

# The National Revenue Administration and the Protection of the Financial Security of the State and the Security of the Individual

*Róża Kosińska,<sup>1</sup> Piotr Woltanowski<sup>2</sup>*

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## Abstract

An assessment of the National Revenue Administration, which has changed the basis of the functioning of the Polish tax services from the point of view of the need to protect the financial security of the state and the security of the individual, cannot limit itself to only indicating the evident budgetary benefits that these changes have brought, nor to listing the violations of the rights of the individual due to the unconstitutional solutions adopted in the Act on the National Revenue Administration. This study aims to indicate the area in which individual and public security are compatible.

## Keywords

tax; tax administration; financial security

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<sup>1</sup> Doctor of Legal Sciences, employed in the National Revenue Administration; Secretary of the Drohiczyn Scientific Society, member of the Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe; author of several dozen scientific publications, she specialises in tax law. Contact email: [rozmark@wp.pl](mailto:rozmark@wp.pl).

<sup>2</sup> Doctor of Legal Sciences, employed in the Department of Public Finance and Financial Law at the Faculty of Law of the University of Białystok (Poland); Secretary and member of the Board of the Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe; member of the Drohiczyn Scientific Society; author of over 60 scientific publications, including numerous articles published in prestigious scientific journals. Contact email: [piotrwoltanowski@gmail.com](mailto:piotrwoltanowski@gmail.com).

## 1 Introduction

The justification of the introduction of the National Revenue Administration reform was primarily the need for effective protection of the financial security of the state. It was undertaken with a view to reducing the tax gap, the size and continuous increase of which was already threatening the stability of public finances. At the same time, the expansion of the competencies and the streamlining of the structures and methods of work of the new tax services could raise doubts about the appropriate protection of the rights of entrepreneurs.

In the opinion of the authors of this study, the contradiction between the financial security of public law associations (state and local government), as beneficiaries of tax income, and on the other hand, the security of taxpayers bearing the public burden, which is stressed in journalistic discussions and sometimes in the literature on the subject, is only a certain fragment of reality, primarily related to the relations between the state and the entrepreneur. For a large group of natural persons, ensuring that the budget income is at a suitable level guarantees their social security. The average monthly gross salary in the national economy in Poland in 2017 was PLN 4,272 (approx. EUR 1,000); however, the scale of wage inequality is easily illustrated by the fact that only 6.3% of the total employed received a gross salary equal to at least double the average salary in the national economy. In turn, employees receiving a wage equal to or less than the average salary (i.e. less than PLN 4,346.76) constituted 66.2% of the total employees. Those who are paid less are not interested in increasing the level of protection of entrepreneurs, but instead are interested in effective and fair redistribution.

The research used the dogmatic-legal research method, analysis of the case law of the Constitutional Tribunal and statistical analysis. Due to lack of space, the article omits terminological considerations regarding the otherwise interesting issue of the scope of the concept of financial security of the state and social security of the individual.

## 2 Financial Security of the State and Social Security of the Individual

The limits of protection of the rights of taxpayers are determined in practice by the need to ensure the financial security of the state, including, above all, the realisation of planned budget income (sometimes identified with the public interest). It should be remembered that these limits are also determined by such constitutional values as tax fairness and the general obligation to pay taxes, ensuring budget redistribution at a sufficient level. It seems that these values interact and primarily serve the realisation of constitutional guarantees, such as the following:

- the principle of protection of the family, expressed in Art. 18 of the Constitution of the Republic of Poland, clarified by the provisions of Art. 71 of the Constitution, according to which families in a difficult material and social situation, particularly large and single parent families, have the right to special assistance from the public authorities, while mothers before and after giving birth have the right to special assistance of the public authorities;
- special protection of veterans, especially war invalids, in accordance with Art. 19 of the Constitution;
- protection of family farms in accordance with Art. 23 of the Constitution;
- the right to safe and hygienic work conditions in accordance with Art. 66 of the Constitution;
- the right to social security in case of inability to work due to illness or invalidity as well as reaching retirement age in accordance with Art. 67 of the Constitution;
- the right to social security in accordance with Art. 67 of the Constitution;
- the equal right to health care financed from public funds, the duty of the public authorities to guarantee health care for children, pregnant women, disabled people and the elderly, and to fight epidemic diseases and prevent the negative health effects of the degradation of the environment, regulated by the provisions of Art. 68 of the Constitution;
- the duty to provide assistance to disabled people in securing their existence, adapting them to work and social communication;
- the right to education in accordance with Art. 70 of the Constitution.

It is difficult to imagine that the real implementation of the above provisions in practice could be possible without appropriate financial assistance from the state budget – however, this is dependent on an efficient, modern tax apparatus, thanks to which the budget has sufficient financial resources derived from taxes. An unsatisfactory level of implementation of the constitutional provisions (e.g. regarding the right to health care) is often justified in Poland by the insufficient amount of funds received for this purpose.<sup>3</sup> Therefore, it is difficult to speak of a simple conflict of interests between the state on the one hand, and the individual on the other, but this relationship should rather be seen as a complex system of mutual connections that are aimed at harmoniously meeting human needs. In light of this, we should also recognise the constitutional principle of proportionality, which determines the level and principles of the implementation of these interests.

When considering the question of the impact of the NRA reforms, during which mechanisms were introduced aimed at increasing the effectiveness of the tax services and the protection of the rights of the individual, one should remember about “the statutory possibilities to limit the public property rights of citizens, among

<sup>3</sup> There are no official reliable statistics on the size of the gap in the health insurance contributions; however, as a result, the level of health expenditure in Poland in 2016 – according to *OECD Health Statistics 2017* – was only 6.9% of GDP, while the OECD average during this time was 9%.

others, due to the public interest and [...] the barrier to the state's implementation ability, which is the 'common good', as well as due to the ability of the state to fulfil its basic obligations" (Art. 1 of the Constitution). The authors of this study believe that a different approach, always counterposing the security and interests of the individual to the financial security of the state, seems to be a blatant simplification that does not take into account the interests of a large group of people interested in wider redistribution, more than what, from their point of view, is the abstract protection of the rights of taxpayers or (even more) the protection of rights of a (even narrower) group of people running their own businesses.

It is worth noting that there is a large and obvious sphere in which the need to ensure the security (protection of interests) of the individual and of the taxman, represented by the NRA, is not only not contradictory, but instead identical. An example of this is the need to maintain budget balance, the maintenance on which the possibility of public entities to act and assist taxpayers to solve their various life problems depends (Kosińska and Woltanowski, 2014; Trybunał Konstytucyjny, Ref. K 27/98; Trybunał Konstytucyjny, Ref. K 13/01; Trybunał Konstytucyjny, Ref. K 6/02). Here it should be remembered that tax fraud, extortion of loans, dishonest business activities, and money laundering that the NRA struggles against harm not only the financial security of the budget, but also the interests of those economic entities that conduct their activities in an honest way and in accordance with the law. This is because the running of an un-taxed business by different entities in a similar scope of activity, in conditions of free competition, may lead to the elimination from the economy of those who fulfil their tax obligations honestly. The Constitutional Tribunal emphasises that "since there is a 'grey economy' in the Polish economic reality, it is the right and obligation of the legislator to adopt regulations aimed at eliminating it", and also that it "recognises the existence of a significant public interest in establishing regulations to this end, especially since they will not only protect the interests of the state, but also of those economic entities that want to conduct business in a fair and lawful manner" (Trybunał Konstytucyjny, Ref. K 6/02).

Undoubtedly, the limits of interference in the sphere of the rights and freedom of the taxpayer are determined by their necessity, effectiveness in implementing the objectives intended by the legislator, adequacy, optimisation of protection of public interest in a manner and degree which could not be achieved through the application of other means, minimisation of the burden on entities whose rights or freedom are restricted as a result of the application of the legal measures, and rationality and proportionality (Kosińska and Woltanowski, 2014). In this respect, the authors of this study shall attempt to present the most important changes in the reformed tax administration, referring directly to the situation of taxpayers.

### **3 Financial Security of the State and the Need for Reform of the National Revenue Administration**

Research conducted by the authors of this study under the guidance of Prof. E. Ruśkowski before the introduction of the reforms (Kosińska and Woltanowski, 2007; Kosińska et al., 2014; Ruśkowski et al., 2016) revealed the necessity for radical changes, both structural and methodological, as well as changes in the scope of tasks of the tax office. It was necessary to change the concept of management and approach to the client – taxpayer. Experience of the reform of the Polish tax apparatus preceding the reforms of 2017 introducing the system of the National Revenue Administration was not encouraging: there was a delay in the adoption of the draft of the first NRA reform – widely discussed and accepted in academic circles – prepared under the guidance of the Ministers of Finance Prof. T. Lubińska and Prof. Z. Gilowska in 2005–2007 (Gilowska et al., 2007), and later in 2008 it was shelved, while changes after 2008 mainly concerned the organisational frameworks, but did not aim to eliminate many of the important factors which were hampering the effectiveness of the tax administration (Ruśkowski et al., 2016). It is not surprising that with such negligence the costs of the tax administration in Poland in 2015 were the highest in the EU and constituted 1.6% of budget receivables collected by it (Tax Administration 2015, 2018), while the VAT and CIT tax gaps were constantly growing (Kosińska et al., 2014). The then introduction of fragmentary changes in the structure of the apparatus were not preceded by academic research, including above all an accurate description of the challenges that were faced by the tax apparatus and the mistakes and factors limiting the effectiveness, which needed to be eliminated as a result of the reform (Ruśkowski et al., 2016). Certainly, the criteria for the success of the fiscal reform postulated in the literature were not achieved: stability of the adopted solutions, ensuring a suitable substantive preparation of tax office staff (Kosińska and Woltanowski, 2007), appropriate personnel and motivational policy, and the need to properly respect the rights of the taxpayer and non-statutory legal regulations (Ruśkowski et al., 2016). The reform creating the National Revenue Administration since 2017 is dictated primarily by the need to protect the financial security of the state. It was undertaken with a view to reducing the tax gap (Ruśkowski et al., 2015), the size and continuous growth of which was already threatening the stability of public finances (Kosińska et al., 2016). According to the authors of the draft bill, the NRA reform was supposed to achieve the following:

- effective tax collection;
- improvement in customer service to the taxpayer;
- efficient administrative enforcement of monetary claims;
- reduction of the tax gap;
- effective, that is, reliable and quick verification of data provided by taxpayers in tax declarations and customs documents;

- increase in the efficiency and effectiveness of taxpayers' compliance with tax obligations;
- improvement in the image of the tax administration (Justification to the draft Act on the National Revenue Administration of 17 February 2016).

The third priority of the NRA reform is no less important for increasing public security and the security of the individual: the prevention of broadly understood economic crime (including, above all, VAT fraud), which, by reducing budget revenues, limits the performance of public social functions, including access to education, health care, etc. In order to improve the fight against grey economy, new divisions were created to combat economic crime at the level of the NRA head office and in local units, as well as to control procedures:

- customs and tax control – created through the unification of fiscal control and control performed by the Customs Service (hard control); its main task is to detect and combat irregularities on a large scale in situations when the size, complexity and the degree of the impact of existing failings have a significant impact on the financial security system of the state;
- tax control – carried out on the basis of the provisions of the Tax Ordinance (soft control); this control is intended for honest taxpayers and is to be aimed at helping in the proper performance of tax obligations.

It is possible to speculate to what extent the spectacular increase in tax revenues was the result of the extension of the competences of the tax administration and other results of the NRA reform, and to what extent it resulted from the introduction of more modern solutions in the field of substantive tax law (primarily in the VAT Act) – however, the fact is that despite simultaneously reforming tax administration structures, tax revenues in 2017 amounted to PLN 315.3 billion and were PLN 14.2 billion (4.7%) higher than planned in the Budget Act. This was mainly due to higher VAT receipts. In 2017, VAT income was estimated at PLN 156.8 billion, so in comparison to 2016 it was 23.9% (PLN 30.2 billion) higher.

#### **4 Financial Security of the State and Unconstitutional Solutions Adopted in the Act on the NRA**

The principle of proportionality resulting from Art. 31 of the Constitution requires that constraints laid down in the scope of constitutional freedoms and rights should be established by an act only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or freedoms and rights of other people and that the restrictions do not violate the very

essence of freedom and rights. The authors of the draft Act on the NRA referred to the principle of proportionality, stating in their justification that “the phenomenon of fiscal and customs crime and corruption, especially large-scale VAT fraud, undoubtedly poses a significant threat to the financial security of the state and public order. For this reason, operational-reconnaissance activities should be considered in the light of the norms of the Constitution, as measures proportional to combating this type of crime” (Justification to the draft Act on the National Revenue Administration of 17 February 2016). In the opinion of the authors of this study, ensuring the financial security of the state cannot justify the pro-effective but unconstitutional solutions that the legislator included in the Act on the National Revenue Administration. We signal this problem on the basis of the following:

1. Breach of the scope of the protection of legal professional privilege of advocates, legal advisors and tax advisors in Art. 72 (3) of the Act on the NRA.
2. Restrictions on controlled access to the case file and the right to court as a consequence of accepting the jurisdiction of the customs and tax authorities.
3. Principles of search and personal control in the Act on the NRA.

Ad 1. According to Art. 72 (3) of the Act on the NRA, persons authorised to represent or conduct the matters of controlled persons are obliged to provide explanations regarding the object of the customs and tax control, resulting from the scope of activities or tasks performed. It seems that this provision violates the essence of protection of legal professional privilege of advocates, legal advisors and tax advisors and violates the principles of a democratic state governed by the rule of law, the right to defence expressed in Art. 42 (2) of the Constitution, and the right to court and the right to appeal against decisions issued in the first instance (resulting from Art. 45 (1) and Art. 78 of the Constitution).

Ad 2. The fact that the head of the customs and tax office can exercise control over the entire territory of the Republic of Poland streamlines and speeds up the inspections he carries out. This solution is also designed to make more effective the use of the potential of the NRA authorities and prevent the hindering of control by changing the seat, place of residence or place of business. This pro-effective regulation is irreconcilable with the security of the individual, significantly reducing access of the controlled person to the case file. It should be emphasised that restrictions on access to case files of certain controlled persons are a difficult phenomenon to explain on the grounds of the constitutional principle of equality. What is more, the competent court to hear the case is the Voivodeship Court, the jurisdiction of which is the public administration body whose activity has been contested, so the seat of the customs and tax control authority determines the local provincial administrative court (after the customs and tax control has been transformed into tax proceedings). As a result, control, tax proceedings and court and administrative proceedings may take place in a geographically remote location from the registered office of the controlled place, which may to a certain extent limit the right to a court.

Ad 3. The provisions on search and personal control contained in Art. 133 (1.1) in connection with Art. 64 (1.6) and Art. 64 (2.2) of the Act on the NRA raise a series of serious doubts from the perspective of their compliance with the provisions of the Constitution of Art. 11a (1.3) and Art. 11c (1) of the Act of 28 September 1991 on Tax Audit. The said regulations give officers broad powers to conduct searches of persons and premises (including residential premises), without, however, specifying properly the scope of these activities and are inconsistent with Art. 41 (1) and Art. 47 in connection with Art. 31 (3) of the Constitution. Also, ensuring the possibility of lodging a complaint to the prosecutor on the manner of conducting searches and personal checks during customs and tax control does not ensure a sufficient level of judicial protection of the rights of the controlled person (Art. 54 (1) and Art. 77 (2) of the Constitution of the Republic of Poland). Also, ensuring the possibility of lodging a complaint to the prosecutor on the manner of conducting searches and personal checks at customs and tax control does not ensure a sufficient level of judicial protection of the rights of the controlled person (Art. 54 (1) and Art. 77 (2) of the Constitution of the Republic of Poland).

Due to formal limitations in terms of the length of the text, the authors of this study could not refer here to the issue of the unconstitutional pro-efficiency solutions adopted in operational control by the National Revenue Administration that were discussed in detail by the Polish Ombudsman. On 5 September 2017, the Commissioner for Citizens' Rights filed a motion with the Constitutional Tribunal regarding the compliance of the provisions of Art. 114, Art. 114 (1) and Art. 115 (1), Art. 114 (3) in conjunction with Art. 114 (2), Art. 116, Art. 118 (2), Art. 118 (7), Art. 118 (16) and Art. 122 (4) of the Act on the National Revenue Administration with the Constitution.

## 5 Conclusion

The article points out the close links between the security of the state and the protection of the social security of the individual. The authors of the article propose supplementing the NRA reform with a study and implementation of a stable motivational system, taking into account the requirements of a suitable personnel policy, effectively motivating employees to raise their qualifications, which will be crucial for filling the structure of the NRA. Unfortunately, despite the reform, the low level of remuneration, instability of employment and lack of guaranteed career progression result in an outflow of experienced staff to the private sector. Experienced employees are often replaced by people without a specialist education. This is of key importance for increasing the level of financial security of the state and social security of individuals, who often benefit from budget redistribution. It is necessary to thoroughly determine the existing human resources potential and to verify the adequacy of the staffing of positions to qualifications and education. In the opinion of the authors of this work, it was good that there was a tax reform and the establishment of the National Revenue Administration; however,



considering that the fiscal reform occurred relatively recently, we should withhold the final judgement until it is consolidated. It seems that it will play a significant role for the state finances and social security. It is of fundamental importance to remove those provisions of the Act on the National Revenue Administration, which, although they are pro-effective, are incompatible with the protection of individual rights.

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