

# Do the Social Insurance Contributions Payable in Poland Constitute a Tax?

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## Abstract

Among the enforced public levies in Poland, taxes and social security contributions are certainly the ones of the greatest significance. There are major similarities between them, however differences are also noticeable. On the economic level, contributions are even referred to as an “exceptional tax”. The aim of the study is to determine – on the legal level – whether it is reasonable to consider the contributions payable in Poland a tax.

## Keywords

tax; social security contribution

## 1 Introduction

There is no doubt that currently in Poland taxes are the most important component of public levies. Public levies also include social security contributions. From the beginning of the functioning of the reformed financial system of social insurance (January 1, 1999), the legal nature of contributions has been raising numerous doubts, whose number increases on a yearly basis. The aim of this study is to determine whether the social security contributions in Poland payable at present constitute a tax in legal terms.

The issue concerned with the determination whether social insurance contributions constitute a tax is not a novel research problem. In Polish literature, one may find examples of publications in which this issue is discussed to a narrower or broader

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extent.<sup>2</sup> It should be emphasised, however, that it is not possible to definitively resolve the dilemma once and for all. It is obvious that the answer to the question raised in the title of the study depends primarily on current legal regulations which are dynamic in character, particularly in the area of social insurance contributions. Of course, one may attempt to build a theoretical model, however it will not allow the determination of the relationship between social insurance contributions and taxes that exists here and now if we perform it in isolation from the existing regulations.

Under the current legal environment, social insurance contributions (particularly those for pension insurance) are part of a system where the amount of benefits is derived from the amount of premiums paid. However, for many years, there have been discussions on the concept of “civic pension” – the adoption of such a solution would mean that the length of the contribution period and their amount would not have any meaning for the amount of the benefit. In such a system, the legal nature of contributions would certainly be different than in the current legal situation. Therefore, in the analysis, it is important to take into account the up-to-date legislation.

## **2 Public Levies in the Constitution of the Republic of Poland**

There is no doubt that social insurance contributions and taxes should be included among public levies. The Constitution of the Republic of Poland of April 2, 1997 (*Journal of Laws*, 1997, No. 78, item 483) in Art. 217 indicates that the imposition of taxes, other public imposts, the determination of entities, objects of taxation and tax rates, as well as the rules for granting reliefs and remissions and the category of taxpayers exempt from taxation, is effected by means of a statute.

The literal interpretation of Art. 217 leads to the conclusion that the legislator classifies taxes as part of public levies, however because of their rank they are mentioned by “name” as the only public imposition, before “other imposts”. It should be emphasised that the phrase “other imposts” appears in the context of taxes. Therefore, this provision should be understood as follows: the imposition of a public levy, i.e. the tax, as well as other public imposts. This rather subtle structure is not always paid proper attention in the literature. And so, B. Banaszak, who in the commentary on Art. 217 while writing about “taxes and other imposts” (understood as public levies) “notes” that tax is one of public imposts (Banaszak, 2009: 934), whereas elsewhere he seems to contradict this – “The Constitution does not mention all types of taxes and public levies (duties, fees, surcharges)” (Banaszak, 2009: 931). The use of the conjunction “and”, and at the same time not adding to the noun “imposts” the adjective “other” may give the reader the impression that he does not include taxes among public levies. In turn, J. Oniszczyk avoids the confusion in terminology as he writes about the Constitutional Tribunal’s

<sup>2</sup> See for example Wantoch-Rekowski, 2007: 349–358; Wantoch-Rekowski, 2005: 106–112; Sobczak, 1996: 51–54.

interpretative statements regarding, inter alia, the understanding of taxes and other public imposts (Oniszczyk, 2004: 982). In the following fragments of chapter XIV of his publication (entitled *Public Finances*) J. Oniszczyk consistently uses the term taxes and other public imposts.

On the other hand, A. Bień-Kacała indicates that: “Tax governance finds its normative basis in several constitutional provisions. Art. 84 determines the necessity of bearing all burdens and public responsibilities specified in the Act. The content of the tax acts is specified in Art. 217 of the Constitution of the Republic of Poland” (Bień-Kacała, 2015: 658). In the following part of her dissertation, she writes: “The basis for the imposition of taxes and other public imposts is therefore the Act” (Bień-Kacała, 2015: 659).

B. Brzeziński, who distinguishes four basic categories of public imposts (taxes, fees, surcharges and customs duties), indicates that they also include “various types of obligatory contributions for purposes considered public. However, they are treated as legal constructions different from others mainly because the proceeds from them usually do not go to the budget but are organised in a different way (e.g. they replenish the resources of special purpose funds)” (Brzeziński, 2017: 129). Thus, this unquestionable authority in the tax sphere has no doubt that social insurance contributions are included among public levies.

An interesting concept is presented by M. Niezgodka-Medek, according to whom Art. 217 mentions tax as the only constitutional example of a public impost (Babiarz et al., 2011: 71). As a rule, it is difficult to contradict this statement.

As may be seen, a rather coherent concept emerges from the presented views on the doctrine – Art. 217 of the Constitution of the Republic of Poland regulates the problem of public levies, including, among others, the taxes.

### **3 Public Imposts in the Light of the Provisions of the Public Finance Act**

An important systematisation of public financial resources which is currently applicable in Poland results from the provisions of the Act of 27 August 2009 on public finances (*Journal of Laws*, 2017, item 2077). The broadest concept introduced in Art. 5 para. 1 is the concept of “public funds”. The legislator does not explain nor define this concept.<sup>3</sup> All we have is an enumerative indication of what is included among public funds. First and foremost, it is required to indicate Art. 5 para. 1 point 1, according to which public funds include public revenues. The concept of “public revenues” also lacks definition – in Art. 5 para. 2, the legislator indicates which financial resources are included among public revenues. The key is Art. 5 para. 2 point 1, according to which public revenues include public imposts, including taxes, fees, contributions from the profits of state-

<sup>3</sup> Due to the variety of elements that make up the concept of public funds, C. Kosikowski applies the term “a mosaic of public funds” – Kosikowski, 2010: 41.

owned enterprises and sole-shareholder companies of the State Treasury and state-owned banks, as well as other cash benefits payable to the state, local government units, state earmarked funds and other units of the public finance sector pursuant to separate acts. What is significant is that this provision includes taxes and contributions among public levies. It should also be emphasised that contributions are distinguished and indicated next to taxes.

It seems that Art. 5 para. 1 of the Public Finance Act, as far as the understanding of the concept of “public tax” is concerned, cannot contradict Art. 217 of the Constitution of the Republic of Poland. And indeed it is not contradictory. It should rather be considered a more detailed general constitutional regulation.

Moving on to the analysis of doctrinal views, one should first of all recall C. Kosikowski, who points out that the Public Finance Act lists contributions among public imposts. “This particularly concerns social security contributions which constitute mandatory charges for employers and employees” (Kosikowski, 2010: 47). A similar position is presented by E. Kornberger-Sokołowska – according to whom apart from taxes, public imposts include, inter alia, social insurance contributions paid on the basis of the provisions of the Act of 13 October 1998 on the social insurance system (Kornberger-Sokołowska, 2015: 21).

In turn, B. Kucia-Guściora points out that the act includes among public imposts, inter alia, taxes and contributions. According to the author, the common feature characterising public imposts “is the obligation to pay them to the state, local self-government units or other units of the public finance sector – i.e. their mandatory character. The list of the commented public imposts is non-exhaustive” (Kornberger-Sokołowska, 2015: 95–96). B. Kucia-Guściora also points out that public levies include all compulsory cash liabilities, which were established unilaterally in the exercise of official authority (Kornberger-Sokołowska, 2015: 96). By writing that imposts include contributions, he emphasises at the same time that although they were listed among the imposts, their definition had not been provided. “In the doctrinal definition of a contribution the feature of other public imposts is inscribed – its authoritative and public law nature. This feature allows to distinguish between public and private contributions. The commented provision suggests that also in respect of contributions, the obligation to make payments to the state, local government units, state earmarked funds and other units of the public finance sector results from separate acts.” The author moreover observes that: “In addition to the public character and acting from the position of authority, one may also mention the feature of compulsion. The obligatory nature of contributions is also associated with the fact that they are incurred by the general public, which in turn involves statutorily defined amounts and collection procedures. These features also testify to the unilateral nature of setting premiums.” B. Kucia-Guściora also aptly points out that: “The feature of contributions is their purposeful nature. They are intended for financing public tasks, inter alia, related to social tasks or health care. The purposeful nature of contributions is also confirmed by their beneficiary. It is pointed out, however, that in practice the contributions incurred for social or health

insurance, i.e. special purpose funds, are the important ones” (Kornberger-Sokolowska, 2015: 98).

## 4 The Features of Tax and Contributions – Similarities

In order to determine the features that are common to social security contributions and tax, as a starting point it is necessary to establish the definition of tax. While social insurance contributions lack a normative definition,<sup>4</sup> tax has been defined in Art. 6 of the Act of 29 August 1997 – the Tax Ordinance (*Journal of Laws*, 2018, item 800) – according to which, tax is a public, gratuitous, compulsory and non-returnable cash benefit to the State Treasury, a voivodeship, poviát or commune, resulting from the tax act.

B. Brzeziński aptly pointed out that: “Tax is defined by listing the features attributable to this impost, distinguishing it from all or some other public levies” (Brzeziński, 2001: 30). In the literature it is even claimed that in defining tax, the legislator adopted the doctrinal and textbook features (Brzeziński et al., 2017: 49).

In turn, referring to Art. 6, A. Olesińska writes that: “The features of tax indicated in this definition as a cash payment are convergent with the tax characteristics most frequently mentioned in the tax-related literature” (Olesińska, 2009: 25). On the other hand, according to W. Wójtowicz: “All components of the definition are necessary to specify tax and distinguish it from other public revenues. The replacement of any element with another, such as the exchange of its gratuitous character into non-gratuitous, with the remaining part of the definition being unchanged, causes that this kind of revenue is no longer a tax but another kind of a public revenue” (Wójtowicz, 2009: 7).

Based on the content of Art. 6 of the Tax Ordinance, it can be assumed that the common features of social security contributions and tax include:

1. public-law character;
2. compulsory character;
3. non-refundability,
4. pecuniary character.

The first of the features common to social security contributions and tax is the public law nature of these levies.

A. Gomułowicz and J. Małecki indicate that: “The public law nature of tax results from the fact that the right to taxation, i.e. the establishment of tax obligations, remains the sole attribute of state power. The idea of tax authority is connected with the concept of state sovereignty. Tax obligation exists unconditionally, since tax is a unilateral act of power adopted in a statutory form” (Gomułowicz and Małecki, 2011: 113).

<sup>4</sup> There are, however, definitions in the literature, cf. e.g. Wantoch-Rekowski, 2007: 350–351.

The literature also points out that: “The public law character is seen in the actions of public law associations (state, province, powiat, commune) resulting from the fact of exercising public authority, i.e. *the empire*, not *the dominion*” (Brzeziński et al., 2017: 49). M. Popławski observes that “tax is inherently a public tribute, resulting from state power, and therefore based on public law” (Popławski, 2017: 105).

Another of the common features is compulsion which – according to W. Wójtowicz – means that “in a situation when the tax payer does not pay it voluntarily, it is possible to collect the benefit in a compulsory manner, i.e. by way of administrative execution” (Wójtowicz, 2009: 8). R. Mastalski notes that: “Compulsion is in fact one of the fundamental features of law in general and not only of the tax law” (Mastalski, 2018: 14). In turn, A. Gomulowicz and J. Małecki argue that: “Compulsion is an immanent feature of taxation. It means that there exists a relationship of dependence between the taxpayers obliged to fulfil the tax obligation and the state entitled to collect it. The state must be able to use coercion to effectively enforce tax obligations” (Gomulowicz and Małecki, 2011: 114).

The third common feature is the non-refundable character of the impost – in the literature it is aptly pointed out that the non-refundability of tax means that “the tax benefit, paid in due amount, is definitive by nature and non-refundable to the payer” (Brzeziński, 2010: 220). A similar remark is made by W. Wójtowicz: “Tax charged in accordance with the law is non-refundable. This way, tax becomes a kind of a public impost to the state or self-government” (Wójtowicz, 2009: 8). According to R. Mastalski: “Tax in its historical development has always been characterised by a very special feature – it was an individual’s performance in favour of the state or another public entity (ruler) not accompanied by mutual benefit” (Mastalski, 2018: 14).

As far as social security contributions are concerned, there is also no doubt that they are non-refundable. Of course this relates to contributions paid in the correct manner and amounts.

The fourth common feature is the pecuniary character of the imposts. In case of tax, this means that it is paid not in kind but in money. A. Gomulowicz and J. Małecki aptly observe that: “The monetary nature of tax benefits is related to the fact that tax belongs to the category of “finances”, and these in turn relate only to economic phenomena that are associated with the collection and distribution of monetary resources. Taxes do not include benefits in kind, personal services, goods and property rights. Generally speaking, tax cannot take a material form” (Gomulowicz and Małecki, 2011: 115). B. Brzeziński emphasises that the monetary nature of tax is not questioned today (Brzeziński, 2010: 132).

## 5 The Features of Tax and Contributions – Differences

Referring once again to Art. 6 of the Tax Ordinance, it can be assumed that features that are not common to social security contributions and tax include:

1. gratuitous character;
2. the beneficiary of the impost;
3. the legal basis for the obligation of payment/imposition of the impost.

The issue of gratuitous/non-gratuitous character of social security contributions and taxation was already the subject of a detailed analysis in the literature performed over 10 years ago (Wantoch-Rekowski, 2007: 356–357). During that time, normative regulations concerning contributions were subject to numerous alterations, also far-reaching ones. Inter alia, in practice, the second pillar of pension insurance was liquidated. Despite this, theses regarding the at least partly non-gratuitous character of social security contributions (mainly pension insurance contributions) remain valid, which clearly distinguishes this public impost from the tax – an absolutely gratuitous benefit.

The literature indicates that: “The gratuitous nature of taxation is expressed in the fact that the entity obliged to pay the tax, does not receive any mutual benefit from the beneficiary of the tax benefit in return for its payment” (Brzeziński, 2001: 30). Similarly, A. Borodo wrote: “In exchange for providing the tax, the entity that pays it does not receive direct mutual benefits from the state or local government. However, the tax payments made to the accounts of the state or local government budget are used to finance all public tasks provided for in statutes, according to the hierarchy and criteria adopted in a given period as justified by organs competent for the adoption of a budget act or budget resolution of a local government unit” (Borodo, 2010: 135). J. Głuchowski and J. Patyk accordingly pointed out that: “The gratuitous nature of taxation is based on the fact that the entity that paid it is not entitled to claim mutual benefits from the state. Tax revenues increase the total amount of budget revenues” (Głuchowski and Patyk, 2011: 11).

Considering the above, we observe that the social insurance contributions, particularly those paid for pension insurance, have a completely different character. *De lege lata*, in the defined contribution system, the amount of pension depends on the sum of contributions paid. In simple terms – in ideal conditions the sum of benefits is equal to the sum of contributions paid. Social security benefits, especially pension benefits, have the character of a mutual benefit related to previously paid contributions.

The other characteristic, which is not common to social security contributions and tax, is the beneficiary. In the area of public levies, it is important to specify the beneficiary, i.e. the entity to which they are paid. In case of tax, the beneficiary is the State Treasury, a voivodeship, a poviats or a commune. Currently, there are no voivodeship and poviats taxes in Poland (voivodeships and poviats have only shares in two state income taxes),

hence in fact taxes are benefits paid to the State Treasury or the commune. In turn, social insurance contributions constitute one of the revenues of the Social Insurance Fund, which is a state special purpose fund established for the implementation of social security tasks. This is not an autonomous fund but it is related to the state budget. The method of financing social security benefits with the funding method is an alternative to solutions of a budgetary nature, thus the current legislator chose one of the two options. Therefore, it cannot be assumed that the beneficiary is the State Treasury in a situation where contributions constitute the revenue of the Social Insurance Fund.

The literature indicates that: “Tax is a benefit made to the entity authorised by the obliged entity. The authorised entity is referred to as an active entity, and this is usually the state. Active entities are also local public law unions, such as municipal or rural communes. In extraordinary cases, also international organisations are active entities” (Głuchowski and Patyk 2011: 12).

In order to complete the analysis of the characteristics of tax and social security contributions, one needs to refer to the legal basis for imposing these levies. The statutory definition of tax indicates its resulting from the “tax act”. This is an interesting concept, as the Constitution of the Republic of Poland in Art. 87 para. 1 while indicating the sources of universally binding law, lists (inter alia) certain acts, however without specifying them by use of a proper adjective. The ambiguity of the concept of the tax law is emphasised in the literature. C. Kosikowski indicates that this is a normative act issued by the parliament in order to impose (establish) a tax or an impost having the characteristics of a tax and specifying its legal structure (tax rates and other activities adjusting the tax amounts) or making changes to the legal structure of tax (Kosikowski, 2006: 13). It is worth emphasising that C. Kosikowski offers an extremely broad interpretation of the concept of a tax act, as according to him it is a normative act regarding a tax or a tax-related impost. In turn, P. Bartosiewicz and J. Kulicki regard tax laws as both the laws that impose tax obligations and regulate the rights and obligations of various entities, including tax authorities, taxpayers, payers and collectors (Bartosiewicz and Kulicki, 2017: 14).

Referring to social security contributions, which were first and foremost regulated in the Act of 13 October 1998 on the social insurance system, it must be pointed out that this Act does not apply only to contributions (as the Personal Income Tax Act applies solely to this tax, the Act on local taxes and fees applies to such taxes and fees, etc.), its scope of regulation is significantly wider. One can even venture the hypothesis that although the problem of contributions occupies an important place in this legal act, it is certainly not the most important one. Contributions are one of many elements of the entire “system” that this law applies to. Therefore, I believe that social insurance contributions are regulated by a law that should not be classified as a tax act. The acceptance of the validity of this statement means that yet another difference between social security contributions and tax has been demonstrated.



## 6 Conclusion

B. Brzeziński indicates that: “In tax law, a tax is what this law recognises as a tax”. Nevertheless, all types of financial penalties, financial tax sanctions, interest for late payment, prolongation fees, enforcement costs, etc., are not usually regarded as a tax. All the more so this concerns various public fees, duties, compulsory social security contributions and other public imposts. Nevertheless, these levies – if the law so provides – may be imposed and collected on the basis of the provisions applicable to the imposition and collection of taxes. B. Brzeziński also points out that: “In economics, tax is usually understood more broadly than in law. For example, social insurance contributions in international statistics are considered together with income taxes on natural persons” (Brzeziński, 2017: 133).

As a result of the analysis, it was evidenced that *de lege lata*, the social insurance contributions are not a tax in Poland. Both public imposts demonstrate numerous similarities, however, several key features testify to the fact that contributions and taxes do not constitute the same public impost.

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