

Tax Rulings in Poland – Wealth or Crisis?

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DOI: 10.36250/00749.40

JEL Classification: K29

Abstract

The article addresses the issues of significance and practice of applying the provisions concerning tax interpretations in Poland. This issue is presented in the context of global trends, especially in the law of the European Union. It demonstrates a great development of the number of issued individual interpretations of tax law in Poland until the year 2007, and their subsequent significant regression, both in terms of the number and practical significance for taxpayers. The article points to problems resulting from the development of the system of individual interpretations in the tax law.

Keywords

tax ruling; Poland; EU law

1 Introduction

Poland is a country where obtaining tax interpretations is a taxpayer's daily practice. We probably have the highest number of individual interpretations (tax rulings) in the world. In Poland there is also a great variety of tax interpretations. Importantly, legislative work is currently underway which is likely to result in an increased number of interpretations and similar legal instruments offered to taxpayers.² Thus, it could be concluded that tax interpretations in Poland have been successful. However, the problem is more complex. At the same time, taxpayers' confidence in the interpretations is now

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² A new Tax Ordinance Act is currently under development; for more information see Etel, 2017a.

gradually diminishing. The protection policy of the holder of a tax interpretation has been subjected to numerous exceptions. In addition, the practice of tax authorities is becoming less and less user-friendly to taxpayers who make use of the interpretation. The perception of individual interpretations in the world is also slightly changing. Although seemingly successful, it is possible to put forward a thesis that from the taxpayers' point of view, tax interpretation in Poland, at the same time, is in a crisis. It is worth sparing a thought about the causes of this situation.

2 Tax Interpretation – Version 2017

In Poland, the issuance of general and individual interpretations has a clear legal basis in the general provisions of tax law – the Tax Ordinance Act of 29 August 1997 (hereinafter: O.P.). There are also specialised interpretations, based on laws regulating particular taxes, but they will be omitted in this paper.

The current system of interpreting the tax law “was born” on 1 July 2007 (Act of 16 November 2006). The basic structure of the regulation remained unchanged compared to its original form, but it introduced a large number of changes which significantly changed the practice of applying these provisions.

The regulation introduced on 1 July 2007 was characterised by a significant centralisation of the process of issuing interpretations. Centralisation was fully implemented only in relation to general interpretations, which were issued by the Minister of Finance himself (Art. 14a O.P.). In case of individual interpretations, only the Minister of Finance was formally the issuing authority (Art. 14b § 1 O.P.). However, he could authorise some of the Directors of Tax Chambers to issue them on his behalf. These were tax authorities of second instance, their number corresponded to the number of voivodeships. However, only 5 Directors were authorised to issue interpretations. The individual interpretations were issued in the following manner: individual Tax Chambers had separate units in other locations (branches) which issued those interpretations. Full centralisation of issuing individual interpretations in one (physical) place was not possible on account of the size of the country and, consequently, a potentially large number of cases that were handled.

In practice, therefore, there existed separate organisational structures which were responsible for issuing individual interpretations. As of 1 March 2017, Poland underwent a fundamental change in the structure of its tax administration. A single National Revenue Administration (KAS) was established, under which a separate body, the National Revenue Information Service (KIS), was established and is headed by the KIS Director who issues individual interpretations. The KIS took over the branches of the Tax Chambers which had previously issued individual interpretations. Therefore, an authority competent to issue tax interpretations was formally singled out.

Interpretations concerning local taxes should be approached separately.

Individual interpretations were issued at the request of the person concerned (Art. 14b § 1 O.P.), which could refer to both the already existing factual situation or future events. The entity applying for an individual interpretation was obliged to present in an exhaustive manner the facts or the future event and to present its own standpoint as to the legal assessment of the facts or the future event (Art. 14b § 3 O.P.). The tax authority was not entitled to examine the truthfulness of the facts presented by the taxpayer (Judgement of the Provincial Administrative Court in Gdańsk of 26 January 2010. I SA /Gd 912/09).

Individual interpretations were inexpensive – the fee for issuing an interpretation was only PLN 40, i.e. less than EUR 10.³ Initially, there were no explicit exemptions as to the subject matter of these interpretations. What is more, it was possible (and still is) to repeatedly ask about the same issue.⁴ An individual interpretation could be requested even if a general interpretation had already existed. At first glance, applying for an individual interpretation in such a situation would seem pointless – it would have been difficult to count on the fact that the interpretation authority would issue an individual interpretation contrary to the general interpretation of the Minister of Finance. However, it should be noted that individual interpretations could be challenged by the holder before an administrative court. The court could oblige the interpretation authority to issue an individual interpretation contrary to the general one.⁵ Therefore, asking for an individual interpretation often made sense, even in such a case. If there was a conflict between individual and general interpretations, the taxpayer could choose the one which he considered more advantageous.

Both individual and general interpretations were not binding on the tax authority. In the event when during an examination of the taxpayer's case it was found that the interpretation was incorrect, it was obliged to issue a tax decision on the basis of the provisions of the law. The taxpayer was entitled to file an application for a tax exemption, which allowed them to actually pay the tax in the amount that would have resulted from the interpretation, as long as it related to future events (Art. 14m O.P.). If a taxpayer asked a question about the past, they were only exempted from the obligation to pay default interest, but they had to pay the amount of tax itself, under the provisions.

Individual interpretation could be changed either as a result of the applicant's appeal or on the initiative of the interpretation authority, if the latter considered it to be defective. The change consisted in issuing a new individual interpretation. When issuing and changing individual interpretations, the interpretation authority was obliged to take into account court rulings, although it was not bound by them.

³ The Ministry of Finance estimated the cost of issuing one interpretation at over PLN 1,000.

⁴ This seems pointless only at first glance. In practice, however, a taxpayer may apply for a new interpretation when the court's ruling changes and there is no possibility to challenge an individual interpretation issued a long time ago.

⁵ However, it could not annul a general interpretation, the legality of which it could not examine.

3 Functioning of Tax Interpretations until 2016

As a result, the number of individual interpretations issued in Poland by the Minister of Finance was enormous and increased further. In 2008, the number of interpretations amounted to 24,229, in 2009 – 28,153, 2010 – 30,920, 2011 – 35,929, 2012 – 36,816, 2013 – 36,147, 2014 – 37,891, 2015 – 37,710 (mf.gov.pl, 2013). Later, the number of interpretations decreased, probably due to the legal changes described below.

The cost of the functioning of the system of individual interpretations from the point of view of the state budget was also increased by the possibility of appealing against them, similarly to tax decisions. From the taxpayer's point of view, the costs of appeals to both court instances were also small, up to a total of PLN 400 (EUR 100). However, they have generated significant burdens for administrative courts. For example, only in the case of complaints to the Supreme Administrative Court in 2011, out of 6,192 complaints in tax matters, there were 1,342 complaints against interpretations, in 2012 the figures were 6,164 and 1,271, in 2013 – 7,714 and 1,874, in 2014 – 7,789 and 1,527. It follows that over 20% of tax cases considered by the Supreme Administrative Court were complaints concerning individual interpretations. In case of voivodship administrative courts, this percentage was usually about 15% (Etel, 2017: 87).

When compared to individual interpretations, general interpretations came down as extremely feeble. In 2007, after the analysed provisions entered into force, no general interpretation based on them was published, in 2008 nine general interpretations were published, in 2009 – six, and in 2010 – five.

In reaction to the Minister of Finance's tardiness, a possibility for taxpayers to submit applications for general interpretation was introduced (Act of 16 September 2011). No real changes occurred because the conditions for an effective request for a general interpretation were very difficult to meet. As a result, in 2012, 14 general interpretations were issued and in 2013 – 16, in 2014 – 11, in 2015 – 11, in 2016 – 9 and in 2017 – 6 (sip.mf.gov.pl).

Therefore, individual interpretations still dominated.

In practice, any major economic operation was carried out (as long as time was available) following an individual interpretation. The weight of the dispute over the interpretation of tax law increasingly shifted from the stage of tax proceedings to the stage of obtaining an interpretation. Obtaining an individual interpretation greatly reduced the taxpayer's risk. At the same time, it could encourage attempts of quite radical tax optimisation, since the risk could be minimised by obtaining an interpretation in advance. Additionally, the issuing of individual interpretations generated increasing administration costs, which were in no way balanced by symbolic fees for their issuance.

Of course, this raised a fundamental question: Should the individual interpretation be the main component of the tax system?

4 The Shortcomings of the System of Individual Interpretations – Introduction

The system, which was set up in 2007, quickly revealed many limitations. Lots of interpretations were issued, which generated huge costs for the tax administration. The more interpretations were issued, the more difficult it was to maintain uniformity. At the same time, legal solutions were not always tailored to the needs of taxpayers. Ever since the changes of 2016, the efforts to both reduce the number of individual interpretations and improve their usefulness to taxpayers have essentially been combined. Whether this has been achieved is another matter.

5 Joint Interpretation Requests Made by Counterparties

One of the problems was that each of the parties to the economic operation had to request a separate interpretation. The interpretation could only be used by its owner, but not by its counterparties. This increased the risk of the lack of a consistent approach to the same problem by the interpretation authority and also generated completely unnecessary work for that authority.

The answer was two new institutions, which appeared on 1 January 2016. One is the so-called joint request for an individual interpretation (Art. 14r O.P.). A request for an individual interpretation may be made by two or more interested persons who are in the same factual situation or who are to participate in the same future event. In order to avoid a multitude of entities in the course of the interpretation procedure, the parties concerned must identify one entity to be party to the interpretation procedure. The procedure will result in one interpretation that will assess the entire operation from the point of view of tax law. It shall be sent to the concerned person designated as party to the procedure and to the other persons concerned in the form of copies. Individual interpretation may be used by all parties, but it can be challenged only by the person who is a party (Decisions of the Supreme Administrative Court of 22 December 2016, II FZ 889/16 and of 14 February 2017, II FZ 967/16).

Undoubtedly, the purpose of introducing this provision is to reduce the number of requests submitted by several entities for which, as a result, identical individual interpretations are issued, which is to improve the effectiveness of interpretation bodies. From this point of view, this change should be seen as positive. Of course, taxpayers can always make several separate requests for interpretation.

6 Regulating the Relationship between Individual and General Interpretations

Certainly, a solution introduced on 1 January 2016, which boils down to the primacy of general interpretations over individual interpretations, offers great opportunities as far as the reduction of the number of issued individual interpretations is concerned. Currently, the existence of a general interpretation makes it impossible for an individual interpretation to be issued to a taxpayer when the legal and factual situation is identical (Art. 14b § 5a O.P.). In such a case, the interpretation authority, while refusing to issue an individual interpretation, will indicate to the taxpayer which general interpretation relates to their question. If a general interpretation is issued after the previous issue of an individual interpretation, the latter shall expire (Art. 14e § 1a(2) O.P.). However, the holder of the Interpretation shall be protected until the individual interpretation expires. The protection that results from individual interpretation will not therefore expire automatically.

This solution is not very well thought out. It often requires a huge amount of work on the part of interpretation authorities, which must find all individual interpretations that expire as a result of issuing a general interpretation, and then issue a decision on the expiry of each individual interpretation. These provisions can be challenged with an appeal and with a complaint before the administrative court. In addition, the interpretation authority is certainly unlikely to be able to achieve the expiry of all interpretations at the same time.⁶

This results in different levels of protection for holders of interpretations who are in the same factual situation. However, by fulfilling a rather sensible demand, the lawmaker has led to a situation where procedural solutions are complicated, expensive and do not guarantee equal treatment of taxpayers. In the event when the Minister of Finance started to issue interpretations in bulk, interpretation authorities would probably have to deal mainly with searching and determining the expiry of individual interpretations.

7 GAAR and Individual Interpretations

The introduction of a general anti-avoidance rule on 15 July 2016 triggered a real revolution in the Polish tax law. The changes have resulted in a radical reduction in the degree of trust that the taxpayer can have for an individual interpretation.

If the interpretation authority comes to the conclusion that there is a reasonable suspicion that the action described in the request for an individual interpretation may constitute a basis for the application of GAAR, it must seek the opinion of the Head of the KAS. Only after such an opinion has been obtained may it issue an interpretation, if it considers that the rule is not applicable (Art. 14b § 5b O.P.). They make use of

⁶ Even if all orders were sent simultaneously, they would not be served at the same time.

the possibility of refusing to issue an interpretation in quite a number of cases (out of 29,955 requests filed in 2017 the interpretation was refused on these grounds in 650 cases).

Even if the applicant obtains an interpretation when the interpretation authority does not notice the applicability of the rule, they are left with nothing. In accordance with Art. 14na of the Tax Ordinance Act added then on 15 July 2016, the provisions on the protection of the holder of an individual interpretation do not apply if the actual state or future events which are the subject of the interpretation constitute an element of the operations which are the subject of a decision issued on the basis of GAAR or in connection with the abuse of rights within the meaning of the provisions on value added tax.

This leads to a quite obvious conclusion that the individual interpretation does not protect the holder in any way when tax avoidance occurs and it is irrelevant that to some extent the defect in interpretation is the result of an error on the part of the interpretation authority. As a result, it can be concluded that the interpretation authority will in no case suffer negative consequences of its error in assessing the taxpayer's actions and its failure to request the opinion of the Head of the KAS.

Similarly, the protection of the interpretation holder is also excluded, for example, under the Slovak law (Lang et al., 2016: 588). In other countries, such as Portugal (Lang et al., 2016: 526) and Finland (Lang et al., 2016: 256), obtaining a “normal” tax interpretation protects against the application of GAAR.

8 Sad Practice of the Tax Authorities

The greatest threat to taxpayers, however, does not lie in the provisions of law, but in the practice of tax authorities. We are increasingly often confronted with situations where the tax authorities refuse to apply the interpretation on the grounds that the description of the actual state or a future event in the request does not correspond to the actual course of the event. The alleged differences between the content of the request and reality give the impression, to put it mildly, of being far-fetched. As a result, requests for individual interpretations are becoming more detailed.

At present, the Polish tax administration often takes pride in the increase in tax collection. The fight against tax fraud has become a trademark of the Polish Prime Minister (earlier: Minister of Finance and Development) Mateusz Morawiecki. There is no doubt that a significant number of actions of the government should be given the credit. However, the prevailing atmosphere of fighting against fraud creates a tendency among the tax authorities to focus only on the result of tax collection. Less attention is paid to the legitimacy of the actions of the tax authority. If individual interpretations which are beneficial for the taxpayer are disregarded, the trust that the taxpayer should have in those interpretations and tax authorities is undermined by them.

9 Climate Change around Individual Interpretations in Global Terms

Likewise, we must not overlook the growing doubts about the functioning of tax interpretations, which are appearing in the world. Tax interpretations may constitute an instrument of harmful tax competition.⁷ It is tax interpretation that Luxembourg has been using for many years (the *LuxLeaks* scandal). It was in Luxembourg that a discretionary system of “creating” tax law for the use of large multinationals and to the detriment of the fiscal interests of other countries was created. This practice was well described by the International Consortium of Investigative Journalists (ICIJ) (Kleinnijenhuis, 2014).

The actions of Luxembourg authorities were treated by the European Commission as an unlawful State aid.⁸ This is a common trend nowadays. The Commission runs a significant number of cases in which it argues that obtaining an interpretation (including an advance pricing agreement) can be an example of an unlawful State aid.⁹ This does not mean that the interpretation itself as an institution constitutes State aid. Rather, state aid is a misinterpretation of the law in this interpretation, or a hidden agreement between a taxpayer and a state that creates a favourable tax regime (Lang, 2015: 395).

The practice of Luxembourg authorities is quite commonly quoted as an incentive for the OECD and the EU to address the issue of transparency of tax interpretations (Balco and Yeroshenko, 2017: 263) and changes in the exchange of tax information.

Polish tax interpretations have never been an instrument of harmful tax competition. However, it cannot be ruled out that in the future the European Commission will consider some of them to be state aid, which will entail the obligation to return the tax advantage. This is certainly an additional risk factor for taxpayers.

10 Conclusions – Wealth or Crisis?

The system of tax interpretations in Poland seems to be well-developed in every aspect. For many years now, new, useful legal solutions have been introduced to adapt it to the taxpayers’ needs. Tax interpretations are widely used by taxpayers. However, it seems that the success also proves that there is a crisis. Issuing more than 37,000 tax interpretations each year is a disastrous sign of the relations between taxpayers and authorities. The taxpayer does not trust the tax authorities and therefore always tries to be on the safe side and obtaining an interpretation. However, current changes in both the law and the practice of its application undermine the taxpayer’s confidence even in the tax interpretation. In too many cases tax interpretation no longer protects the taxpayer. In the course of their discussions, lawyers quite often take the view that “the time of tax interpretations in Poland is over”. Maybe it is a bit exaggerated, but in

⁷ For more information on the issue see Harmful Tax Practices, 2017.

⁸ For more information see Rossi-Maccanico, 2016: 475–507.

⁹ For more information on the issue see Luja, 2015: 379–390.

fact since 2016 the number of tax interpretations issued in Poland has finally started to decrease significantly.¹⁰ I do not think that Polish tax law has become clearer. Rather, it is the result of a combination of two factors: first, the introduction of legal restrictions on the possibility of applying for tax interpretations; second, the taxpayers' confidence in the protective power of interpretation has been significantly undermined.

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¹⁰ In 2016, 33,605 individual interpretations were issued (i.e. 3,000 less than in the previous year), and in 2017 only 25,718.

