1 Introduction

Considering tax law regulations from the point of view of a characteristic relationship between tax law and civil law – and including the consequences of economic turnover – we can see two ways of the so called legislative attitude, namely using typical legislative drafting measures that are indicated by the legislator in a regulation entitled *Legislative Drafting Principles* (Regulation of the Prime Minister on the *Legislative Drafting Principles* of 20 June 2002). On the one hand, these are legal definitions; on the other hand, these are measures ensuring the flexibility of tax law provisions. The two categories are not all available legislative drafting measures that could be used by

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the tax legislator to express this relationship and allow for the consequences of economic turnover. However, it seems that they are characteristic in this respect. The point is that it is essential to open the scope of tax law regulation due to the necessity of embracing tax effects of the behaviours of the entities in civil law area, or taking into account the dynamic development of economic turnover – which consequences should be worthy to be mindful of in concrete tax regulations. In order to fulfil this plan, the tax legislator has the legislative drafting measures at his disposal; these measures ensure the flexibility of the text of the normative act, that is the flexibility of this law.²

Moreover, the context of pinpointing the expressions used in tax provisions by introducing legal definitions should be taken into consideration. There are various justifications for these definitions, related both to the relationship between tax law and civil law, and taking into consideration the indicated consequences of economic turnover.

The two types of legislative solutions discussed are not in opposition to each other. Hence, they may be considered from the point of view of the purposes pursued by the tax legislator³ who has i.a. those legislative measures at his disposal, the measures that should be successfully put in tax law provisions. Using the word “should” in this respect is not accidental. The tax legislator does not always spot not only the consequences of using vague wording or legal definitions, but also the effects of using both those two normative solutions at the same time. The simultaneous using of both of them might be perceived as a good mechanism of shaping the area subject to taxation, both from the point of view of the Treasury’s needs (local government units) or the taxpayer’s situation. This way, it is possible to formulate a research hypothesis in this paper. Its purpose, in turn, would be to identify the “areas of coexistence” of both the measures ensuring flexibility of tax law and legal definitions. Within this purpose, an attempt will be made to formulate the determinants of their use in the cases where both types of legislative technique measures are used at one stage, that is for example vague wording used in terms of a legal definition.

2 Looking for the “Areas of Coexistence” of Vague Wording and Legal Definitions in Tax Law

It seems that while looking for the “areas of coexistence” of vague wording and legal definitions in tax law, the output solution should be the one that the legislator described in the regulation *Legislative Drafting Principles*. However, it should be highlighted that the discussion on implementing the peculiar principles of this legislative technique allowing for the specificity of this branch regulations is a separate issue – equally attractive as regards looking for proper legislative measures for tax law. Hence, some of the solutions proposed in this regulation tend to change their normative shape after

² For particularly vague expressions and general clauses see Borszowski, 2017: 62 et seq.

³ On the possible functions of legal definitions in legal acts see Breziński, 2001: 225.

transposing them to tax law; the normative shape is a result of the specificity of this law – the point is the criterion of necessity instead of need while formulating vague expressions or general clauses in the Polish tax law.

It is also worth noticing that the described regulation *Legislative Drafting Principles* – as a starting point to the issue under examination – does not mean that its creators use “areas of coexistence” expressed in this way. The idea is to employ the functional view of these typical legislative drafting measures which use was indicated in the regulation. First of all, we should consider this area for the legislative measures mentioned with regard to the criteria/bases of their formulation. In other words, we seek for an answer to the following question: should this area be determined within the criterion (which, if fulfilled, results in introducing vague wording into tax law provisions) or within the bases of formulating legal definitions?

It was stated that transposing the criterion of the need to ensure flexibility of the normative text to tax law leads to its sharpening; moreover, it results in understanding the criterion as the necessity to ensure flexibility of tax law provisions. However, the criterion expressed this way does not give any basis to acknowledge that it is simultaneously an opportunity to analyse the “area of coexistence” of vague wording and legal definitions in tax law. It should be kept in mind that it is only used to make tax law provisions more flexible. Thus, in this case there is no subject area for these two different typical legislative drafting measures. It can be obtained within the bases of formulating legal definitions, indicated in the regulation *Legislative Drafting Principles*. Among the four bases formulated,⁴ the basis described as a requirement to limit the vagueness of a given notion by a legal definition should be seen as the one which gives the opportunity to determine the “area of coexistence”. It is worth noting that in this case, the analysed issue is somehow inscribed into the essence of the basis of formulating a legal definition in tax law provisions. These two types of legislative drafting measures are aggregated within this basis.

Moreover, it seems that the studied area will be visible also when it comes to the basis expressed in the final part of § 146 of the regulation *Legislative Drafting Principles* and its reference to tax law provisions. The point is the need to determine a new meaning of a given expression. We can also spot the “area of coexistence” of vague wording and legal definitions here.

3 “The Area of Coexistence” of Vague Wording and Legal Definitions within Reducing the Vagueness

As stated, this area is somehow planned within the regulation *Legislative Drafting Principles* in the event of a vague expression; and simultaneously if it is determined that reducing the vagueness would be desired. Such a situation is also characteristic for

⁴ See § 146 of the regulation *Legislative Drafting Principles*.

the solutions found in tax law provisions. Regulations concerning the tax avoidance clause are a clear example of it.⁵

Thus, the starting point in this case is to determine that a vague expression exists. At this stage, it is impossible to determine the indicated coexistence. In other words, introducing a vague expression in tax law provisions cannot at the same time mean a basis to formulate a legal definition in this law. Therefore, there is an obligation to make an assessment between the introduction of a vague expression and the possibility of its coexistence with a legal definition. Ultimately, this legislative measure should be assessed from the point of view of the desire to reduce its vagueness. Therefore, the determinants of the desirable reduction of vagueness will become crucial. If the determinants are not determined and then used by the legislator, and they are not used to decide whether to formulate the legal definition, it may have negative consequences both as regards vague wording and the legal definition itself. While doing research on the indicated determinants, it should be primarily stated that the point is the existence of a desirable reduction of vagueness – not the potentially predictable state. It is particularly important as the term ‘reduction of vagueness’ is a vague expression itself. Therefore, adopting the determinant in this respect at the potential, predictably desirable state of the reduction of vagueness would lead to formulating a so called premature definition, so a definition which is not required as a reduction of the vagueness area. Introducing a premature definition would result in highlighting the area to be defined without any justification to the process, as we can call it conventionally. The consequences of this may be assessed primarily as an unnecessary hardening of the scope of the defined expression. Second, it may be assessed as an unnecessary hardening of the scope of the regulation or even of whole mechanism where the defined expression will be put. Furthermore, if there is no desirable reduction of vagueness in a given field of regulation yet, formulating a legal definition (when it is determined that a vague expression exists) may lead to disrupting the fulfilment of the purpose for which the vague expression was introduced. Further negative consequences may be indicated as far as the relationship between tax law and economic turnover is concerned. This may lead to eliminating the flexibility required to reflect the relationship between economic turnover and tax law. As a result, it is difficult to assess further consequences that it may have on other regulations which are directly or indirectly related to the defined notion.

Therefore, it may be assumed that the aim is to create a determinant of the existing desirable reduction of vagueness. It is worth setting further determinants within one determinant that is expressed this way, and we may consider this determinant a starting one. The idea is not to do any reduction – we seek the desired reduction. Finding determinants within this expression is difficult as they are vague.

It seems that we can indicate several other determinants, that is determinants of implementation. First of all, the determinant concerning the degree of reduction of vagueness, secondly – the determinant concerning the ground of reduction. In the second

⁵ See more broadly in Borszowski, 2018: 631–639.

case, it is about the assessment from the point of view of this ground in relation to which the reduction of vagueness will be desirable. Taking into account the first indicated determinant of implementation, we should assume that the degree of vagueness reduction cannot be excessive (on the contrary: it should be relevant). It is worth keeping in mind the results that the excessive vagueness reduction could cause – it cannot lead to a situation where this area actually ceases to exist. It seems that it is difficult to indicate an individual determinant by which it would be possible to determine the degree of relevant vagueness reduction. This will depend on the place where the given legal definition is put. Depending on this location – whether it is put in general or specific tax provisions – the determinant will be indicated in relation to the legal relationship of tax obligation (or other general tax law institutions) or other elements of tax legal construct.

If the determinant regarding the ground of reduction is subject to analysis, we may assume that it is a consequence of putting a vague expression, what is worth considering at the level of legal regulation and legal institution. The heart of the matter is a relevant degree of vagueness reduction due to a given legal regulation, and also due to a given legal institution – where a given regulation or group of regulations is put. Therefore, it may be stated that these two determinants are functionally related. Thus, we should adopt the determinant of the degree of vagueness reduction for a legal regulation and the determinant of the degree of vagueness reduction for a legal institution.

Considering the degree of vagueness reduction due to putting a vague expression in a given regulation, this determinant will depend on the number of regulations – whether there is one regulation that the vague expression is put into, or there is a group of regulations. The desired reduction of the degree of vagueness will be then determined for one regulation or for a group of regulations. It is therefore appropriate to indicate a determinant of relevant vagueness reduction for one regulation or for a group of them.

In turn, the determinant of the degree of vagueness reduction for a legal institution may be adopted for a given institution – both general and specific tax law. In the first case, the point would be to reduce the vagueness area within a legal relationship of tax obligation (or other institutions of general tax law), and in the second case – within a legal construct of a tax. The reduction of vagueness area for an institution of tax liability should be assessed from the point of view of a dynamic analysis, that is creation, securing and termination of the tax liability in the cases when the legislator would find it necessary to introduce legal definitions in order to clarify the expressions used as part of the analysis. Moreover, we should discuss the determinant of the degree of vagueness reduction as far as the legal definitions used in order to create tax avoidance clauses are concerned. It will be significantly important to look for a determinant of the degree of vagueness while stating particular elements of a tax legal construct, especially the objective scope of taxation and objective exemptions. Therefore, it is worth recalling the problems with implementing the scope of revenues in personal income tax.⁶ On the other hand, research on the determinant of the reduction of vagueness

⁶ See also Borszowski, 2018: 57–66.

for the objective scope in relation to the objective exemptions leads to the necessity of considering legal definitions for vague wording used with these exemptions. If the tax legislator can tell the indicated determinants, and simultaneously bases the process of formulating legal definitions to reduce vagueness on them, it ensures that there is an area of the assumed coexistence of legal definitions and vague wording, guaranteeing proper realisation of general and specific institutions of tax law.

4 The “Area of Coexistence” of Vague Wording and Legal Definitions as Part of Determining a New Meaning of a Given Expression

As stated, the situation of the tax legislator simultaneously using vague expressions and legal definitions may also occur within another ground of formulating legal definitions; that is when the legislator creates a new meaning of a given expressions due to the field of regulated matters. In this case, tax law will be this field, to be more precise – the necessity of the tax legislator to take into consideration the relationship between economic turnover and tax law. This situation is not programmed by the legislator, as in this case it becomes crucial to determine a new meaning of a given expression. Nevertheless, the tax legislator may use – and does use – vague expressions in such cases, what is clearly confirmed by the definition of business activity in the provisions of both general⁷ and specific tax law,⁸ despite the fact that the definition was earlier introduced in the provisions of the Act on Freedom of Business Activity (Act of 2 July 2004 on Freedom of Business), or recently – the Entrepreneurship Act (The Entrepreneurship Act of 6 March 2018).

Also in this case, considering the “areas of coexistence” of vague wording and legal definitions requires indicating certain determinants; compliance with these determinants by the tax legislator guarantees that the measures ensuring flexibility of tax law provisions will be used correctly in the area of legal definitions. First of all, it should be noted that the highlighted criterion of the need to determine a new meaning of a given expression in the area of definitions formulated in tax law takes a whole new meaning. It seems that it is not the criterion of need that should be stipulated, but the necessity of determining a new meaning of a given expression. Due to the specificity of tax law and some actual autonomy of the tax legislator, the criterion of need is too lenient and thus may justify too often the use of definitions that lead to determining new meaning of a given expression. We may expect negative consequences of such a situation not only in the area of tax law system, but also within the whole legal system. As a result, the criterion used to formulate this type of definitions should be the necessity of determining a new meaning of a given expression.

⁷ In the provision included in Art. 3 point 9 of the Act of 29 August 1997 – Tax Ordinance Act.

⁸ Namely the definition in Art. 5a point 6 of the Personal Income Tax Act of 26 July 1991, or Art. 15 section 2 of the Act of 11 March 2004 on Value Added Tax.

It should be considered that a criterion expressed in this way should be also used to indicate determinants of using vague wording within formulated legal definitions. Therefore, we may accept the determinant of the necessity to indicate a semantic novelty of a given expression that should refer to using legislative drafting measures ensuring flexibility of tax law provisions. It seems that fulfilling this determinant in the area of tax law faces many obstacles. Not only the already mentioned definition of business activity, but also other cases – as for example the definition of a building in Art. 1a Section 1 Point 1 from the Local Taxes and Fees Act (Act of 12 January 1991 on Local Taxes and Fees) – may raise doubts about its fulfilment.⁹ The already described determinant should be referred directly to the vague expressions used by the tax legislator in this case. It seems that it is difficult to fulfil for the legislator. First of all, by the use of vague wording, the given legal definition is somehow opened so that it may embrace a broader extent of situations. Then, the point is that the determinant of the necessity to indicate a semantic novelty – with an extended scope of it – should be fulfilled. Secondly, we should assess the way of using vague expressions within its frames, in order to fulfil this determinant. A certain situation may raise doubts concerning its fulfilment; it is a situation where the tax legislator uses a vague expression with the same normative shape as a definition included in another normative act. For example, the vague term of organised and continuous business in Art. 5 Point 6 of Personal Income Tax Act and Art. 3 of the Act on Freedom of Business Activity. In such cases, when as part of the defined term, the tax legislator uses vague expressions of the same normative shape, it does not necessarily mean that the determinant of the necessity to indicate a semantic novelty is not fulfilled. However, this requires an assessment of the whole scope of the legal definition with the use of this legislative measure, from the point of view of this semantic novelty – which could be avoided if a solution with other normative shape was used.

Therefore, the discussed determinant is fulfilled when the tax legislator uses vague expressions with a different normative shape than the one that in relation to which it is a semantic novelty. However, if the legislator uses an identical – or a similar in terms of normative shape to the given vague expression – determinant, then its fulfilment requires an assessment of the whole scope of the definition in terms of semantic novelty.

Thus, when analysing the indicated “area of coexistence” of vague expressions and legal definitions, we should note that it is – or at least should be – a consequence of fulfilling the determinant of the necessity to ensure the semantic novelty. Its fulfilment guarantees that this area will be properly shaped without negative consequences not only for the scope of the definition, but equally with the legal system – where its element is the legislative solution according to which the so called semantic novelty is determined.

⁹ Fulfilling the determinant of semantic novelty raises doubts.

5 Conclusion

The issue of simultaneous use of legal definitions and vague wording by the legislator in tax law provisions should be discussed not only within the doctrine, but also as part of the tax practice. The results of the research should be particularly significant for the tax legislator that simultaneously uses such normative solutions. This study identifies two areas in which we can spot that the legislator simultaneously uses these two different typical legislative measures. If such a process is to succeed in the tax practice – that is at the stage of employing tax law, the legislator must fulfil the determinants of using vague expressions while formulating legal definitions. These determinants were formulated both for a situation where the tax legislator aims at reducing vagueness of a given expression, and for a situation where the aim is to determine a new meaning of a given expression. It seems that the determinants of the first situation are somehow a natural consequence of some programmed “area of coexistence” of vague expressions and legal definitions.

On the other hand, in case of determining a new meaning of a given expression, fulfilling the determinant of semantic novelty is key; in this case, the tax legislator treats fulfilling this determinant too mildly. When translated to vague expressions used in legal definitions, it brings consequences not only for tax law. It may have a negative impact on the relationship between tax law and other branches of law, or on the relationship between the economic turnover and tax law.

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