Changes of Rules Applicable to Value Added Tax

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DOI: 10.36250/00749.25

JEL Classification: H61

Abstract

Every year the state budget loses several dozen billions of zlotys. What provides the measure of the extent of this loss is "the tax gap" (although in fact it is not a gap) which shows the level of discrepancies between theoretical receipts due to the state budget and receipts actually collected in its fiscal function.

The paper therefore explores the analysis of selected changes which have been implemented and which are commonly referred to as "the tightening of the tax system". This is the reaction to those behaviours within legal and commercial exchanges which could be classified as a misuse of the tax system. The paper collates the most important, in the author's opinion, possible legal responses to exchange situations having as their consequence an impairment or threat to the financial interest of the state, including, in particular, the phenomenon for which the standard term in criminal law dogma is tax loss. In the paper, possible methods of countering tax losses in the tax system will be addressed, while identifying mechanisms which are relevant for the legal construction and specificities of the tax on goods and services. The existing legal regulations are not sufficient for preventing fiscal fraud; the structure of the tax itself and the rules on setting the tax rates are the source of the threats encountered, while the expectations placed upon the valued added tax by the EU and the Member States are not met.

Keywords

Value Added Tax; split payment; STIR; Standard Audit File

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Kopyściańska, K. Changes of Rules Applicable to Value Added Tax. In: Hulkó, G. and Vybíral, R. eds., *European Financial Law in Times of Crisis of the European Union*. Budapest: Dialóg Campus. 2019. pp. 265–273. DOI: https://doi.org/10.36250/00749.25

1 Introduction

The situation in which the existing tax regulations ultimately lead to other goals than those envisaged by the legislator, in other words, the regulations in force fail to fulfil the dedicated roles or tasks, or their fulfilment is only partial, may form the basis for a finding that these legal regulations are dysfunctional. According to the definition in the Polish Dictionary (Sjp.pwn.pl, 2018), dysfunctional means: ill-suited or incorrectly suited for fulfilling specific functions, tasks, goals, expectations; non-workable.

The legal dogma does not construct the concept of a "tight" tax system. This is a common language term, a non-legal category referring to the tax system. The legal category describing the financial system is the concept of effectiveness, which the legislator, for instance, states in Art. 68 (1) of the Act of 27 August 2009 on Public Finances (Act of 27 August 2009 on Public Finances). The disposition of the norm inferred from the content of the provision stipulates the obligation to realise public goals and tasks – including collection of money – in a manner that is legal, economical, timely and effective.

One has to assume that "tightness" is a certain conceptual subcategory within the framework of a broader concept of effectiveness. For effectiveness can be considered in two aspects (Pyszka, 2015: 15): primo – as an organisational effectiveness, which expresses a qualitative approach, secondo – as an organisational performance which adopts quantitative reasoning. The qualitative approach to effectiveness focuses on the implementation of the goals set – in the organisation of a public levy system those goals are represented by fiscal and socio-economic goals. Effectiveness, according to a quantitative approach, is orientated towards measurable outcomes in relation to efforts made – it is centred around cash revenues received by the state budget while applying a specific organisation of the revenue collection scheme.

One should thus conclude that the "tightness" category bears the designata of the concept of effectiveness within the meaning indicated above, since it refers to the category of measurable outcomes of the process of tax revenue collection. The concept that is opposite to the term mentioned is the so called tax gap, which is the measure signifying "the lack of tightness" of a particular tax system. In arithmetic terms, this is the difference between the tax that is theoretically due (theoretical budget revenues) and the tax that is actually collected (actual revenues) (Sejm.gov.pl, 2016).

According to the estimates of the consultant company PwC (Pwc.pl, 2017), the tax gap within the tax on goods and services in Poland, owing to the employment of measures devised for countering the gap, could get reduced from 2.9% of GDP (PLN 52 billion) in 2016 to 2% of GDP (PLN 39 billion) in 2017, which means that it was smaller by PLN 13 billion compared to the last year.

In order to increase the effectiveness of the VAT collection, what was needed was the strengthening of analytical efforts on the part of the revenue apparatus, enhancing its capacity in terms of modelling, forecasting and identifying the economic trade phenomena whose negative effects exert impact on the effectiveness of the tax system.

To this end, the legislator took steps seeking to initiate, among other things, the following changes: the implementation of the system of taxpayer preliminary verification using the Standard Audit File, the implementation of the communication and information system STIR, as well as the split payment mechanism.

2 Standard Audit File – SAF

SAF was introduced into the Polish legal system by means of the Act of 10 September 2015 amending the Act on Tax Ordinance and other tax acts (hereinafter: TO).

The institution of the Standard Audit File was introduced in Art. 193 of the Tax Ordinance (TO), placed in chapter 11 "Evidence". In Art. 180 §1 of the Tax Ordinance the legislator states that "anything that may contribute to clarifying the case and that is not illegal may be admitted as evidence". Evidence may be classified based on a variety of criteria. The most popular is its breakdown into named and unnamed evidence. The named evidence is that which is mentioned directly in the TO, while the unnamed include all other evidence which may contribute to clarifying the case and it is not illegal (Pietrasz, 2013: 1088).

In Art. 181 of the TO, there is an illustrative catalogue of evidence in tax proceedings, including such items as, for example, tax accounts and tax information. The evidence cited in this article is classified as the named evidence. Unnamed items of evidence are e.g. private documents.

Currently there are seven logical structures in force in the form of the following XML schema – JPK_VAT (records of VAT Purchases and Sales), JPK_FA (Invoices), JPK_KR (Accounting Books), JPK_WB (Bank Statements), JPK_MAG (Warehouse), JPK_PKPiR (Tax Revenue and Expense Ledger) and JPK_EWP (Records of Revenue).

The JPK_VAT file is currently the most frequently reported JPK file. This results from the frequency of its transfer. The file may be transferred in two ways. Firstly, based on the provision of Art. 82 §1b of the TO, JPK_VAT introduced under the amendment as tax information transferred on a monthly basis without being summoned by the tax authority. Secondly, pursuant to Art. 193a of the TO, upon being summoned by the tax authority in an evidentiary proceeding.

In the first case the transmission of the file may proceed solely by electronic means. The file ought to be transmitted directly to the server of the Ministry of Finance. The file should be transmitted by the 25th day of the month following the month to which the information reported in the JPK_VAT file refers. Reporting a file solely by electronic means requires that special attention be given when creating the XML file. The tool employed on the side of the Ministry for accepting file checks, among other things, whether the JPK file is correct technically. A file containing any kind of errors will be rejected even if it contains information in accordance with the laws on VAT record keeping and on the manner of producing and storing accounting documents.

It is also possible to submit the JPK_VAT file, just like other JPK files, on request of the tax authority in tax proceedings. If this is the case, the tax authority may require that the file be delivered on a data storage device or be sent to the transfer gate of the Ministry of Finance. However, such requests hardly ever occur in practice (Ministerstwo Rozwoju i Finansów, 2017).

The tax authority has access to all JPK_VAT files submitted on a monthly basis by taxpayers required to do so. Tax information is one of the named items of evidence listed in Art. 181 of the TO. That is why it seems rather pointless to require that the taxpayer should provide information that is already available to the tax authority.

The JPK_VAT file is aimed at reporting the information which should be included in the VAT records kept by taxpayers within the meaning of the VAT Act (mentioned in the paper as VAT taxpayers) pursuant to the obligation stated in Art. 109 (3) of the VAT Act.

Another file is the JPK_FA file which is to report invoices. In the description of this file in the "Invoice" section, it is indicated that the scope of documents entered in the JPK_FA file is laid down in Arts. 106a and 106q of the VAT Act. In line with the intention of the Ministry of Finance, initially the file was to contain the report on VAT purchase and sales invoices (Ministerstwo Finansów, 2016b). Nowadays reporting purchase invoices in the JPK_FA file is no longer required, while the control of purchase invoices is to be carried out using the JPK_VAT file (Ministerstwo Finansów, 2016a).

JPK_MAG is the JPK file related to warehouse management, or to put it more precisely, warehouse records. This vital area, in particular from the perspective of manufacturing firms, finds rather poor support in the legal regulations. That it is necessary to keep warehouse records arises indirectly from the provisions of the Accounting Act (Act of 29 September 1994 on accounting). In Art. 17 (2) of this Act, as one of the types of accounts, subsidiary ledger accounts are indicated which are kept for the purpose of recording individual classes of physical current assets.

The Ministry of Finance indicated that the "JPK_WB structure is a structure concerned with the bank statement – an accounting document produced by the bank. The obligation of submitting this structure lies with the taxpayer; however, the taxpayer shall perform this obligation in cooperation with the bank. In practice, the tax authority, upon the taxpayer's consent, shall be able to ask the bank to release the relevant bank statements in the JPK form, indicating the reason for the request, bank account number and the requested period" (Ministerstwo Finansów, 2016a: 2).

The last of the JPK file discussed is JPK_EWP which is to report records of revenues. Taxpayers who pay personal income tax as a lump-sum payment are required to keep records of revenues.

3 Split Payment Mechanism

The model of split payment is one of the methods of collecting taxes, being also one of the solutions aimed at combating tax frauds and misuse while improving the process

of collecting VAT (which is then reflected in the smaller VAT gap). The principle idea behind this mechanism is the breakdown of payment for delivered goods or services rendered into a net amount which the purchaser pays to the bank account owned by the supplier of goods or the provider of services, and the VAT amount which goes directly to a separate bank account which is "supervised" by the tax authority. This model allows tax authorities to monitor and block the resources held on the VAT bank accounts, eliminating the risk of the taxpayer's vanishing together with the tax he was paid by his contractors but which he failed to pay to the tax authorities (Ministerstwo Finansów, 2017).

For the goods sold or the service provided, the supplier shall receive only the net amount. The remainder of the payment as set out in the invoice and corresponding to the VAT amount will be paid to the so called VAT account. The initiative in this respect is left to the purchaser of goods or services; nevertheless, if he uses this accounting method, this will imply specific consequences for both the purchaser and the provider of goods or services. The split payment procedure is voluntary and to be applied only between entrepreneurs, and as such it will not affect ordinary consumers' purchases.

The split payment mechanism is applied only and exclusively with respect to payments made since July 1, 2018. This rule arises clearly from the transitional provisions.

According to the definition provided for in Art. 108a of the VAT Act (Act of 11 March 2004 on the Tax on Goods and Services), the VAT itself may be paid under the split payment. As the provisions stipulate that "the payment, partial or in whole, of the amount corresponding to the net sales value based on the invoice is made to the bank account or to the account of a credit union for which the VAT account is kept, or it is made by other method". The final line of the provision speaks clearly of the possibility of accounting for the net amount by applying a different method (than the split payment).

The taxpayer orders split payment within one payment order. The tool (instrument) for making this payment is the "transfer statement". It can be defined as a special transfer format or a transfer form in which the person ordering the transfer shall indicate certain additional data (information) pertaining to the invoice issuer or the invoice itself which will allow the bank (credit union) to split the payment into two streams of cash and to debit and credit accordingly with the relevant amounts the clearing account and the VAT account.

In the transfer statement – referring to payment for invoices in the form of split payment – apart from the data allowing the receiving party to be identified, one should indicate the following data:

1. the amount corresponding to all or part of the tax amount set out in an invoice which is to be paid according to the split payment mechanism – it should be noted here that the taxpayer specifies the amount of the tax to be paid to the VAT account by himself; the bank is not required to check whether or not the amount set by the taxpayer has been correct; the taxpayer may, in the transfer statement, set out only part of the tax amount which he wants to pay in the form of split payment;

2. the amount corresponding to all or part of the gross sales value – it appears that here the entire gross amount taken from the invoice concerned is to be stated; it can differ from the transfer amount (representing the total of the amount marked as VAT and the net amount paid by using split payment);
3. the invoice number for which the payment is made – one should assume that there is no obstacle for the buyer to indicate several numbers of invoices if he wants to pay for several invoices issued by one seller using split payment;
4. the number which identifies the supplier or service provider for tax purposes – here one should indicate the seller's tax identification number NIP indicated in the invoice.

What is to be discerned from the above: the provisions of the Act do not provide for measures protecting against making an unauthorised split payment in that a larger amount than the tax amount indicated in the invoice in question will be transferred as the VAT amount (from the buyer's VAT account to the seller's VAT account) (Bartosiewicz, 2018: 232).

Among the advantages of the mentioned split payment mechanism is that it is not necessary for entrepreneurs to verify the credibility of suppliers. It suffices to make sure that the money gathered on the special account is reflected in invoices. According to experts, split payment may prove to be an efficient tool in combating tax frauds although it also entails some risk to honest entrepreneurs. That is so because the implementation of this solution will affect the system for paying and declaring VAT, which may have the effect that Polish taxpayers will have to adjust to these new conditions. Moreover, what is being pointed out is that the costs related to the split payment implementation, which are borne by honest entrepreneurs, may prove to be ultimately higher than the state's profit.

4 STIR

One of the strictest measures envisaged within the framework of the project is the communication and information system of the clearing house used for assessing VAT extortion risk, abbreviated as STIR. This solution is meant to tighten the VAT collection system. Drawing on the experience gathered from the analysis of accounts, flows, payments and withdrawals, transfers across the banking sector, the Ministry of Finance (which strengthens itself, as it were, using the power of information technology not only of the entire banking sector but also credit unions and cooperative banks) is implementing an innovative project which in a few months will allow for the implementation of the IT tools which will be at the interface between the National Clearing House, the financial sector in its broad sense, the Ministry of Finance, the National Revenue Administration and the General Inspector of Financial

Information. So far, there has been no such series of information that would be under ongoing supervision of the revenue administration.

Art. 119zn, which was added to the Tax Ordinance, provides for that the head of the National Revenue Administration (KAS) will analyse the risk of using the operations of banks or credit unions for the purpose of committing offences or fiscal offences. This refers to offences involving VAT extortion, including those which, for instance, consists in issuing blank invoices. The risk analysis is to be conducted while taking into account the risk indicator determined by the clearing house in its STIR system.

The Tax Ordinance provides, inter alia, for automatic determination in the STIR system of the risk of banks and credit unions being used for fiscal extortion. The STIR system will analyse the data from the banks and credit unions, as well as publicly available data sent to the Central Subjects Register of National Taxpayer Register (CRP KEP). Obligation will be imposed on banks and credit unions to transfer to the STIR system certain data, including those representing bank secrecy or professional secrecy of the credit union – for the purpose of determining the risk. The clearing house shall transfer the information on the risk indicator to the head of National Revenue Administration and to banks and credit unions.

The tasks conferred on the National Revenue Administration will be expanded including now identification, detection and combating offences related to money laundering.

The data transferred to the STIR system will refer to entrepreneurs' accounts, regardless of whether or not they are VAT payers. If information is obtained that a given entity may conduct an activity aimed at using the operations of banks or credit unions for the purposes involving fiscal extortion, the head of the tax office will have the option of refusing to register the entity in question as a taxable person for VAT purposes (Etel et al., 2018).

Moreover, there are the following mechanisms to be implemented counteracting VAT extortion which involves the so called "missing trader" fraud: blocking the account on request of the head of the National Revenue Administration (thus secured funds will be released if the tax amount due according to the invoice is paid); refusing the registration and deleting ex officio the entry identifying the entity as a taxable person for VAT purposes, without having to notify the entity thereof.

In Art. 119zp, the Tax Ordinance obliges banks to transfer to the National Clearing House all data allowing one to identify the entrepreneur: address, business identification number REGON and the numbers of accounts, as well as to notify the clearing house no later than within 24 hours about any changes, open or closed accounts. The full scope of data allowing for the STIR system to operate will be set out in the regulation by the Minister of Finance.

As the content of Art. 119 zn of the TO states, the list will certainly contain the whole history of transactions present on the account. The National Clearing House will assess the risk of fraud on the basis of the following five criteria: economic (the assessment of transactions carried out by entrepreneur), geographic

(analysis of operations with countries where the risk of tax fraud is high), subject-based criterion (assessment of the extortion risk based on the nature of the business), behavioural (the unusual behaviour of the entrepreneur) and links (interdependence net suggesting the risk of participating in fiscal extortion offence).

Thus, all transactions in all the payment systems will be subject to daily reporting by the banks. The processing of data involves the use of a suitable algorithm. The method devised for its creation was thoroughly thought out and fine-tuned and has not been disclosed so far. The Ministry of Finance assures that the tool, which is calibrated, will operate extremely precisely and shall detect only those taxpayers who steal VAT and only their accounts will be blocked. One should then wait and hope that the system is indeed infallible. For in some types of businesses blocking the entrepreneur's account for 72 hours may have a significant impact, distorting or even preventing the business from being further conducted.

As the OECD reports show, in some countries the intrusion into the accounts of taxpayers by tax authorities is considerably larger than that proposed in Poland. It appears that in implementing the project, the Ministry of Finance seeks to strike a balance between the entrepreneurs' rights and the need to combat VAT extortion occurring on such a big scale. Pursuant to Art. 119zv of the TO, blocking the taxpayer's account is to be the final stage of the analysis provided by STIR and it is essentially, according to the statements issued by the Ministry of Finance, to influence the taxpayers' awareness. It should be stressed that the requirement for blocking the bank account of the qualified entity, pursuant to Art. 119zv § 1 of the TO, is satisfied if the information held by the head of the National Revenue Administration shows that it is merely possible for the qualified entity to use the operations of banks or credit unions with the aim of fiscal extortion. Further to that, it should be noted that Art. 119zv speaks of "fiscal extortion", yet does not provide the definition of the concept, which considerably increases the uncertainty felt by taxpayers. One should therefore hope that this definition will be specified so that the taxpayer will not have to rely solely on a teleological interpretation. Moreover, reasonable doubts may be raised by the account blocking under the premise "of reasonable concern of failing to meet the tax obligation", included in Art. 33 § 1 of the TO. It should, however, be emphasised that this condition was the subject of the analysis of the Constitutional Tribunal which in its decision of 8 October 2013 affirmed the constitutionality of this premise (Constitutional Tribunal, SK 40/12, OTK a A 2013, no. 7: 97).

5 Conclusion

It is not easy to assess in clear terms the changes implemented. What is needed is some time to pass to allow these changes to work. However, it seems that some of them, like for instance split payment may carry the risk of violating one of the fundamental principles of VAT, which is the principal of neutrality.

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