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EVOLUTION OF THE RULES PERTAINING TO THE ISSUING OF 'OFFICIAL' INTERPRETATIONS OF TAX LAWS IN POLAND

Abstract. Interpretations of the tax law (currently referred to as general and individual interpretations), issued by tax authorities, are a fairly new institution in Poland. They were introduced into the legal system by the Tax Ordinance Act of 29 October 1997. From that time these regulations were deeply changed three times. Now it seems that Polish legislator has finally succeeded in elaborating an appropriate model for binding interpretation of tax law that protects the interests of taxpayers. However, discussed regulations seem to need some other amendments. The objective of this article is to present the evolution of the provisions pertaining to the issuing of the so-called official interpretations of tax law and to point at certain shortcomings of the present regulations.

1. Introduction

Interpretations of the tax law (currently referred to as general and individual interpretations), issued by tax authorities, are a fairly new institution in Poland. They were introduced into the legal system by the Tax Ordinance Act of 29 October 1997 (ustawa z 29 sierpnia 1997 – Ordynacja podatkowa (Dz. U. z 2012, poz. 749 t.j.)). Despite the fairly short period of their application, the regulations pertaining to the issue of such interpretations have been amended several times in a rather profound manner. The objective of this article is to present the evolution of the provisions pertaining to the issuing of the so-called official interpretations of tax law and to point at certain shortcomings of the present regulations.

2. Official interpretations in the years 1997–2002

Originally, official interpretations of tax law were regulated only in art. 14 of the Tax Ordinance Act (Dz. U. z 2012, poz. 749 t.j.). The ar-

ticle authorized the Minister of Finance and the tax authorities to issue interpretations of tax law. Interpretations made by the Minister of Finance were to be published in the Fiscal Bulletin of the Ministry of Finance (*Biuletyn Skarbowy Ministerstwa Finansów*) and their objective was to ensure uniform application of tax regulations by the tax authorities. Even though the Act did not expressly state that the tax authorities would be bound by the interpretations of the Ministry, in practice they (in particular those subordinated to the Ministry) often complied with the interpretations.

A separate type of interpretations was information on the scope of application of tax laws in individual cases, issued by the tax authorities. The tax authorities were required to issue such interpretations (referred to as information) only upon request of taxpayers, payers, and collectors (thus, the group of persons authorized to request such interpretations was limited). The interpretations pertained to existing factual states. What this meant was that the requesting person could not demand interpretation regarding a future (hypothetical) state and was only limited to the existing state. The disadvantage of this was that it was not possible to request the opinion of tax authorities regarding events that would take place in the future, and the requesting person could not learn the consequences of his future actions. The interpretations could not be issued if a fiscal proceeding or a fiscal audit had been initiated in the case to which the request pertained.

As for the guarantee of protection of the persons who complied with the interpretations, the legislator only stated that “compliance by the taxpayer with the official interpretation of tax law may not be detrimental to him.” However, the Act was not clear on what such lack of detrimental effects would mean. In particular, it was not certain whether, for example, compliance with an erroneous interpretation concerning a lack of duty to pay a tax would enable the taxpayer to effectively avoid paying the tax. For unknown reasons, the guarantee was limited to taxpayers only, even though payers and collectors were also allowed to request interpretation from tax authorities. Of note is also the fact that the Ordinance Act did not provide for a time limit for the issue of interpretations.

Interpretations issued in individual cases had no specific form as the Act did not provide that they should have the form of an official decision or disposition. The only requirement was that they had to be issued in writing. As a result, there was no procedure for challenging the interpretations: no appeals or complaints to an administrative court were provided for.¹

3. Changes introduced in the Act of 12 September 2002

(ustawa z 12 września 2002 r. o zmianie ustawy – Ordynacja podatkowa oraz o zmianie niektórych innych ustaw. (Dz. U. z 2002 Nr 169, poz. 1387))

On 1 January 2003 certain changes became effective regarding the rules for the issuing of official interpretations of tax law. Art. 14 of the Tax Ordinance Act (Dz. U. z 2002 Nr 169, poz. 1387) precisely defined the nature of the interpretations issued by the Ministry of Finance. Such interpretations were to pertain to “general problems of the tax law,” and the Ministry was prohibited from issuing interpretations in individual cases (which were restricted to the tax authorities). The Ministry’s interpretations were to be binding on the tax authorities and the tax audit authorities. Also, the legislator clarified the essence of the guarantee of protection of persons complying with the Ministry’s interpretations. It was provided that compliance of a taxpayer, payer, or collector² with interpretations of tax law may not be detrimental to him, but does not exempt him from the duty to pay the tax. The legislator guaranteed that in the scope resulting from the compliance with an interpretation, proceedings would not be initiated in cases regarding fiscal crimes or fiscal misdemeanors (and proceedings that had been initiated in such cases would be discontinued), interest for delays would not be charged, and additional (punitive) VAT payments would not be imposed. The Act also provided that a taxpayer’s, payer’s, or collector’s compliance with interpretations of tax law may constitute grounds for remittance of overdue taxes, if the overdue payments were the result of their compliance with such interpretations. It should be emphasized, however, that the legislator used the word ‘may’ and did not require remittance of overdue tax payments in such cases but only suggested that the tax authorities consider this possibility.

The express provision that the tax authorities are bound by the interpretations issued by the Ministry of Finances could be interpreted as a violation of the principle of two-instance tax proceedings, since authorities of both the 1st and the 2nd instance were required to adopt the same interpretation of tax law. This problem was raised in a complaint filed with the Constitutional Tribunal (Trybunał Konstytucyjny, TK). In its verdict of 11 May 2004, the Tribunal found that art. 14 (2) of the Tax Ordinance Act (in the part providing that the tax authorities are bound by the Ministry’s interpretations) violated art. 78 and 93 of the Constitution of the Republic of Poland. (Dz. U. z 1997 Nr 78, poz. 483). Thus, the relevant provisions were no longer valid. Paradoxically, the reason for implementing this change (which was questioned by the Constitutional Tribunal) was to ensure uni-

form application of law by the tax authorities: the legislator wanted the taxpayers to be sure that in similar situations the tax authorities in the entire country would make identical decisions.

In individual cases the official interpretations (still referred to as information) were to be issued by the tax authorities of the 1st instance. The persons authorized to request such interpretations were to be taxpayers, payers, and collectors, provided that the interpretations pertained to existing factual states.³ Tax authorities were not allowed to issue interpretations pertaining to future (hypothetical) events. Thus, requests for interpretations in cases where tax proceedings, tax audits, or proceedings before administrative courts had been initiated were not allowed. The Act did not provide for any negative consequences of delays in the issue of interpretations by the tax authorities.

4. Official interpretations of tax law in the laws in force after 1 January 2005

The Act of 2 July 2004 (ustawa z dnia 2 lipca 2004 r. Przepisy wprowadzające ustawę o swobodzie działalności gospodarczej (Dz. U. z 2002 Nr 169, poz. 1387)) introduced further changes to the rules regarding the issuing of official interpretations of tax law. In those changes, the legislator introduced significant protective measures of the taxpayers' interests.

The principle that compliance with interpretations may not be detrimental was extended to cover, in addition to taxpayers, payers, and collectors, also legal successors of taxpayers and third parties liable to cover taxpayers' overdue taxes. Thus, it can be concluded that only since 2005 the protective measures related to interpretations of tax law have applied to all entities required to pay taxes.

The scope of the protection was significantly increased. The provision that compliance with interpretations did not exempt one from paying the tax was removed. In the scope resulting from compliance with interpretations, tax authorities were no longer allowed to impose taxes for the period prior to cancellation or change of the interpretation. Thus, the tax authorities were allowed to impose a tax in a way that was not compliant with the interpretation only if the interpretation was changed and such tax would apply only to the period after the change. Also (the same as before), the tax authorities were not allowed to impose additional (punitive) VAT tax, to initiate proceedings in fiscal crime or misdemeanor cases (and were required to terminate proceedings that had been initiated) and to

impose any other sanctions resulting from provisions of tax law and penal fiscal law.⁴

The separation of the competences of the Ministry of Finance and the tax authorities was maintained. The Minister was authorized to issue interpretations pertaining to general problems of the tax law,⁵ while the tax authorities (heads of tax offices,⁶ heads of customs offices, heads of communes, mayors, presidents of cities, district heads, and province marshals) would issue interpretations in individual cases.⁷

Individual interpretations could be issued not only upon request of taxpayers, payers, or collectors, but also upon request of legal successors of taxpayers as well as the so-called third parties liable to pay taxpayer's overdue taxes. Eventually, the legislator regulated the form of the individual interpretations. The legislator provided that they would take the form of dispositions and would be subject to complaints. Complaints would be considered by an appeal body who would issue a relevant decision. In its decisions, the appeal body could change or repeal individual interpretations if the relevant complaints were found to be justified or if the interpretation was in flagrant conflict with the verdicts of the Constitutional Tribunal or the European Court of Justice. Decisions of the appeal body could be appealed against in an administrative court.

Individual interpretations issued by the tax authorities were not binding on the persons who requested them but were binding on the tax authorities and the tax audit authorities. Consequently, decisions imposing a tax had to be compliant with the current interpretations issued to taxpayers, payers, or collectors.

A new provision in the law was the introduction of a 3-month time limit for the issue of individual interpretations, starting from the date of receipt of the relevant requests by the tax authorities. In complicated cases, the time limit could be extended to 4 months. If a tax authority failed to issue an interpretation by the deadline, the statute provided that the tax authority would be bound by the position of the person requesting the interpretation expressed in the application. Such situations were often referred to as 'silent interpretations' (Kosikowski, 2011, p. 179) whereby the requesting person was authorized to conclude that he had received an interpretation that was fully conformant to his position expressed in the application. In order to impose a tax, the tax authorities were required to issue a decision changing such a 'silent interpretation', if such a tax would be in contradiction to the taxpayer's position.

5. The reform of the rules regarding official interpretations of tax law introduced in the Act of 16 November 2006 (ustawa z dnia 16 listopada 2006 r. o zmianie ustawy – Ordynacja podatkowa oraz o zmianie niektórych innych ustaw (Dz. U. z 2006 Nr 217 poz. 1590))

On 1 July 2007, new changes to the regulations pertaining to official interpretations of tax law issued by tax authorities became effective. In the amended Tax Ordinance Act, interpretations of tax law are the subject of a dedicated chapter (1a).

Interpretations were expressly divided into two categories: general and individual. General interpretations are issued only by the Ministry of Finance in order to ensure uniform application of tax laws by tax authorities and tax audit authorities.⁸ General interpretations are required to take into account court verdicts as well as verdicts of the Constitutional Tribunal and the European Court of Justice.

One of the most important changes was that state tax authorities (heads of tax offices and customs offices) would no longer be authorized to issue individual interpretations). According to the new law, individual interpretations pertaining to taxes collected by tax offices and customs offices would be issued by the Ministry of Finance and individual interpretations pertaining to taxes collected by local authorities would still be issued by commune heads, mayors, presidents of cities, district heads, and province marshals. Because the Ministry of Finance is unable to consider all requests (from the entire country) for individual interpretations, the new law authorized the Minister to delegate the power to issue individual interpretations on the Minister's behalf to bodies subordinated to the Ministry. The Minister has taken advantage of this possibility and authorized the directors of 5 tax chambers (Bydgoszcz, Katowice, Poznań, Łódź, and Warsaw) to issue individual interpretations.⁹

Another important change was the enlargement of the scope of interpretations. Individual interpretations may pertain not only to existing factual states but also to future events. This provision enabled the requesting persons to obtain interpretations that are binding to the tax authorities and pertain to the fiscal consequences of future actions. Consequently, the group of persons who are authorized to request individual interpretations includes all persons whose actions have consequences in the area of tax law.

Applications must contain the applicants' positions regarding the legal evaluation of the factual state presented, and the authorities issuing the interpretations are required to evaluate such positions and find them

to be correct or present their own positions (different from those of the applicants).

In the new law, the legislator abandoned the previous form required in the case of individual interpretations, namely the form of disposition. Also, the provisions giving the requesting persons the right to complain against interpretations were repealed. The applicants who do not agree with individual interpretations may call on the authority to eliminate the breach of law (this is a special institution provided for in the regulations pertaining to proceedings before administrative courts). After an ineffective call to eliminate the breach of law, the applicant may appeal against the interpretation in an administrative court.

Interpretations can be changed, *ex officio*, by the authorities that have issued them. However, compliance of applicants with individual interpretations before they are changed must not be detrimental to them, which means that in the scope covered by the interpretation, penal fiscal proceedings against the applicants cannot be initiated (and proceedings that have been initiated must be terminated) and interest for delayed payments cannot be charged. The issue of exemption from a tax was regulated in the new law in a rather innovative manner: The legislator identified two types of situations in this regard:

1) if the applicant is asking about consequences of an event that has taken place and has led to some fiscal consequences (e.g. the requirement to pay a tax) before the interpretation is delivered, then an advantageous interpretation (one that confirms that there is no duty to pay the tax) does not constitute an exemption from the duty to pay the tax if it is later replaced with a disadvantageous interpretation (one that confirms the duty to pay the tax);

2) if the request pertains to an event that will have fiscal consequences in the future, after the interpretation is delivered, then an advantageous interpretation (which confirms that there is no duty to pay the tax) will be a basis for exemption from the tax, even if it is later replaced with an interpretation that is disadvantageous to the applicant.

The new law maintained the institution of the so-called 'silent interpretation'. If an individual interpretation is not issued within 3 months of the date of receipt of the application by the authority, then it is considered that on the day following the day on which the deadline for the issue of the interpretation expired an interpretation is issued that fully confirms the position of the applicant.

6. Conclusions

An analysis of the amendments to the regulations on official interpretations of tax law leads to the conclusion that the Polish legislator has finally succeeded in elaborating an appropriate model for binding interpretation of tax law that includes protection of the interests of taxpayers.¹⁰ However, the model is not free of shortcomings. Nevertheless, they can be eliminated without another deep reform of the rules governing the issue of interpretations. It appears that small changes to the Tax Ordinance Act would suffice. Below are some issues that the legislator has so far failed to eliminate:

1. In the theory of law there is a widespread opinion that interpretation of law is just one stage of application of law. The process of application of law consists of the following stages: selection of the regulation that constitutes the basis of a decision, interpretation (determination of the meaning of the regulation), collection of evidence pertaining to facts with which the legal consequences provided for in the regulation are to be related, subsumption (qualification of the case to match a behavior described in the regulation), and determination of the consequences of the fact qualified as the behavior described in the regulation. (Nowacki, Tabor, 2012). Thus, an allegation regarding violation of a law may pertain to an action by an administration body consisting in implementation of law. An administration body may violate a law by issuing a decision (an act of application of law) that is not in compliance with relevant regulations. Interpretation of regulations cannot be analyzed from the point of view of compliance with law and the reasoning of an entity applying law can be neither compliant nor not compliant with law. This observation leads to a rather negative opinion of the regulations that enable complaints against individual interpretations of tax law. Administrative courts exercise control over individual interpretations with respect to observance of law. A body issuing an official interpretation could risk the allegation of violation of law only if it violated the procedure pertaining to the issue of interpretations (which is defined in the Tax Ordinance Act). Nevertheless, administrative courts study not only the procedure but also the essential contents of the interpretations issued by the tax authorities.¹¹ The control of the essential contents of the decisions made by tax authorities should only pertain to decisions regarding the values of imposed taxes, as opposed to interpretation of regulations that are to be applied for the purpose of issuing such decisions.

2. The Tax Ordinance Act gives the Minister of Finance the authority to issue individual interpretations pertaining to taxes charged by the bodies that are subordinate to the Minister and the authority to issue general

interpretations pertaining to all taxes. There are some doubts regarding the authority to decide about the interpretation of regulations pertaining to taxes collected by local authorities. The idea of self-government and financial independence of local authorities are the foundation of the principle that communes are responsible for collecting their own taxes.¹² It is quite feasible that the Minister of Finance could be wrong in his reasoning; such an error (incorporated in a general interpretation) would affect the tax revenue of all communes in Poland.

3. The institution of 'silent interpretation' needs to be defined in detail. The legislator gives tax authorities only 3 months to issue individual interpretations. If the interpretation is not issued within this time limit, the position of the applicant is considered to be correct. So far it has not been clearly decided what date constitutes the deadline for issue of interpretations. There are three possible solutions:

- a) the date of issuing of an interpretation is the date of its preparation (signing) shown on the letter sent by the administrative body (wyrok Naczelnego Sądu Administracyjnego z dnia 14 grudnia 2009, II FPS 7/09);
- b) the date of issuing of an interpretation is the date of sending of the letter to the applicant (wyrok Wojewódzkiego Sądu Administracyjnego w Białymstoku z dnia 10 października, SA/Bk 364/07);
- c) the date of issuing of an interpretation is the date of delivery of the letter to the addressee (Wyrok Naczelnego Sądu Administracyjnego z dnia 2 listopada 2008, I FPS 2/08).

It appears that the second solution is the most appropriate. The best date of issuing of the interpretation is the date on which the letter is sent. The first option may lead to allegations of backdating of letters by tax authorities. The last option, on the other hand, may lead to 'silent interpretations' becoming effective due to the delays in the delivery of the letters by the postal service operator.

N O T E S

¹ In its verdict of 2 December 1998 the Supreme Administrative Court (Naczelny Sąd Administracyjny, NSA) (Wyrok NSA z dnia 2 grudnia 1998, I SA/Ka 16/98) stated that information on the scope of application of tax law regulated in art. 14 of the Tax Ordinance Act are not actions in the scope of public administration that can be appealed against in an administrative court.

² Thus, the protection also covered payers and collectors.

³ The right to request interpretations was not granted to legal successors of taxpayers and the so-called third parties liable to pay the taxpayers' overdue taxes.

⁴ This protection pertains to individual interpretations and interpretations issued by the Ministry of Finance.

⁵ The Act of 30 June 2005 (Dz. U. z 2005 Nr 143, poz. 1199) on amending the Tax Ordinance Act and on amending certain other statutes, as of 1 September 2005, extended the powers of the Minister of Finance. From that day on, he could also issue individual interpretations pertaining to agreements on avoidance of double taxation and other ratified international agreements pertaining to taxes.

⁶ As of 1 September 2003, tax offices are no longer tax authorities, their place was taken by the heads of tax offices.

⁷ Only in this amendment did the legislator decide to call “information on the scope of application of tax law” as “interpretations regarding the scope and way of application of tax law.”

⁸ Since 1 January 2012, general interpretations have been issued also upon request. However, public administration bodies cannot be the applicants.

⁹ Regulation of the Minister of Finance of 20 June 2007 concerning authorization to issue interpretations of tax law. (Dz. U. z 2007 Nr 112, poz. 770 z późn. zm.).

¹⁰ The rules regarding the issue of official interpretations of regulations pertaining to other levies are regulated in the Act of 2 July 2004 on the freedom of economic activity (Dz. U. z 2010, Nr 2010, poz. 1447 j.t.).

¹¹ Initially, in their verdicts, administrative courts limited their considerations to whether law was violated in the process of issue of interpretations (e.g. whether the interpretations were issued in the required form, if all the elements of the factual state described in the applications have been considered, etc.). However, in its resolution of 8 January 2007 the NSA (uchwała siedmiu sędziów NSA z dnia 8 stycznia 2007, I FPS1/06) stated that control of courts should also cover correctness of the essential contents of interpretations.

¹² Commune-level tax authorities collect real estate tax, farmland tax, forest tax, and means of transport tax. The other three taxes that constitute a source of revenue of communes are collected by the tax offices subordinated to the Minister of Finance.

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