

# BIAŁYSTOK LAW BOOKS

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Mariusz Popławski

INTRODUCTION  
TO POLISH TAX LAW



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## LIST OF ABBREVIATIONS

- Act on Agricultural Tax – Act of 15.11.1984 Law on Agricultural Tax (Journal of Laws of 2006, No. 136, item 969 as amended)
- Act on Excise Duty – Act of 6.12.2008 Law on Excise Duty (Journal of Laws of 2009, No. 3, item 11 as amended)
- Act on Forestry Tax – Act of 30.10.2002 Law on Forestry Tax (Journal of Laws No. 200, item 1682)
- Act on Gambling Activities – Act of 19.11.2009 Law on Gambling Activities (Journal of Laws No. 201, item 1540 as amended)
- Act on Inheritance and Donation Tax – Act of 28.7.1983 Law on Inheritance and Donation Tax (i.e. Journal of Laws of 2009, No. 93, item 768 as amended)
- Act on Lump–Sum Tax – Act of 20.11.1998 Law on Lump–Sum Income Tax on Some Revenues Earned by Natural Persons (Journal of Laws No. 144, item 930 as amended)
- Act on Stamp Duty – Act of 16.11.2006 Law on Stamp Duty (Journal of Laws No. 225, item 1635 as amended)
- Act on Tax on Civil Law Transactions – Act of 9.9.2000 Law on Tax on Civil Law Transactions (i.e. Journal of Laws of 2010, No. 101, item 649 as amended)
- Act on Tonnage Tax – Act of 24.8.2006 Law on Tonnage Tax (Journal of Laws No. 183, item 1353 as amended)

Act on VAT Tax	- Act of 11.3.2004 Law on Tax on Goods and Services (Journal of Laws No. 54, item 535 as amended)
a.t.r.	- advance tax rulings
CT	- Constitutional Tribunal
EU	- European Union
L.C.I.T	- Act of 15.2.1992 Law on Corporate Income Tax (i.e. Journal of Laws of 2000, No. 54, item 654 as amended)
L.L.T.	- Act of 12.1.1991 Law on Local Taxes and Fees (i.e. Journal of Laws of 2010, No. 95, item 613 as amended)
L.P.I.T	- Act of 26.7.1991 Law on Personal Income Tax (i.e. Journal of Laws Journal of Laws of 2010, No. 51, item 307 as amended)
L.S.G.	- Act of 8.3.1990 Law on Self-Government - (i.e. Journal of Laws of 2001, No. 142, item 1591 as amended)
OECD	- Organization for Economic Co-operation and Development
PAC	- Provincial Administrative Court
P.B.A.C	- Act of 30.8.2002 Law on Proceedings before Administrative Courts (Journal of Laws No. 153, item 1270 as amended)
SAC	- Supreme Administrative Court in Warsaw
T.O.	- Act of 29.8.1997, Tax Ordinance (i.e. Journal of Laws of 2005, No. 8, item 60 as amended)
TEC	- Treaty Establishing the European Community
TFEU	- Treaty on the Functioning of the European Union
The Republic of Poland's Constitution	- the Constitution of the Republic of Poland of 2.4.1997 (Journal of Laws No. 78, item 483 as amended)
VAT	- Value added tax

## INTRODUCTION

This study is an attempt made to present the Polish tax law in force. The study has been assumed to be of a general nature. Its purpose is to present basic mechanisms specific to tax law. It is not the author's intention, however, to make a profound analysis of the provisions regulating taxes, or evaluate them. Nevertheless, it does not mean that one can find neither detailed considerations nor references to practice in this paper at all. It has been decided that it would be the easiest to find out about some, frequently quite complicated, institutions of tax law if they are presented in the context of specified factual conditions. Therefore the examples which may appear in reality will sometimes be indicated therein. Principles of specific tax law mechanisms' operation will be presented through these examples' prism.

The book has been divided into three parts. The first one is devoted to basic issues. It may help a reader to find out about the essence of tax law. It will be possible to achieve this by learning, *inter alia*, about the notion of the tax, sources of tax law as well as the specifics of making and applying tax law provisions.

In the second part, the institutions of the so called general tax law are presented. They include both substantive law (e.g. manners of tax obligations' formation) and procedural law institutions (e.g. principles of conducting tax proceedings). It is difficult to overestimate the importance of the instruments included in this part of the study. Learning about tax law, it seems that the greatest attention should be paid just to this fragment of law. It is connected with at least two matters. Firstly, general tax law institutions apply to each tax being in force in Poland. One cannot be an expert in the area of any tax considerations without the knowledge of general tax law. Secondly, this part of tax law is quite stable. It does not undergo as frequent changes as provisions of specific tax law. In consequence, it is more probable that the knowledge acquired in the area of general tax law will be up-

to–date for a longer time. Therefore the issues of general tax law are discussed in more details therein.

The third part of this publication is devoted to specific tax law. Some chapters refer solely to individual taxes. It is so in the case of personal income tax, corporate income tax and tax on goods and services. It has been assumed that these considerations should be discussed in relatively more details due to their substantial practical importance in particular. Other chapters describe several allowances or forms of taxation. It has been assumed therein that individual chapters describe taxes that are similar as far as their objects are concerned. Under this rule, the following parts have been created, devoted to: flat–rate forms of income taxation, turnover taxes (excise duty and betting duty), real estate taxes and other local taxes.

To the best of Author’s abilities, an attempt has been made therein to show mutual relations between general and specific tax law institutions. Therefore references used in the text serve such a purpose. It means, *inter alia*, that reading descriptions of certain institutions of general tax law, one may come across a reference to a particular fragment in the specific part. Moreover, a reader may sometimes be referred from the specific part to a particular fragment in the general part. Thanks to this, the operation of the tax law mechanisms described therein may be learned better. What is more, there are also references within the same part, e.g. within the general or specific. Their purpose is to avoid repeating descriptions of tax law mechanisms or institutions that have already been or are going to be presented in more details in, e.g., another chapter, but within the structure of the same part of the study. The abovementioned references are used in the following visual form (see III, 2.4). In this example a reader is referred to part three, chapter two, and sub–chapter 4 therein.

While working on the publication, some translation issues appeared concerning specific terms used in the Polish tax regulations and their English equivalents. Several, sometimes contradictory versions of translations of the definite terms could be found. Two specific phrases functioning in the Polish regulations can serve as an example. “Obowiązek podatkowy” is translated as “tax liability” and

“zobowiązanie podatkowe” is translated as “tax obligation”.<sup>1</sup> There are, however sources where “zobowiązanie podatkowe” turns into “tax liability” in English.<sup>2</sup> Sometimes both terms are translated as “tax liability”.<sup>3</sup> Taking into consideration the lack of universally applied English translations of particular Polish tax phrases, Author of the book used those versions of English translations that he found to be most proper. At the same time, he does not acknowledge other possibilities of translation to be unacceptable.

*Mariusz Poptawski*

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- 1 See: Articles 4 and 5 of Act of Tax Ordinance (1997) in: Acts of Polish Law Collection, Version 5.0.1, Translegis Publishing, Translated by Danuta Kierzkowska, Anna Setkowicz–Ryszka and Magdalena Sporniak–Czerkas.
  - 2 See: Międzynarodowy słownik podatkowy, ed. Susan M. Lyons, Warsaw 1997, p. 476.
  - 3 See: R. Koziarkiewicz, Dictionary of Tax Terms, Warsaw 2005, p. 101 and 144.





## INTRODUCTORY ISSUES

### 1. General remarks

The aim of this work, which has already been mentioned in the introduction therein, is to present the character and essence of the Polish tax law. This aim will not be fulfilled if the essence of the tax and tax system are not described. Knowing these concepts seems to be a necessary basis without which the analysis of tax law mechanisms cannot come about. It is reflected in the first chapter of this part. Moreover, it is very important to consider the questions about the way taxes are formed, a entity responsible for their introduction and the form they are realized, and the principles that should be followed under the course of such procedures. These issues are analyzed in the second and third chapter of this part. What is more, a key issue is the presentation of rules which should be followed at the stage of tax law application. Thanks to this, it will be possible to notice certain elements showing specificity of the subject branch of law.

### 2. Tax and tax system

#### 2.1. A definition of tax

A normative definition of the **tax** is enclosed in the Tax Ordinance Act<sup>1</sup>. According to this definition, **tax is** a gratuitous, compulsory, non–repayable pecuniary performance made under public law in favor of the State Treasury, a voivodeship (province), powiat, or gmina (municipality), resulting from the statutory tax law. Every pecuniary

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1 Art. 6 T.O.

contribution, regardless of its name, that jointly meets requirements laid down in the T.O. is a tax<sup>2</sup>. It means that, e.g. the customs duty or a market levy should also be considered as a tax. A consequence of acknowledging the fact that specified contributions fulfill the abovementioned tax features is application thereto of any rules of such contributions' execution that are determined in the Tax Ordinance, which are described in Part II therein.

## 2.2. Constant features of tax

There are some constant features that each levy must meet to be called a tax<sup>3</sup>. Firstly, taxes should be **specified by tax acts**<sup>4</sup>. By virtue of the Constitution, only a statute can introduce a tax. It is reflected, inter alia, in two provisions of the Constitution. Pursuant to **Art. 217** of the **Republic of Poland's Constitution**, the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute. This provision expresses two principles: **the Act's exclusiveness in the scope of introduction of taxes**, as well as **the Act's exclusiveness in the scope of developing essential constructive elements of tax**. It means, on the one hand, that a decision about introducing a tax may be taken solely by the Parliament (in Poland, composed of the Sejm and Senate). On the other hand, however, it means that introducing a specified tax, the Parliament must absolutely declare its shape/form. This should also be done in the form of an Act (see I. 4.2.). In practice, a decision introducing a tax is taken through determination of its construction. From the formal point of view, though, it may be ascertained that such an act includes two decisions: tax introduction as well as determination of its construction. The power to determine a tax construction may be delegated, to a certain extent, to other subjects, e.g., the Cabinet, or Minister of Finance. However, it

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2 W. Wójtowicz, (ed.) Prawo podatkowe. Część ogólna i szczegółowa, Warsaw 2009, p. 6 and next, A. Olesińska, Polskie prawo podatkowe. Zarys systemu, Toruń 2009, p. 25, R. Mastalski, Prawo podatkowe, Warsaw 2009, Z. Ofiarski, Prawo podatkowe, Warsaw 2008.

3 L. Etel, (ed.) Prawo podatkowe, Warsaw 2008, p. 21 and next.

4 T. Dębowska–Romanowska, Prawo daninowe – podstawowe pojęcia konstytucyjne i ustawowe, Volume II, Glosa 1996, No 12.

may refer exclusively to some constructive elements and solely in the scope resulting expressively from the Act (see I, 4.3. and 4.4.).

In **Art. 84 of the Republic of Poland's Constitution**<sup>5</sup>, another principle of tax law has been introduced, i.e., **the principle of general taxation**. This principle is important, most of all, on the ground of tax law application. Another rule may be deduced from the abovementioned principle according to which exceptions cannot be interpreted extensively. Tax payment should be treated as a rule, and all deviations (it mostly refers to application of reliefs and tax exemptions) as exceptions thereof.

Secondly, the general rule envisages that taxes should always be **specified in a certain amount of money**. However, there is a possibility to settle up a tax in an auxiliary form (e.g. with securities or excise stamps), which has a financial dimension as well. The above rule also applies when ownership rights or property rights have been transferred for the benefit of the State Treasury or territorial self-government units to cover tax arrears. By virtue of this rule, one can meet a tax obligation imposed on a taxpayer.

Thirdly, to secure the fulfillment of tax obligations, tax authorities can use **enforcement proceedings** provided by the law. It means that a tax-creditor has at his/her disposal legal means which enable them to take over the ownership of property or property right in enforcement proceedings, even without a taxpayer's consent. Taking advantage of enforcement measures to enforce taxes should be treated as a necessary element of tax operation. In practice, taxpayers pay taxes of their own free will as they are aware of the fact that otherwise a Revenue Office will take advantage of enforcement measures which are at its disposal. However, legal regulations concerning tax enforcement are not perceived as a part of tax law but rather as a field of law that is ancillary to tax law<sup>6</sup>.

Fourthly, a tax that has not been overpaid **cannot be returnable**. This distinguishes taxes from credits or loans, which must be returned

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5 According to this provision, everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute.

6 B. Brzeziński, Wprowadzenie do prawa podatkowego, Toruń 2008, p. 331 and next.

within a certain period of time. However, some exceptions to that rule can be pointed out. Tax refunds are envisaged more often as a kind of tax preferences. They can stimulate certain behaviors (value added tax refunds for natural persons connected with some housing expenses) and increase incomes (excise duty refund on fuel used for agricultural activity). Tax refunds can occur also as a part of a tax construction (in the case when input VAT exceeds output VAT). Taking into account the fact that tax refund operation is an objective phenomenon, it is **difficult to justify regularity of defining tax through the prism of its non–returnability** if facts prove just the opposite. Attempting to adapt the content of Art. 6 of the Tax Ordinance to the actual status quo, it would be necessary to resign from indication of tax non–returnability as a tax immanent feature, or indicate that tax refund may occur in cases resulting from tax law provisions<sup>7</sup>.

Fifthly, the paid tax cannot constitute a ground for **any legal claims against the state or territorial self–government units lodged by taxpayers**. A taxpayer cannot demand special preferences due to the fact that s/he pays taxes. Tax due is not implicitly tied with certain expenditures. It leads to the conclusion that there are no specified duties of tax beneficiaries connected with tax payment. Therefore, a frequently repeated statement: “I pay taxes and demand”, cannot be justified. In the context of this principle, it is also unreasonable to claim that someone who pays higher taxes may demand better treatment by the State. A mere fact of tax payment cannot constitute the ground to separate a social group which will take advantage of, e.g., better healthcare, or better educational facilities, etc. On the other hand, however, it should be emphasized that thanks to tax income, the State may perform specific actions fulfilling social needs. Among other things, thanks to taxes, roads and schools are built, or public order is assured, etc. Such services are used, inter alia, by taxpayers. Moreover, this aspect includes a certain **element** of the State **repayment** for tax payment. It is, however, of **exclusively indirect nature** since the abovementioned

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7 See more about the institution of tax refund in M. Popławski, *Instytucja zwrotu podatku. Charakter prawny i funkcjonowanie*, Warsaw 2009.

services that are offered by the State are not addressed solely to those who will be able to prove that they have paid taxes.

Sixthly, the privilege to receive taxes belongs **only to the state and territorial self-government units**. By virtue of the Polish tax system there is only one level of territorial self-government unit having its own tax incomes. Only local councils were provided with local taxes. Other local authorities obtained tax share in income taxes. Consequently, taxes may constitute income of the solely abovementioned entities. Taxes cannot constitute income of other subjects even if the state or a local self-government unit would have been their founder or exclusive owner (state-owned or self-government enterprises, or budget entities, etc.). What is more, taxes that constitute income of public authorities organs cannot be introduced as well, notwithstanding the fact whether these would be legislative, executive or judiciary authorities. Therefore the Parliament introducing a tax cannot decide that it would constitute income of President, the Cabinet, or the Constitutional Tribunal, etc.

### 2.3. Structural components of tax

Every tax can be characterized on the basis of its structural elements such as: the **subject of taxation, object of taxation, tax base, tax rates, tax reliefs and exemptions, time limits for payment and payment conditions**<sup>8</sup>. They are called variable features of the tax<sup>9</sup>.

**The subject of taxation** is each party of a legally binding fiscal relationship. The **subject of taxation** with a tax duty is called a **passive party** of a legal tax relationship. The tax authority, authorized to represent a tax creditor (state or territorial local self-government units), is called an **active party** of a legal tax relationship.

Apart from a taxpayer (II, 2.4.), subjects obliged on the ground of tax law may also include other subjects, such as: tax remitters, tax collectors, third parties and legal successors. A legislator may impose on them specified tax liabilities (see II, 2.4, 2.5 and 7). Nevertheless,

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8 M. Radvan, Czech Tax Law, Brno 2008, p. 6 and next.

9 B. Brzeziński, Wprowadzenie do prawa podatkowego, Toruń 2008, J. Głuchowski, J. Patyk, Zarys polskiego prawa podatkowego, Warsaw 2008, K. Koperkiewicz-Mordel, W. Nykiel, W. Chróścielewki, Polskie prawo podatkowe, Warsaw 2006.

a taxpayer is in the foreground of the so called passive subjects of a legal tax relation. A role of this subject is of a **fundamental nature** whereas other subjects' role is **complementary**. Other subjects either fulfill their liabilities **irrespective of a taxpayer** (a tax remitter and a tax collector), or next to a **taxpayer** (third party), and sometimes in place of a **taxpayer** (legal successors).

In some cases, a classic relation occurring in tax law (a taxpayer – a liable person, a tax authority – the authorized person) may be reversed. A taxpayer may be entitled to demand a specified consideration from the state or a local self-government unit whereas these subjects will be liable to fulfill such an allowance for a taxpayer. We deal here with **tax entitlements**. When they are carried out, a public – legal relation becomes a debtor whereas a taxpayer is his/her creditor entitled to claim specified conduct from another party of such a tax relation. An element characterizing the institution of tax entitlements presented above occurs alongside the institution of the tax refund, excess tax, or tax damages<sup>10</sup>. We deal with such a situation when a passive taxable subject (a taxpayer) is entitled to claim specified conduct (e.g. tax refund), which would result in winning financial allowance<sup>11</sup>, from an active taxable subject (tax authority).

**The object of taxation** should be perceived as the factual or legal status which is connected with tax liability arising from the Tax Act. For example, obtaining income or revenue, or showing turnover, constitute an factual state of affairs which is the object of taxation. Acquiring ownership of a property, acceptance of inheritance, or conclusion of a contract of sale are examples of a legal status which is the object of the tax.

**The tax base** is the object of taxation expressed in quantity or value. The income which is expressed as a particular amount of money (the object of taxation formulated according to its value) is an example of the valuably expressed tax base. On the other hand, buildings which

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10 M. Popławski, Uprawnienia podatnika, stanowiące podstawę dochodzenia należności od podmiotów publicznych, in: L. Etel (ed.), System prawa finansowego, vol. 3, Prawo daninowe, Warszawa 2010, p. 624 and next.

11 M. Popławski, Instytucja zwrotu podatku. Charakter prawny i funkcjonowanie, Warsaw 2009, p. 9 and next.

are subject to real estate tax are taxed on the basis of the usable area of such property expressed in square meters (the object of taxation formulated quantitatively).

Determination of the tax base in the Act enables to answer the question how we are going to perceive specified taxable subjects for tax purposes, and whether it will be done through the prism of **quantity** or **value** since it is not always apparent and results from the essence of a certain tax itself. As far as income tax is concerned, it would be difficult to determine the tax base otherwise than by indicating the amount of income expressed in cash. However, it is not the case with regard to other allowances. Taxing, e.g., buildings with real estate tax, it is possible to introduce the tax base expressed quantitatively (e.g. the area expressed in square meters, or a number of buildings being owned) as well as valuably (e.g. a market or rental value of such a building). As far as excise duty is concerned, it is also possible to introduce the tax base on the basis of a value of goods being manufactured (e.g. cigarettes) or their quantity. What is more, there is no obstacle, which happens in practice, to make the tax base conditional on the both abovementioned elements at the same time.

**Tax rates** are an element of the tax structure that expresses a quantitative relation between the tax base and tax amount on the grounds of which the tax amount is assessed. Tax rates are of various character, nevertheless, we can distinguish three different **tax rates** according to their form: expressed by the **amount** of due tax (e.g. in property tax – PLN 1 for 1 m<sup>2</sup> of a usable area), **percentage** (e.g. in corporate income tax – 19% on income), or **mixed percentage** (e.g. in personal income tax – PLN 14.839, 02 + 32 % of surplus over PLN 85.528).

As far as the relation between the tax rate and the tax base is concerned, we can talk about **proportional (flat) rates** – the rate remains unchanged despite a change of the tax base, e.g. a 19% rate on personal income tax, **progressive** – as a rule, these rates go up together with the increase of the tax base, e.g. in personal income tax, for the income up to PLN 85.528, the rate amounts to 18% minus the amount reducing the tax – PLN 14.839, 02 + 32 % of surplus over PLN 85528),

etc., **regressive** – which are quite rare, as the result of the essential structure of these rates, they decrease proportionally to the increase of the tax base (the opposite of progressive rates), **digressive** – they decrease when the tax base goes down, and they are uncommon, too.

**Tax reliefs and tax exemptions** are other elements of the tax structure. Tax **reliefs** are elements of the tax structure that reduce the amount of tax to be paid by decreasing: the **tax base**, e.g. deducting social insurance premiums from income, the tax rate, e.g. the reduction of a rye purchase price, and as a consequence also of the **tax rate** in agricultural tax, the **tax amount**, e.g. deducting a specified amount provided for children maintained by the taxpayer from the tax. On the other hand, **tax exemptions** are the exclusion of a given tax belonging to a certain category of subjects (**subjective exemptions**) from the subjective scope, e.g. the State Treasury in income tax, or the exclusion of a certain category of objects (**objective exemption**), e.g. social welfare benefits. To underline the difference, as opposed to tax exemption, **tax relief** does not exclude the obligation to pay tax in whole but reduces its amount. Unlike other elements, **tax reliefs and tax exemptions** are optional.

Furthermore, tax acts list **exclusions** which lead to the elimination of a specific category of factual or legal occurrences, or a specific category of subjects from the subjective or objective scope of a given statute. In the case of exclusion, a tax liability does not arise at all because the provisions of a given statute do not apply in an excluded scope.

**Procedure and terms of payment** are the statutorily specified rules a taxpayer is obliged by while paying a tax, which concern a time limit on tax payment, a manner and form of payment and a place of payment. **Time limits for payment** is the time limit within which the tax should be paid. Tax provisions should specify precisely whether the tax due should be calculated by a taxpayer by **self-assessment**, or whether the tax will be **determined by a tax authority** (see II, 3.3.). Moreover, it should be specified whether the tax should be paid directly by a taxpayer, or whether tax collection will be realized **through the agency of a tax remitter or collector** (see II, 2.5.). Another essential



element is indication whether tax payment should be accompanied by documents submitted by a taxpayer with a tax organ, e.g. **tax returns**, and when it should be realized. It should also be specified to what tax organ the tax should be paid. Determination of the above elements is an important element of tax construction since failure to pay tax within the specified deadline and according to principles indicated in tax provisions may evoke negative consequences for a taxpayer. Particular attention should be paid, among other things, to the issue of tax arrears and default interest connected with them (see II, 3.5 and 3.6).

## 2.4. Classification of taxes

Taxes can be classified according to the following criteria: **the object of taxation** (income, property, turnover), **the method of assessing the tax base** (unit, value), **the relation to the tax source** (direct, indirect), **the type of activity conducted by a taxpayer** (connected with running business activity, other), **income allocation among the budgets** (that constitute state and local authorities' income).

Taking the last criterion into consideration, the following taxes should be classified as the state budget income: **goods and services tax, excise duty, gaming tax, corporate income tax, personal income tax, including tax paid as a lump-sum tax, i.e. a lump-sum on registered revenues, a lump-sum on the income tax paid by clerics, and tonnage tax.**

The following taxes should be classified as municipal (gmina) budget income: **real estate tax, agricultural tax, forestry tax, tax on means of transport, donation and inheritance tax, tax on civil law transactions, personal income tax paid in the form of a tax card.**

## 2.5. Tax system

A tax system is the entirety of taxes existing in a given place and time<sup>12</sup>. The set of taxes shaped in specific social and economic conditions is called a **historical system**. This system, due to its imperfections, is not

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12 P. Mrkývka, M. Radvan, *Správa dani a Daňone řízeňni*, in: M. Radvan, ed. *Finanční Právo a Finanční správa*. Berni Právo, Brno 2008, p. 71 and next.

a rational system. A **rational tax system** is a model a legislator should aim at while constructing a tax system in given conditions. A rational tax system assumes that taxes are put in order, harmonized and serve their functions; this, however, is difficult to achieve in practice<sup>13</sup>.

### **3. International and European union law on the basis of selected tax issues**

#### **3.1. Introductory remarks**

This part will present issues concerning the EU and international tax law since separation of these two sources of tax law have been considered reasonable. In case of these two sources, certain supranational standards of their formation are applied. They result from the acts of international and European law. They are not merely and solely about procedural aspects, but substantive too. In the EU Treaties or international conventions we can find orders, postulates, guidelines and instructions referring not only to the ways how the tax law provisions of a supranational level should be formed, but what they should include as well.

On the other hand, in case of sources of domestic tax law, principles elaborated, above all, within the frames of a given country apply since each country has the right to create their own rules according to which these provisions will be created, and which will indicate what this law will include. It does not mean that complete discretion may exist therein. Limitations that may occur here result, among other things, from the provisions of the European law (e.g. Directives), or international law (e.g. agreements on avoidance of double taxation). Activities undertaken by a national lawmaker should also be limited by the adoption, among other things, of a rule of the state of law. As far as the creation of tax law is concerned, it means, e.g. introduction of taxes solely by statute.

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13 L. Etel. (ed.), Prawo podatkowe... *op. cit.*, p. 45 and next.

### 3.2. EU law and the issue of tax harmonization

Tax law valid in Poland is generally based on legislation created by the Polish lawmaker. However, it is frequently completed by the EU law. It results from the assumption according to which functioning of taxes should not influence negatively on the functioning of the common market within the frames of the European Union<sup>14</sup>. For this reason, it has been decided reasonable to introduce two principles in the TFEU (Treaty on the Functioning of the European Union) which, in connection with the rule of primacy of EU law over domestic law, must be respected in all EU Member States.

**According to the first principle, the EU Member States are forbidden to use any instruments of tax discrimination<sup>15</sup>**, which is connected, most of all, with trade exchange between the EU Member States. Consequently, a ban on taxation on the products of other Member States of any kind in excess of that imposed on similar domestic products<sup>16</sup> has been introduced<sup>17</sup>, as well as a ban on any repayment of internal taxation that will exceed the internal taxation imposed on the products exported to the territory of any Member State<sup>18</sup>.

**According to the second principle, it has been decided that certain harmonization activities** aiming at the introduction of similar tax solutions within the EU Member States **are necessary**. A scope of such activities is indicated straightforwardly in the EU law as far as **indirect taxes** (tax on goods and services and excise duty) are concerned. It is shown that such dues should be harmonized to the extent that it is

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14 J. Kiszka, Dostosowanie polskiego systemu podatkowego do wymogów prawa Unii Europejskiej – stan i perspektywy, in: Kierunki reformy polskiego systemu podatkowego, ed. A. Pomorska, Lublin 2003, A. Pomorska, J. Szolno-Koguc, K. Wójtowicz, Proces dostosowywania polskich podatków pośrednich do standardów Unii Europejskiej, Lublin 2003,

15 A. Zalesiński, Test podatkowej dyskryminacji sprzecznej z prawem WE w postępowaniu sądowniczym, Monitor Podatkowy 2007, No 8, p. 9 and next.

16 It was explicitly expressed in Art. 110 TFEU. Pursuant to this provision, no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

17 K. Lasiński-Sulecki, Zakaz podatkowej dyskryminacji produktów w art 90 Traktatu ustanawiającego Wspólnotę Europejską, Kwartalnik Prawa Podatkowego 2005, No 2.

18 Art. 111 TFEU as well as Art. 112 TFEU. The first one indicates that where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition<sup>19</sup>. As far as **direct taxes** are concerned, harmonization should regard issues that directly affect the establishment or functioning of the internal market<sup>20</sup>.

The **process of tax law harmonization** discussed above should, most of all, be perceived as actions involving adaptation of the Member States' tax regulations to the EU requirements<sup>21</sup>. It implies the need to introduce suitable institutions of tax law required by the European law provisions to national legislations, or carry out certain changes in domestic law of a given country so that discrepancies with the EU law, which is of a superior nature, are eliminated.

The harmonization process requires the issuance of detailed provisions, most often included in the Council's directives or regulations, based on the provisions resulting from the TFEU<sup>22</sup>.

A **regulation** is of a general scope. It is binding in whole and directly applied in all Member States. It means that the EU regulations coming into force effect taxpayers, including the Polish ones, in such a way that they may always refer directly to the provisions of such acts.

A **directive** binds each Member State it is directed to. With reference to the result that is to be achieved, however, it leaves national bodies the freedom of a choice of the form and means thereof. Based on such acts, the national legislator is obliged to undertake certain legislative actions aiming at implementation of assumptions indicated in the directives. It means the need to adopt certain legal regulations by the national law-maker (national parliament). If a Member State fulfills a duty of complete and due transposition of the directive's content to the national legal order, individuals' rights and duties will

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19 Art. 113 TFEU.

20 Art. 115 TFEU.

21 B. Brzeziński, J. Głuchowski, C. Kosikowski, *Harmonizacja prawa podatkowego Unii Europejskiej i Polski*, Warsaw 1999, H. Hamaekers, K. Holmes, J. Głuchowski, T. Kardach, W. Nykiel, *Wprowadzenie do międzynarodowego prawa podatkowego*, Warsaw 2006, B. Brzeziński, M. Kalinowski (ed.), *Prawo podatkowe Wspólnoty Europejskiej*, Gdańsk 2006, J. Wyciślak, *Harmonizacja podatków bezpośrednich w świetle Unii Europejskiej*, Warsaw 2005, p. 4 i next.

22 Art. 288 TFEU.

result from the norms of the national law<sup>23</sup>. Otherwise, that is when appropriate implementation of the regulations resulting from the EU law does not occur, or if it does not occur at all, we will deal with the case of **inconsistency of the national law with the EU law**. If the duty to implement the directives into the system of the national law is not fulfilled, or it is fulfilled defectively, certain consequences may arise, among which the most significant are the following:

- the need to interpret national law in accordance with the EU law (assuming that the national norm exists but is contradictory to the EU law),
- a possibility of applying legal regulations resulting from the EU law directly by taxpayers, national courts and tax authorities, e.g. in order to take advantage of tax preferences envisaged therein, e.g. tax exemptions,
- a possibility to claim damages for the harm suffered by a taxpayer in connection with a lack of proper implementation of solutions favorable for him or her.

Such actions may be exercised in connection with the principle of the EU law supremacy over national law and a possibility of direct application of the EU legal regulations.

### **3.3. Elimination of international double taxation**

#### **3.3.1. Economic and juridical international double taxation**

International double taxation is a phenomenon where a certain object of taxation (most frequently income) is subject to taxation by comparable considerations in two countries. This phenomenon may be perceived on two levels: economic and juridical<sup>24</sup>.

We deal with the **international economic double taxation** when the following conditions are met jointly:

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23 W. Nykiel, Wykładnia prawa podatkowego wewnętrznego, międzynarodowego i prawa podatkowego Unii Europejskiej (selected issues), *Kwartalnik Prawa Podatkowego* 2004, No. 4, p. 136.

24 J. Banach, *Polskie umowy o unikaniu podwójnego opodatkowania. Komentarz*, Warsaw 2002, p. 55 and next.

- at least two countries levied taxes,
- the same objects of taxation were taxed,
- taxation considered the same taxation period,
- applied taxes are of an identical nature.

The second, that is a **juridical variety of double taxation**, occurs in situations which fulfill conditions specific for the economic variety of this phenomenon. Additional element which must occur in juridical double taxation is the identical subject of taxation. It is the only difference between economic and juridical variety of this phenomenon. In the first case, we deal with a situation when two different subjects obliged to pay tax (e.g. a company/partnership and a shareholder) occur, whereas in the second one, the same subject is a taxpayer obliged to pay tax in two countries.

It should be emphasized that the object of agreements on elimination of double taxation is only its juridical variety. With reference to economic double taxation, no ways of elimination of this phenomenon are applied.

The phenomenon of international double taxation should be assessed negatively. It goes without saying that no taxpayer wants to pay tax on the same income twice. This way profitability of his or her actions, and in consequence, motivation to undertake them, diminishes. Causing too high fiscal burden, particularly in business activity, the analyzed phenomenon is also a considerable dam blocking free movement of capital and people, and at the same time, the countries' economic development. It means that apart from taxpayers, the countries themselves are interested in elimination of this phenomenon (if not wholly, at least partially), even though it could appear on the surface that from the point of view of each country, it would always be more favorable to tax income that emerges.

### **3.3.2. A role of international agreements and the OECD Model Convention**

International agreements on elimination of double taxation play an important role in the tax law. Most often, agreements between two

countries (bilateral) are concluded<sup>25</sup>. Such agreements are of fundamental importance in elimination of this phenomenon. Poland is now bound by app. 80 such acts. In practice, however, there are also agreements where a larger number of countries determines together mechanisms of the elimination of this phenomenon (multilateral agreements).

Most agreements occurring in practice are based on the **OECD Model Convention on Income and on Capital**<sup>26</sup>, elaborated by its Fiscal Committee in 1963. The aim of this convention is the assurance of uniform principles of resolving problems occurring in the scope of international juridical double taxation.

The OECD Member States should apply this act when they conclude or revise bilateral agreements. Moreover, it is helpful to form agreements by countries which do not belong to this organization. For this reason, the above-mentioned Convention may be treated as a template of such agreements. Its application enabled far-reaching unification of solutions included in individual agreements on elimination of double taxation. It should be added that all agreements concluded by Poland are based on the above-mentioned document. It also regards those concluded by Poland before joining OECD.

In practical functioning of the analyzed agreements, the Comments to the above **Convention elaborated by OECD** are of considerable importance too<sup>27</sup>. Interpretations of individual provisions of this act have been made in this document.<sup>28</sup> The Comments do not formally have absolute binding force. Nevertheless, they are considered as an essential source of interpretation of norms included in the agreements. They are used to this extent by both tax authorities and courts resolving tax disputes.

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25 D. Šramková, M. Radvan, Mezinárodní aspekty berního práva, in: Finanční Právo a Finanční správa. Berní Právo, Brno 2008, p. 493 and next, D. Mączyński, Międzynarodowa współpraca w sprawach podatkowych, Warsaw 2009.

26 OECD Model Convention available at: <http://www.oecd.org/dataoecd/43/57/42219418.pdf>

27 The Comment available at: <http://browse.oecdbookshop.org/oecd/pdfs/browseit/2310081E.PDF>

28 A. Zalański, M. Malicka, Rola oficjalnego Komentarza do Modelu Konwencji OECD w wykładni umów o unikaniu podwójnego opodatkowania, opartych na tym Modelu, Kwartalnik Prawa Podatkowego 2005, No. 1, p. 95 and next.

Analyzing the character of agreements on avoidance of double taxation, attention should be paid to the fact that they constitute a source of commonly binding law in a given country. They complete domestic taxation system of the country introducing certain restrictions in its application. They also make a peculiar boundary separating the scope of tax claims of individual countries. In other words, they indicate whether countries which file tax claims against a certain subject aggregating income based on their domestic tax jurisdiction may realize them and to what extent. **Such agreements, however, do not constitute any grounds for any tax claims filed by the country** against the subject generating income. They are included exclusively in the country's domestic legislation.

### **3.3.3. Basic mechanisms eliminating double taxation**

Two mechanisms eliminating double taxation are mainly applied in bilateral agreements. **The first one involves indication what kind of income may be taxed exclusively by a given country.** Indication of a country competent to realize its tax claims results in deprivation of another country of such right even if the first one did not conduce to taxation of given income at all.

The question arises here what kinds of income it refers to and which country is authorized to realize fully its own tax jurisdiction in the scope of such income taxation. Relying on the Model Convention and the agreements on avoidance of double taxation constructed on its basis, it should be stated that the above-mentioned principle applies, inter alia, to the following categories:

- income from business activity conducted by a subject in a foreign country without using a permanent establishment located therein,
- profits on selling shares or securities,
- income from disability pensions and old age pensions,
- payments received by a student in the studies or trainings,
- assets in the form of shares and stock,



- income from the performance of a liberal job not connected with a permanent establishment or centre located in a country of the source of income.

In case of such kinds of income (assets), **they may generally be taxed exclusively in the country where a taxpayer's place of residence or seat is located.** The country where the source of the above revenues (**country of source**) is located **must refrain from taxing such income or assets.** Thus the application of this mechanism consequently leads to situations when double taxation does not arise at all.

The **second way** enabling elimination of double taxation present in the subject agreements involves granting the **authorization to tax certain income to both countries as far as it is possible based on their domestic legislations with the simultaneous duty of application in the country where a taxpayer's place of residence or seat is located of a specified method eliminating or limiting the phenomenon of double taxation.** Thus we do not deal here with attributing a concrete country with the right to exclusive taxation of taxpayer's income.

The income this mechanism refers to will be presented in two groups. The first one includes such kinds thereof which may be taxed solely by a limited way in a country of a source of income. It concerns interest, dividends and license charges. In such cases, a source country must limit its own taxation to the extent specified in an agreement. It taxes such income, e.g., according to a 5% rate instead of a 19% one as resulting from internal legislation. In a country of a taxpayer's seat, such income is taxed but with a simultaneous consideration of a specified method of elimination of double taxation. This principle does not apply when income from these sources is connected with the activity of a permanent establishment located in the country where a source of income originates. In such a situation, the income may be taxed without any restrictions in a source country.

The second group includes income that may usually be taxed without any restrictions in a country where a source of income is located. They should include the following types of income:

- income from a real estate located in a given country,
- profit from business activity conducted abroad with the use of a permanent establishment located in this country,
- income obtained by artists and sportsmen from the activity performed in a given country regardless of the fact whether such income is due to an artists, a sportsman or a third person except a situation when such an activity is performed within the frames of a cultural or sports exchange,
- income from the performance of a liberal job assigned to a unit that wins profit in a given country from the sale of such a unit and movable property belonging to it,
- remuneration of members of Management Boards of organs constituting the amounts paid by the companies having their seat in a given country,
- remuneration for hired labor performed in a Contracting State unless a hired person resides in this country for less than 183 days during each 12-month period starting or finishing in a given calendar year, and the remuneration comes from foreign sources and is not borne by a permanent establishment that the employer has in this country,
- remuneration for employment on board of a ship or aircraft that is exploited in international transport, or on board of a barge if a place of the factual Management Board is located in this country.

## **4. Introduction of domestic tax law**

### **4.1. General remarks**

The catalogue of sources of law formed as a part of the Polish tax law arises from the Polish Constitution. First of all, the statute is included in this catalogue. Apart from this, the sources of law, including the tax law, are ratified international agreements, regulations as well as enactments of local law. The latter are sources of universally binding law of the Republic of Poland all over the area of action of the

authorities which made them<sup>29</sup>. A fundamental feature combining the sources of law is the presence of general and abstract rules.

Among the abovementioned sources of the tax law, statutes play a particular role. These acts are a direct source of introduced taxes. Also the constructions of taxes are determined in the **statute** (see I, 2.2.). **International treaties** concerning the tax law generally apply the issue of eliminating double taxation (see I, 3.3.1.).

**Regulations** of the Council of Ministers or Minister of Finance are enacted exclusively on the basis of specific authorization contained in statutes. They regulate, inter alia, technical issues concerning tax payment as well as tax return forms.

Being the enactments of local law, **tax resolutions** of the Council of Commune (gmina) and Cities are enacted as well on the basis of specific authorization contained in statutes. They may concern, inter alia, tax rate determination bidding within the territory of units of local self-government.

## **4.2. Special role of the tax statute in the light of constitutional requirements**

**Article 217 of the Constitution of the Republic of Poland** states that the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute. Two rules were introduced into this provision. According to the first rule, the imposition of taxes and other public imposts may be solely by means of statute<sup>30</sup>. The other rule specifies **which elements concerning tax should be determined in this act**. With reference to the key issue, it should be said that the tax constitutional matter is

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29 Art. 87 of the Constitution of the Republic of Poland

30 T. Dębowska-Romanowska, Dylematy interpretacyjne artykułu 217 Konstytucji, in: A. Gomułowicz, J. Małecki (ed.), *Ex iniuria non oritur ius*. Księga ku czci Profesora Wojciecha Łączkowskiego, Poznań 2003, p. 207 and next.

created by the components of the tax construction which decide about the burden of this levy<sup>31</sup>.

The subject literature shows that the tax statute should determine full legal construction of a particular tax, that is to say standardize its **subject, object, tax base, tax rates and the principles for granting tax exemption, as well as tax reliefs and tax remissions**<sup>32</sup>.

We should also agree with the opinions resulting from jurisdiction according to which this subject matter covers **determination of the moment of formation of a tax liability** too<sup>33</sup>.

It does not mean that the abovementioned components must be regulated in the statute within the full scope. Some issues, which are supplementary in nature, may be regulated by the act of a lower level<sup>34</sup>.

Here we will focus on several issues. **Firstly**, determining the tax statutory matter, the legislator spread emphasis thereof in a different way. On the one hand, it has been pointed out that the taxation subject, object and rates should be determined in the statute. This means, as it seems, that their introduction and determination of the shape of these elements require a direct introduction of this matter into the statute.

Issues concerning tax preferences are treated by the legislator in a different way. Principles for granting reliefs and remissions as well

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31 The Constitutional Tribunal stated in the judgment of 9.9.2004, docket no. K 2/03, that all elements of the construction which decide about levy's substantive burden are matters restricted exclusively for the statute.

32 C. Kosikowski, *Podatki. Problem władzy publicznej i podatników*, Warsaw 2007, p. 93.

33 SAC stated in the judgment of 22.2.2006, docket no. I FSK 1075/05, LEX no. 250329, that Art. 217 and Art. 84 of the Constitution of the Republic of Poland require for determination of the moment a tax liability arises the establishment of the essential moment of tax responsibility (the beginning of the obligation burdening a taxpayer, the moment public burden arises) to take place in the Tax Law itself, not in the executive regulation thereof. SAC stated likewise in the judgment of 30.03.2006, docket no. I FSK 765/05, LEX no. 250395 indicating that in the light of Art. 217 of the Constitution, as well as Art. 4 § 2 of T.O., there are no grounds to determine the moment a tax obligation arises in the sub-statutory act. PAC in Gdańsk stated likewise in the judgment of 18.9.2007, docket no. I SA/Gd 576/07, *Jurisdykcja Podatkowa 2008*, No. 1, s. 92. The court decided that it was inadmissible in the light of constitutional provisions to regulate issues concerning developing of a tax obligation in the act of a sub-statutory rank.

34 The Constitutional Tribunal's judgment of 9.9. 2004, docket no. K 2/03, stated that sub-statutory legal acts may include, however, only such regulations which complement provisions reserved to the Constitution provided they meet the requirements stipulated in Art. 92 par. 1 of the Constitution of the Republic of Poland.

as categories of subjects exempted from tax should be determined in the statute.

**As it appears, the statutory matter is not required to introduce objective preferences and determine their construction.** It may be executed on the basis of executive legislation. A statute that is the ground for the issuance of such an act should, however, include distinct competence to issue an act of a lower level and determine principles on the basis of which an authorized organ, e.g. Minister of Finance, will introduce such preferences and shape their legal constructions<sup>35</sup>. It is consistent with the view demonstrated in the subject literature, where one may learn that if the constitutional legislator in Article 217 limited the statute solely to “principles” and “categories”, it should be acknowledged that there are no legal obstacles why a regulation should not possibly include more detailed issues<sup>36</sup>.

**Secondly, not all components concerning the tax construction have been included in the statutory matter.** However, this statement does not apply to the tax base because it should be accepted that this element is closely connected with the object of taxation. It plays a crucial role in shaping the burden of a given levy directly. On that account, it should be presumed that this component is included in the tax statutory matter<sup>37</sup>. **However, the analyzed provision of the Constitution did not cover, inter alia, conditions and time limits of payment as well as objective exemptions.** This means, supposedly, that these components may be determined directly in the act of a lower level, e.g. in a regulation of Minister of Finance<sup>38</sup>, while in these instances the statute does not even have to establish principles concerning determination of these

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35 R. Mastalski, *Prawo podatkowe*, Warsaw 2000, p. 67.

36 M. Bartoszewicz, J. Zakolska, Gloss to the District Court's judgment of 20 May 2003, docket no. IV Ka 893/02, *Przegląd Legislacyjny* 2003, no. 5, p. 115.

37 B. Brzeziński, *Wstęp do nauki prawa podatkowego*, Toruń 2001, p. 111, and the judgment of PAC in Warsaw of 14.9.2000, docket no. III SA/Wa 1121/07, LEX no. 295775, which states that failure to indicate expressis verbis in Art. 217 of the Constitution a manner of determination of the tax base as a component of tax subject to regulation in the statute does not constitute the grounds to conclude that the scope of statutory completeness as indicated in the Constitution does not cover a manner of determination of the tax base.

38 C. Kosikowski, *Ustawa podatkowa*, Warsaw 2006, p. 90, and D. Mączyński, *Niekonstytucyjność przepisów o podatku akcyzowym*, *Państwo i Prawo* 2002, no. 10, *item* 63, where it is indicated that all regulations on tax except technical aspects of its payment (e.g. a course, time limit and manner of tax payment) should be included in the statute.

components. Such conclusion is drawn from Art. 217, and requires, as it has already been discussed, the establishment of principles of determination solely in the scope of certain components, different than objective exemptions, or the procedure and time limit of tax payment.

### **4.3. The requirements resulting from the Constitution concerning tax competence acts**

Both the introduction and determination of constructive elements which are not included into the tax statutory regulations (payment procedure and conditions, objective exemptions) need to be in conformity with Article 92 of the Republic of Poland's Constitution<sup>39</sup>. In the light of this provision, **regulations are issued by the organs shown in the Constitution based on detailed authorization included in the statute to be enacted.**

Whereas the authorization should specify the organ competent to issue a regulation and a scope of matters handed over to be regulated as well as guidelines concerning the content of such an act. A fundamental issue of competence acts in the scope of tax law are requirements resulting from the Constitution of the Republic of Poland. Here the essence of the issue lies in the indication of a difference between “the guidelines concerning the contents of the act”, which is specified in Article 92 of the Constitution of the Republic of Poland, and “the principles of granting the preferences”, which are specified in Article 217 of the Constitution of Republic of Poland.

We will deal with determination of the guidelines when the matter-of-fact prerequisites that show a direction of forming the content of regulations<sup>40</sup> are established, or the prerequisites which will eliminate

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39 R. Mastalski, *Stosowanie prawa podatkowego*, Warsaw 2008, p. 51, where the Author indicates, however, that cases of including authorization to issue tax legal acts in statutes should be rare.

40 W. Kisiel, *Decyzje i wyroki w sprawach chorób zawodowych*, *Przegląd Prawa Publicznego* 2007, No. 9, p. 6, where it is indicated that guidelines cannot be identified with determination of the object of a delegated regulation since flat-rate delegation referring to other legislation which does not assure substantive supremacy of a statute over an executive regulation is excluded. It is not sufficient to restrict a statute to listing a catalogue of cases which are to be regulated in an executive act, but it is necessary to designate a direction which development of the regulation's content should follow.

some content or directions of solutions (e.g. exemption specified in the regulation cannot support subjects conducting business activity). **The guidelines will mainly, as it seems, be positive**, which may be accomplished by pointing out:

- **criteria** which should be followed by an author of a regulation normalizing the scope of matters s/he has been entrusted with, or
- **aims** a given regulation is to fulfill<sup>41</sup>, or
- **functions** which should be carried out by the forming institution<sup>42</sup>.

The scope of guidelines which should appear in the statute depends on the sort of matter to be regulated<sup>43</sup>. It is also emphasized that the guidelines do not need to result directly from the provision that makes the basis to the issuance of an executive act<sup>44</sup>, which is also reflected in the CT's jurisdiction<sup>45</sup>. It is indicated in the doctrine that the guidelines of the tax law should relate not only to the content of executive acts but also to the limits of their content, taking into consideration that a regulation can solely regulate a matter which has not been reserved in Article 217 of the Constitution of Republic of Poland to the direct statutory regulation<sup>46</sup>.

**Determining the principles of granting preferences means, first of all, as it seems, indication of the procedure under which they are to be granted.** It may be an action applied *ex officio*, or upon

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41 W. Kisiel, *Decyzje i wyroki... op. cit.*, where it is indicated that the purpose can be neither presumed in whole, nor interpreted from the statute's text exclusively by means of the interpretation of the purpose.

42 These elements of the guidelines have been presented in the CT's judgment of 12.9.2006, docket no. K 55/05.

43 J. Grabowski, A. Lichorowicz, *Projekty rozporządzeń w świetle opinii Rady Legislacyjnej, Przegląd Legislacyjny 2006, no. 1, p. 73*, where it is indicated that the more a given statutory regulation interferes in the scope of constitutional rights and duties of citizens, the more precise and detailed the guidelines to the content of the executive act should be.

44 W. Kisiel, *Decyzje i wyroki... op. cit.*, where it is indicated that the guidelines do not have to be included in the text of this article of a statute which contains authorization to issue a regulation. It is admissible to include the guidelines in other provisions of the statute as far as it is possible to reconstruct the content of such guidelines precisely from the statute's text. If the reconstruction appears impossible, the provision containing the authorization should be found inconsistent with the Constitution.

45 The judgment of 14.12.1999, docket no. K. 10/99, OTK ZU no. 7/1999, *item 162*.

46 R. Mastalski, *Stosowanie prawa... op. cit.*, p. 54.

a taxpayer's motion. Preference may be granted in result of the issuance and service of a decision by a tax authority, or it may also happen without such a decision. Such understanding of the notion of "the principle of granting" preference corresponds to the abovementioned manner of comprehension of guidelines. Owing to the instructions included in the statute the aim, function and criteria for forming preferences, which will be introduced in the act of a lower level, will be determined. The principles for granting preferences, which should appear in this statute, will determine, on the other hand, a procedure that could be specified in more details also in the act issued on the basis of such a statute.

#### 4.4. Regulations governing the tax matter

Regulations are issued by authorities pointed out in the Constitution of the Republic of Poland. On the ground of tax law, subjects who are most often responsible for such acts are Minister of Finance and, less often, the Council of Ministers. These acts are adopted based on a detailed authorization contained in the statute to be enacted (see I, 4.3.). The authorization should specify an organ competent to issue a regulation, and the scope of matters handed over to be regulated, as well as the guidelines concerning the content of the act<sup>47</sup>.

Some examples of tax matters categories which are regulated in this way may be indicated. Firstly, these are components connected with the **principles for tax collection and payment**. In this category one may point out regulations which concern determination of: tax return templates<sup>48</sup>, a template of a document enabling cash or non-cash payment of tax<sup>49</sup>, methods of tax collection and refund<sup>50</sup>, the value of remuneration of tax remitters and collectors, who collect taxes from

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47 Art. 92 of the Constitution of the Republic of Poland.

48 Minister of Finance's Regulation of 28.11.2008 in the matter of establishment of templates of annual tax calculation and tax returns binding in the scope of personal income tax (Journal of Laws No. 212, *item* 1335).

49 Minister of Finance's Regulation of 23.12.2008 in the matter of a template of a cash payment form and transfer order into the tax authority's bank account (Journal of Laws No. 236, *item* 636).

50 Minister of Finance's Regulation of 16.12.2008 in the matter of a manner of collection and refund of tax on civil law transactions (Journal of Laws No. 234, *item* 1577).



taxpayers<sup>51</sup>. Secondly, these acts regulate **issues enabling to verify the correctness of tax payments** by specifying the principles of keeping tax books<sup>52</sup> and documentation all taxpayers are obliged to keep<sup>53</sup>, documents confirming that expenses were incurred which entitle to tax reliefs<sup>54</sup>, and methods of securing evidence used for tax purposes<sup>55</sup>.

The third category is formed by the acts which cover **elements concerning determination of the tax base** in connection with determination of limits of expenditure being the basis for the calculation of deductible costs<sup>56</sup>, or determination of principles of establishing income by means of estimation<sup>57</sup>.

The fourth group concerns **elements connected with application of tax reliefs and exemptions**. As part of this group, we should indicate regulations which specify the conditions for granting reliefs for repayment of tax obligations<sup>58</sup>, additional conditions and the procedure for applying tax exemptions<sup>59</sup>, as well as the principles of abandoning tax collection<sup>60</sup>.

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- 51 Minister of Finance's Regulation of 24.12.2002 in the matter of remuneration of remitters and collectors collecting tax for the State budget (Journal of Laws No. 240, *item* 2065).
  - 52 Minister of Finance's Regulation of 26.8.2003 in the matter of keeping a tax book of revenues and expenditures (Journal of Laws No. 152, *item* 1475)
  - 53 Minister of Finance's Regulation of 4.1.2010 in the matter of documentation kept by subjects conducting activity in the scope of games of chance and gambling (Journal of Laws No. 8, *item* 57).
  - 54 Minister of Finance's Regulation of 9.12.2008 in the matter of a template of declaration on the value of expenditures connected with investment serving the satisfaction of residential needs (Journal of Laws No. 221, *item* 1439).
  - 55 Minister of Finance's Regulation of 26.8.2005 in the matter of a manner of security, reconstruction and use of evidence preserved during tax control (Journal of Laws No. 166, *item* 1392).
  - 56 The Cabinet's Regulation of 12.3.2002 in the matter of the maximum value of a premium for the employers' union permitted to be calculated as deductible costs (Journal of Laws No. 34, *item* 310).
  - 57 Minister of Finance's Regulation of 10.9.2009 in the matter of a manner and course of determination of corporate income by means of estimation, and a manner and course of elimination of double taxation of legal persons in the case of the correction of profits earned by affiliated subjects (Journal of Laws No. 160, *item* 1268).
  - 58 The Cabinet's Regulation of 31.3.2009 in the matter of provision of some reliefs in the repayment of tax liabilities constituting the state aid for development of Small and Medium Businesses (Journal of Laws No. 59, *item* 488).
  - 59 Minister of Finance's Regulation of 23.8.2010 in the matter of exemptions from excise duty (Journal of Laws No. 159, *item* 1070), the Cabinet's Regulation of 5.8.2008 in the matter of terms of provision of exemptions from a real estate tax and tax on means of transport constituting regional investment aid (Journal of Laws No. 146, *item* 927).
  - 60 Minister of Finance's Regulation of 31.12.2009 in the matter of abandonment of the collection of income tax on some kinds of income (revenues) of taxpayers of personal income tax and corporate income tax (Journal of Laws No. 7, *item* 49).

The fifth group of these acts contains **elements concerning determination of competence of tax authorities**, inter alia, by particularizing the issue concerning determination of local competence of tax authorities<sup>61</sup>.

The sixth category consists of acts concerning **elements connected with a certain choice of the form of taxation**, e.g. in connection with determination of a template of a motion for applying a particular taxation form<sup>62</sup>.

The last group consists of acts including **elements securing tax payment** in connection with, e.g., determination of templates of declarations used to secure execution of tax obligations<sup>63</sup>.

#### 4.5. Tax resolutions of municipal councils

In Poland tax resolutions are passed, by and large, only by organs constituting municipal and town councils. It does not concern organs that constitute other units of local self-government (poviats, provinces/voivodeships), because among the abovementioned units solely municipalities were granted their own tax income<sup>64</sup>.

Similar to regulations, **resolutions may be issued only on the basis of a statute to be enacted**. As all other acts of commonly binding law, resolutions must also include general and abstract norms rather than individual and specific ones. It means that instead of the addressee's name<sup>65</sup>, the addressee's features must be pointed out. Resolutions concerning taxes should relate to an unspecified group of addressees covered by the actual state of tax law.

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61 Minister of Finance's Regulation of 13.2.2009 in the matter of the list and territorial competence of action of Customs Offices and Chambers whose heads and directors respectively are competent to perform tasks in the scope of excise duty within the territory of Poland (Journal of Laws No. 32, *item* 220).

62 Minister of Finance's Regulation of 17.11.2003 in the matter of determination of a template of a motion for the application of taxation on the form of a tax card (Journal of Laws No. 202, *item* 1961).

63 Minister of Finance's Regulation of 19.12. 2008 in the matter of a template of a declaration on real estate and property rights which may be subject to mandatory mortgage, and movables and transferrable property rights which may be subject to tax pledge (Journal of Laws No. 237, *item* 1660).

64 L. Etel, *Uchwały podatkowe samorządu terytorialnego*, Białystok 2004, p. 26 and next.

65 D. Dąbek, *Prawo miejscowe samorządu terytorialnego*, Kraków 2003, p. 73.

Tax resolutions can be divided into two types: **obligatory and non-obligatory (optional)**. Only in the first case, municipal council is obliged to take legislative actions. **Obligatory tax resolutions** specify the issue of tax rates determination. It is understandable given the fact that execution of statutorily imposed payments and taxes is not possible without adopting resolutions. This remark concerns, above all, resolutions specifying rates of a real estate tax, tax on means of transport and market dues. Every municipality in Poland is obliged to adopt such resolutions.

The issue of resolutions on the rates of local and health resort fees looks different. In the case of these payments only municipalities where such considerations may be collected are obliged to introduce such resolutions. Resolutions determining templates of tax information and tax returns for agricultural tax, forestry tax and real estate tax belong to a different category of obligatory tax resolutions. These documents are necessary to execute tax correctly whereas a diversity of tax regulations adopted by municipal councils caused that the legislator did not decide to determine a uniform official template, as it takes place in the case of, e.g., tax on means of transport. In the case of some considerations (a fee for dog owners, or other local fees), apart from statutory regulations, issues concerning principles of their determination, collection as well as terms of payment, have not been tackled. However, the statute expresses the obligation that these considerations will be regulated in appropriate resolutions of municipal councils. A lack of these resolutions in practice unables execution of the above indicated considerations.

**Non-obligatory (optional) tax resolutions** consist of resolutions that introduce certain considerations within the territory of a particular unit. This situation appears in the case of fees for dog owners. Another type of resolutions contained in this category are resolutions introducing tax reliefs and exemptions, which may be passed with regard to all taxes and local fees on the general stipulation that they cannot lead to differentiation of tax burdens according to subjective criteria. Municipal councils' resolutions on the reduction of a purchase price of rye, which are passed in order to determine a rate of agricultural tax, as well as resolutions on the reduction of a purchase price of timber, which are passed in order to determine a rate of the forest tax, are

also of an optional character. Municipal councils may introduce the collection within its territory by means of tax collector (see II, 2.5.) to facilitate tax and local fees collection. In this case collectors and remuneration for collection should be simultaneously appointed too. Municipal councils generally take advantage of this right, particularly within the scope of local fees and tax for dog owners. Under such resolutions, a legal administrative relation between the municipality and the collector arises.

#### **4.6. The principles of making tax law**

Basic rules which should be obeyed within the scope of making law, including tax law, should result from legal provisions. Moreover, an important role in the process of forming such rules is played by the doctrine and the Constitutional Tribunal<sup>66</sup>. Principles connected with the creation of tax law should be divided into those relating to the legislative technique and those relating to the essence of a legal regulation<sup>67</sup>. The first category indicates how tax law should be made, whereas the second one expresses what should be included in this law.

Representatives of the doctrine indicate different principles of making tax law. C. Kosikowski points out the following: the principle of trust of a citizen to the state, the principle of law reliability, the principle of the provision of a suitable adjustment period, the principle saying that law may not be applied retroactively, the ban on changing tax law during a year, the principle of the protection of rights that were justly acquired, the principle of due protection of pending business, the principle of inadmissibility of the accumulation of tax responsibility<sup>68</sup>. Whereas B. Brzeziński shows the principle of statutory regulation of taxes, the principle of the tax source protection, the principle of respecting economic rights and regularities as limits of tax and legal regulations, the principle of prediction of long-term and short-term

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66 A role of this subject in the scope of development of tax principles is indicated by A. Gomułowicz, in: A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warsaw 2010, p. 92 and next. see also A. Gomułowicz, *Zasady podatkowe wczoraj i dziś*, Warsaw 2001, A. Gomułowicz, *Zasady sprawiedliwości podatkowej*, Warsaw 2001.

67 B. Brzeziński, *Wprowadzenie do prawa podatkowego*, Toruń 2008, p. 194 and next.

68 C. Kosikowski, *Finanse publiczne w świetle Konstytucji RP oraz orzecznictwa Trybunału Konstytucyjnego (na tle porównawczym)*, Warsaw 2004, p. 197 and next.

effects of legal and tax regulations, the principle of limiting cash depreciation upon duration of legal and tax regulations, the principle of liquidity of changes of the value of legal and tax burdens, the principle of the state's financial interest protection<sup>69</sup>.

As it appears, not all of these principles should be applied only on the basis of tax law introduction. Some of them are of universal importance and should relate to a law making process regardless of the branch of law. However, some principles which are particularly significant to tax law may be indicated.

The **rule of statutory exclusivity in forming tax obligations**<sup>70</sup> deserves special attention among the abovementioned principles. This issue was already analyzed earlier in the part concerning a special character of the tax statute. For this reason, this issue will not be further analyzed here (see I, 4.2.).

The **principle of the suitable adjustment time** may be perceived as the obligation to observe a suitable period of *vacatio legis*, that is the period between publication of an act in an official journal and its coming into force. It is important for a taxpayer to be able to familiarize himself in advance with new law regulations. Owing to this fact, the taxpayer will be able prepare himself properly to new rules. It is emphasized that it is about a possibility of making decisions in the scope of life interests, which means that a taxpayer must have time for both adjusting to changed tax regulations and a making a decision concerning further proceedings safely<sup>71</sup>.

This principle should absolutely be obeyed when new regulations impose duties on a taxpayer, or limit his or her rights. This rule should be applied to all taxes, even though it plays a special role in the scope of annual considerations, i.e. calculated annually. These will be income taxes and taxes connected with property possession. Attempting to determine a **minimum period of *vacatio legis* therein, attention is**

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69 B. Brzeziński, *Wprowadzenie do prawa podatkowego*, Toruń 2008, p. 194 and next.

70 A. Gomułowicz, in: A. Gomułowicz, J. Malecki, *Podatki i prawo podatkowe*, Warsaw 2010, p. 94.

71 A. Gomułowicz, in: A. Gomułowicz, J. Malecki, *Podatki i prawo podatkowe*, Warsaw 2010, p. 102.

**paid to the fact that it should be a period of at least one month**<sup>72</sup>. It means that changes in such taxes should be announced at least 30 days before the beginning of a tax year when they will come into force.

Another significant principle concerns the **ban on changing tax law during a year**. This principle seems to be particularly important also in reference to taxes calculated annually. The increase of tax rates during a year, or the elimination of tax preferences, are examples of breaching of the abovementioned principle<sup>73</sup>. Such situations should be deemed as actions harming the taxpayer, which also contradict the principle of the protection of acquired rights.

Another special principle is the one concerning the **ban on the introduction of tax law with retroactive force**. The law should not amend taxation rules with reference to the events that happened before a particular regulation came into force. It means that the law should not introduce any new taxation with reference to the events that took place before a given provision came into force if there was no tax burden, or higher taxation in a given situation when lower taxation was earlier in force<sup>74</sup>.

This rule will be violated if, for instance, certain income was taxed by a low tax rate for 10 years, or tax exemption was applied, and the legislator decides to introduce tax regulations increasing taxation or liquidating tax exemptions relating them to the earlier period before this regulation came into force.

As it appears, however, this ban should not be absolute in nature. There are no obstacles to relate tax preferences to the events that occurred before such regulations came into force, and, e.g., exempt a particular income generated already some time ago on which the tax had already been collected.

In the context of this principle, attention should be paid to the fact that sometimes tax law will not be retroactive although it will also relate

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72 Such an opinion was expressed in the judgment of the Constitutional Tribunal of 28.12.1995, K.28/95.

73 See the Constitutional Tribunal's judgments K. 13/93, K. 1/94, K. 12/94, K. 1/95, K.27/98.

74 A. Gomułowicz, in: A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warsaw 2010, p. 102.

to the events that happened before a given regulation came into force. It concerns the situation when this regulation will cover the consequences of such events that still lasted after a new regulation came into force<sup>75</sup>. It mostly concerns property taxes connected with its possession (inter alia the tax on real estate, and the tax on means of transport). There are no obstacles to introduce taxation of owners of property purchased before a given regulation came into force. This tax, however, should only apply to the period of such possession which **falls from the day certain regulations came into force**. Otherwise, the problem of retroactive force of tax law will arise

#### **4.7. Supervision over the process of making tax law**

The **Constitutional Tribunal** plays a special role in the scope of supervising tax law which is created on the central level (statutes, regulations). This organ has the authority to decide, inter alia, if statutes are in conformity with the Constitution, and if regulations are consistent with the Constitution, ratified international agreements and statutes<sup>76</sup>. Such actions are undertaken with reference to already issued and generally published legal acts.

It occurs on certain subjects' initiative, among which the following may be indicated: President of the Republic of Poland, Marshal of the Sejm, Marshal of the Senate, Prime Minister, 50 Members of Parliament, 30 Senators, First President of the Supreme Court, General President of the Supreme Administrative Court, Public Prosecutor-General, President of the Supreme Chamber of Control, Commissioner for Citizens' Rights<sup>77</sup>. Within the scope of the statutes these actions may take place even before their publications in official journals. Before signing a bill, President of the Republic of Poland may refer it to the Constitutional Tribunal for examination of its conformity with the Constitution<sup>78</sup>.

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75 A. Gomułowicz, in: A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warsaw 2010, p. 97.

76 Art. 188 of the Constitution.

77 Art. 191 of the Constitution.

78 Art. 122 par. 3 of the Constitution.

Judgments of the Constitutional Tribunal are universally binding and final. They are required to be immediately announced in the official body where the normative act was promulgated. These judgments take effect from the day of their announcement, the Constitutional Tribunal, however, may specify another date for the end of the binding force of a normative act. Such time period may not exceed eighteen months in relation to a statute, and twelve months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget Act, the Constitutional Tribunal specifies the date for the end of the binding force of the normative act concerned after seeking the opinion of the Council of Ministers<sup>79</sup>.

To the extent established by the acts of tax law made on the local level (resolutions), **regional audit chambers** play a significant supervisory role<sup>80</sup>. The supervision exercised by these subjects over the activities of units of local self-government, in accordance with Article 171 par. 1 and 2 of the Constitution, is performed based on the legality criterion. Within the supervisory competence, the chambers adjudicate invalidity of tax resolution that are against the law, or indicate that a resolution was passed with the law infringement when the law infringement is unimportant. It results from Article 91 par.1 of the L.S.G., where it is expressed that resolutions of municipal authorities that are against the law are invalid.

The supervisory organ adjudicates upon invalidity of a resolution or regulation in whole, or in part within 30 days from the day the resolution or regulation was served. Pursuant to Article 91 par. 4 of the abovementioned statute, in case of a minor infringement of the law, the supervisory organ does not state that a resolution is invalid, but only declares that the resolution or regulation was passed with the law violation.

Resolutions of regional audit chambers that state invalidity of, inter alia, tax resolutions, pursuant to Article 13 point 8a) of the statute on

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79 These issues are regulated in Art. 190 of the Constitution.

80 M. Popławski, Uchwały podatkowe w nadzorze regionalnych izb obrachunkowych, Warszawa 2011.



proclamation of normative acts<sup>81</sup>, are announced in a provincial official journal.

## 5. Application of tax law

### 5.1. General remarks

The doctrine depicts a two-stage model of tax law application, the first stage of which can do without a direct participation of public organs (tax administration and courts) therein, whereas the second stage occurs when a tax authority questions correctness of tax self-assessment or tax calculation made by a tax remitter, and carries out control assessment<sup>82</sup>.

**Tax law application may be perceived on both a practical and theoretical level.** A practical conception of tax law application depicts which actions individual subjects should or may take in different situations while fulfilling their duties or taking advantage of their rights based on norms of the tax law. On the other hand, a theoretical conception of the law application exposes stages of the process connected with tax law norms' reference to the specified factual state and establishment of legal consequences resulting thereof.

**Presenting the issue of tax law application according to the practical conception, we may indicate two primary as well as several specific situations it refers to.**

The first primary situation is connected with actions taken by a taxpayers while exercising tax liabilities they are burdened with. They, undoubtedly, apply tax law in such a situation. Their actions are, most of all, aimed at tax payment. In order to fulfill this purpose, a taxpayer must calculate tax owed, most frequently on their own and according to guidelines resulting from law provisions. A taxpayer may also be obliged, among other things, to keep certain tax books, or submit tax returns. Taxpayers' most essential tax duties result, above all, from the

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81 Act of 20.7.2000 on announcement of normative acts and some other legal acts (i.e. Journal of Laws of 2005 No. 190, *item* 1606, as amended)

82 R. Mastalski, *Stosowanie prawa podatkowego*, Warsaw 2008, p. 39.

statutes regulating the construction of individual taxes (see III). Most of all, realization of such actions is to serve tax organs and make it simpler for them to verify correctness of tax amounts being paid.

A second primary situation when tax law is applied occurs when tax authorities monitor whether a taxpayer fulfills duties they are burdened with in a correct way (see II, 8.10 and 8.11). Such subjects also take certain actions against taxpayers who failed to pay tax voluntarily, or who fulfilled such liabilities but in a wrong way, e.g., they paid the tax in the amount lower than the due one. This entails, among other things, initiating tax proceedings, hearing of evidence, issuing and serving tax decision, as well as administrative and court control of tax decisions. The aim of such actions is to achieve effective realization of a taxpayer's primary duty, i.e. tax payment. In this case, however, apart from provisions that are defined by substantive provisions of tax law, procedural provisions apply as well. They stipulate, among other things, individual actions a tax organ should take in order to lead to the assessment of a correct amount of tax to be paid (see II, 8).

The above-mentioned cases of tax law application are, as it seems, fundamental in nature. However, they do not constitute a closed catalogue of cases of tax law application as we should not forget about situations when taxpayers take advantage of tax rights they are entitled to by taking certain actions against a tax authority, e.g. claiming refund of excess tax (see II, 5.9) or application of reliefs in tax obligations payment (see II, 6). On the other hand, there are also cases when tax authorities have been obliged to relieve a taxpayer of an action connected with self-assessment of the tax owed to be paid. In such a situation, applying tax law provisions, a tax authority takes necessary actions therein concluding them with serving a taxpayer with a decision that includes information about tax obligation this subject is burdened with (see II, 3.3).

**The doctrine indicates four stages of applying the law, which will be presented below<sup>83</sup>, and which may be perceived as application of law according to the theoretical conception.**

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83 W. Gromski, [in:] *Mała Encyklopedia Prawa*, U. Kalina–Prasznic (ed.), Warsaw 2005, p. 15 and next, similar A. Gomułowicz, [in:] A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*,

**The first stage of tax law application according to the theoretical conception is establishment of valid norms of tax law in the scope necessary to settle a given case.** It may concern both a tax authority and a taxpayer. Such subjects should also take into account the provisions of substantive, procedural and system law. Due to an expanded catalogue of tax law sources, it may not be an easy task (see I, 3 and 4). In order to settle a given case, the provisions of substantive law as of a day when tax liability arose rather than a day of the decision making should be taken into account. It would be difficult to justify the application of, e.g., rates that are valid in a present year, to tax a taxpayer for previous years.

A different rule should be considered when provisions of procedural law are determined. In this case a legal status as of a day a decision is made should decide. However, that this rule may be modified in connection with principles stipulated in transitional regulations occurring in the act which introduces specified changes into norms of procedural nature.

In some cases, however, a doubt may arise whether a given issues is of a substantive or procedural nature. In order to illustrate this problem, a question may be asked whether a taxpayer wishing, e.g., to submit or correct a tax return, should use a template of a document that was valid on a day a tax liability arouse, or on a day a given action was taken (when a tax return was submitted or corrected). It seems that what decides about a substantive character of a given institution is the fact whether its application has, or may have influenced upon the amount of the tax obligation. Therefore a taxpayer should use a template of a tax return that was in force on a day the tax liability arose.

**A second stage of the law application is acknowledgement that a specific fact on the basis of which specific tax consequences will be determined is proved.** The doctrine also indicates determination of an actual legal–tax status<sup>84</sup>. Most taxes in Poland are based on the construction of tax self–assessment (see II, 3.3). In principle,

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84 Warsaw 2010, p. 219 and next.  
A. Gomułowicz, [in:] A. Gomułowicz, J. Małecki, Podatki i prawo podatkowe, Warsaw 2010, p. 220.

it is generally a taxpayer who is obliged to calculate the tax owed. In this situation, a presumption according to which actions taken by a taxpayer in this scope are based on true factual state should be adopted. Such actions may be questioned by a tax authority which, as party of tax control, verification actions or through actions realized during tax proceedings, is able to question data indicated by a taxpayer. Consequently, a tax authority may establish a factual state on its own using certain evidence (see II, 8.5.). Actions that require greater activity on the part of a tax authority must also be taken in case of taxpayer's passiveness since in such a case it is a tax authority that is burdened with an obligation to determine and prove a factual state specific tax consequences will be connected with.

**The third stage is ascertainment that a proven fact is one of the cases the applied legal norm refers to.** During this process, a tax authority compares a determined factual state to norms indicating specific tax consequences.

**The fourth stage is indication of specific legal and tax consequences (decisions) resulting from the application a given provision of tax law.** Such consequences may be of various character. They will be different in case of self-assessment or situations when an obligation arises in effect of serving a decision determining the amount of tax obligation (see II, 3.3.). In case of self-assessment, from a taxpayer's perspective, such a decision will include determination of a correct amount of tax to be paid as well as conveying it in the form of, e.g., submission of a tax return by this subject. From a tax authority perspective, the expression of the occurrence of this element of tax law application will be the acceptance of the amount of tax paid independently by a taxpayer. In this case, a "decision of law application" is non-questioning of taxpayer's actions. Such a determination may also include the issue of a decision determining the amount of tax obligation. It is issued solely in case of obligations that arose under the law (see II, 3.3.), when a taxpayer fails to declare or pay a due amount of tax by himself/herself.

In case of tax obligation arising in effect of serving a decision determining the amount of such obligation, the fourth stage will be

the issues of a constitutive decision, which determines the amount of tax obligation. It is issued obligatorily in property tax, agricultural and forestry tax when a taxpayer is a natural person. Only the issue and effective serving of such a decision results in the formation of tax obligation and enables vindication of tax claims<sup>85</sup>.

## 5.2. Principles of tax law application

The principles of tax law application may be defined as primary directives that should be considered by subjects applying this law. They may be treated as guidelines designating interpretation of a legal provision, or basic values that should be taken into account during interpretation of tax law. B. Brzeziński and W. Nykiel indicated a particularly interesting catalogue of such principles, mentioning<sup>86</sup>:

- the principle of resolving doubts in favor of a taxpayer,
- the principle of a limited use of analogy when interpreting tax law,
- the principle of respecting concepts adopted in other fields,
- the principle of the application of regulations which at the moment of adjudication are already repealed to assess events that happened under their regime,
- the principle of the application of previous regulations to conduct cases initiated under their regime if such regulations have been changed and the statute does not include transitory provisions.

This catalogue should be extended by the principle proscribing extensive interpretation with regard to tax reliefs and exemptions, which seems possible to be drawn from Art. 84 of the Republic of Poland's Constitution (see I, 2.2.).

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85 L. Etel, [in:] C. Kosikowski, L. Etel, R. Dowgier, P. Pietrasz, P. Presnarowicz, *Ordynacja podatkowa. Komentarz*, Warsaw 2006, p. 176 and next.

86 B. Brzeziński, W. Nykiel, *Zasady ogólne prawa podatkowego*, *Przegląd Podatkowy* 2002, No. 3.

### 5.3. The importance of advance tax rulings in the scope of tax law application

Two kinds of such advance tax rulings (a.t.r.) may be distinguished in the Polish tax law: general and individual. **General a.t.r.** are issued by Minister of Finance, who, aiming at the achievement of uniform application of tax law by tax organs and tax audit organs, interprets this law in particular taking into account jurisdiction of courts, the Constitutional Tribunal, or the Court of Justice of the European Union<sup>87</sup>.

It appears, however, that **individual a.t.r. of tax law** issued by tax authorities are, most of all, of special importance to the process connected with the application of tax law<sup>88</sup>. It is connected with the fact that general a.t.r. refer to a certain general category of factual states. Due to possible modifications thereof that may be held by various taxpayers, such interpretation cannot always be applied towards them. In the scope of taxes constituting budgets of the State's income (inter alia, income tax, value added tax, excise duty), Minister of Finance is an organ competent to issue individual a.t.r. With reference to local taxes, that is, inter alia, property tax, agricultural and forestry tax, and tax on means of transport, such interpretations are issued by municipal tax organs, i.e. village mayor, or mayor (president of the city).

Advance tax rulings mainly play an **informative role**. It is expressed in the possibility of finding out a legal position held by a tax authority with regard to a given situation of a taxpayer. On the other hand, such instruments may be perceived as those having a **guarantee-like character**. It is expressed in the principle of not harming a taxpayer who complied with such an interpretation.

Elaborating on the issue of an informative character of a.t.r., it should be emphasized that they constitute the interpretation of tax law provisions made by a tax organ that refers to a concrete situation of a taxpayer. Opinions included therein express the tax organ's position on determination of tax consequences resulting from a situation

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87 Art. 14a and Art. 14i § 1 T.O.

88 Art. 14b–14m T.O.

a taxpayer has ended up or may end up in. A taxpayer may obtain the a.t.r. of both a factual state they have already ended up in, obtaining the organ's position on, e.g., the question whether they should have paid tax on goods and services, or income tax in connection with a sale of a real estate that was made some time ago. It is possible, however, to inquire about tax consequences even before a specific legal action (e.g. before a sale of a real estate) actually occurred. In the first case, a taxpayer obtains information which allows them to verify whether actions they undertook (e.g. they paid a specific amount of tax), or their lack (e.g. they did not pay tax at all) are in accordance with the perception of specific regulations by a tax authority. In this aspect, a.t.r. are an element enabling taxpayer's self-control. If it appeared that the taxpayer's assessment was different from the one made by a tax organ, a taxpayer could, e.g., pay the tax owed on his own initiative thus avoiding specific sanctions, or additional costs. In the second case, i.e. the a.t.r. of future factual states, a taxpayer may obtain knowledge about tax consequences that will arise in effect of taxpayer's intended actions, and thanks to this, he or she may decide whether to undertake them or not.

The guarantee principle of a.t.r. is connected, as it is suggested above, with the **principle of non-harming**. Its aim is to protect a taxpayer who obtained, from his point of view, a favorable interpretation which then was changed or repealed, or when a decision made in his case was contradictory to the interpretation he had. Thus on the one hand, a tax authority has the right to withdraw from a wrong position it issued before, on the other hand, however, a taxpayer is entitled to legal protection during the period he held interpretation that was favorable to him.

The legislator introduced here **two kinds of the non-harming principle: narrower and wider**<sup>89</sup>. **The first situation applies** when a factual state that was the object of a.t.r. occurred before serving the individual a.t.r.<sup>90</sup> For instance, a taxpayer sold a real estate and then

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89 M. Popławski, Indywidualne interpretacje prawa podatkowego, *Finanse Publiczne* 2007, No 5, p. 45 and next.

90 Art. 141 T.O.

obtained information according to which he did not have to pay tax. In such a situation, after the change of the a.t.r. to the taxpayer's disadvantage, which provides the information saying that tax should be paid in connection with the earlier transaction of a sale of a real estate, the proceedings for tax crimes or offences are not initiated, and if they have already been started, they are remitted. Another element connected with the principle of non-harming according to the narrow a.t.r. is the fact interest for default is not calculated<sup>91</sup>. In this case, however, the tax itself must be paid by a taxpayer.

**A wide interpretation of the principle of non-harming** occurs under the following conditions<sup>92</sup>. First, a taxpayer obtains the a.t.r. in the scope of a future factual state that is favorable to him, e.g. that he will not be burdened with tax obligation in connection with a sale of a real estate. Second, a taxpayer performs a specific factual action described in the motion but only after obtaining the a.t.r., e.g. he sells the real estate. Third, the a.t.r. is changed to the taxpayer's disadvantage. For instance, it results from it that tax should be paid in connection with this event. Then the change of the interpretation cannot result at all in demand to pay tax for the period when the taxpayer held the a.t.r. that was favorable to him. In this situation, the taxpayer is entitled to tax exemption for the period depending on the settlement period the given tax is paid (see II, 5.8). Consequently, he will not have to pay any default interest too.

#### **5.4. A role of courts in the scope of tax law application**

Courts are an essential element influencing the regularity of application by the parties to tax and legal relation (a tax authority and a taxpayer). In Poland, settlements issued by tax organs (among other things, decisions and a.t.r.) are subject to supervision carried out by administrative courts operating in two instances. It means that after the exhaustion of the case's administrative course, that is issuing a decision by a lower organ and considering an appeal by a superior organ, a taxpayer is entitled to the right of verification of their settlements also

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91 Art. 14k § 3 T.O.

92 Art. 14m § 1 T.O.



in two court instances. The first one is the **provincial administrative court** (there are 16 of them, that is as many as a number of voivodeships provinces in Poland), whereas the second instance is held by the **Supreme Administrative Court** in Warsaw.

The following institutions are an essential element of court supervision carried out in tax cases:

- **resolutions passed by the SAC** (Supreme Administrative Court) aiming at elimination of interpretative discrepancies,
- **prejudicial questions asked by administrative courts and referred to the Court of Justice of the European Union** in case of substantial doubts regarding the compliance of national regulations with the EU provisions,
- **legal questions referred to the Constitutional Tribunal** about the resolution of compliance of the provisions of law with the Constitution.

A role of the Supreme Administrative Court is not limited exclusively to supervision of settlements issued by a lower court. This court also attempts to take care of the uniformity of jurisdiction eliminating discrepancies in administrative courts jurisdictions. Pursuant to Art. 15 of the P.B.A.C., the Supreme Administrative Court adopts two kinds of **resolutions, the so called abstract and concrete** ones. The aim of the first one is to explain legal provisions if their application caused discrepancies in administrative courts jurisdictions. The aim of the adopted, so called concrete, resolutions is a settlement of a legal issue arising serious doubts in a concrete administrative court case.

Both kinds of SAC's resolutions have special influence upon the unification of application of specific tax regulations by individual benches in the SAC. They also have impact on lower courts' jurisdiction (provincial administrative courts) and tax law application by tax organs of both instances as well as taxpayers.

The institution of **preliminary rulings referred to the Court of Justice of the European Union** is an important instrument connected with the application of tax law regarding, most of all, taxes covered by

harmonization (see I, 3.2.) within the frames of the European Union. This Court is competent to adjudicate in a prejudicial course on the Treaties' interpretation as well as on the validity and interpretation of acts adopted by the Union's institutions, organs or organizational units<sup>93</sup>. If the inquiry connected with this is raised before a court of one of the Member States, this court may, if it deems a decision in this case is necessary to make a judgment, refer to the Court of Justice with a motion to consider this inquiry. If such an inquiry is raised in the case pending before a national court whose decisions are not subject to appeal according to internal law, this court is obliged to refer the case to the Court of Justice. The abovementioned principles should be perceived, above all, as a right rather than an obligation of a national court to refer to the Court of Justice of the EU if they ascertain that a preliminary rulings is necessary to make a judgment. In practice some doubts in this scope may be resolved by the adoption of pro-EU interpretation. In simplification, it is connected with making such interpretation of a national provision so that to confer it a meaning and sense that will be consistent with the EU law. It will not always be a sufficient mechanism though. It particularly regards situations when, on the one hand, we deal with a specific national regulation, e.g. introducing certain negative consequences for a taxpayer connected with the violation of registration duties that involve failure to keep a cash register, whereas on the other hand, we have a general principle of, e.g., VAT tax proportionality and neutrality (see I, 3.2.).

What is more, attention should also be paid to the fact that pursuant to Art. 193 of The Republic of Poland's Constitution every court, including an administrative one, may **refer a question to the Constitutional Tribunal** about the compliance of a normative act with the Constitution, ratified international agreements, or a statute if a settlement of a case pending before the court depends on the answer to the legal question.

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93 Art. 267 TFEU (ex Art. 234 TEC).

## Part 2

# GENERAL TAX LAW

## 1. General remarks

General tax law in Poland, in principle, is contained in one statute – Tax Ordinance. This act covers institutions of tax law which are common for all taxes that are in force in Poland. If there are certain common and specific institutions for all taxpayers, it would be unreasonable to introduce such issues in all acts regulating the construction of the taxes. This way identical solutions would be unnecessarily repeated in different legal acts.

Regulations included in the Tax Ordinance may be divided into several groups. The first one is composed of **defining and catch-all provisions**. Certain concepts used by the legislator in tax statutes are not concurrently explained therein. However, they have been defined in the Tax Ordinance and may be used as an additional support to such an extent. It significantly limits interpretative doubts that could arise based on the application thereof (see II, 2, 3.1. and 3.2.). Regulations which describe how tax obligations arise are also of considerable importance. Using the criterion based on this element, constructions of many provisions included in the Tax Ordinance have been adopted (see II, 3.3. and 3.4.).

The second part includes **substantive law institutions** that certain obligations burdening, most of all, taxpayers derive from. Such an obligation is the need to pay default interest (see II, 3.5. and 3.6.). This obligation supplements a primary duty, which is tax payment in due time. Within the frames of this part, regulations imposing obligations on other subjects of tax law – third parties, legal successors, heirs, tax remitters and tax collectors (see II, 7.) should also be indicated.

The third part includes **institutions granting specified rights** connected with the execution of liabilities they are burdened with. They concern both a taxpayer, inter alia the right to recover excess payment (see II, 5.9.), or the right to obtain postponement of maturity (see II, 5.1.), but also a tax authority (security of tax obligations execution – see II, 3.7.).

The fourth part covers **procedural regulations**, that is actions that are undertaken from the moment tax proceedings are initiated to the issue and service of tax decisions (see II, 8.).

## 2. Parties to a legally binding fiscal relationship

### 2.1. Introduction

A legally binding fiscal relationship is characterized by the lack of subjects' equality. On the one hand, we deal with a tax authority which has the powers of mandatory enforcement of taxes, whereas on the other hand, we deal with a taxpayer who is obliged to pay them. The first one is called an active and the other one a passive party to a legally binding fiscal relationship. The legally binding fiscal relationship is similar to an administrative relationship, which is also different from a civil law relationship. Only in the last case both parties are equal subjects that may shape their mutual rights and duties under the same rules.

### 2.2. Tax authorities

A **tax authority can be defined** as a subject representing a public-legal entity competent to carry out actions connected with assessing and collecting taxes. They are an active party to a legally binding fiscal relationship. Tax authorities in Poland are divided into two types. The first one comprises the following tax authorities: **heads of revenue offices, heads of customs offices, directors of fiscal chambers, directors of customs chambers, minister of finance**<sup>1</sup>, whereas the second group includes local government tax authorities. They include

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1 Art. 13 T.O.

the following authorities: in local councils – **a village mayor/wojt, mayor/burmistrz, president of a city**<sup>2</sup>, in poviats – a **starosta**, in regional government voivodeships – a **marshal of voivodeship/province**. A local government authority of the second instance is a **local government board of appeal**. State tax authorities enforce taxes that constitute the state budget income and three ways of performance for communal budgets (tax card, tax on civil law transactions, inheritance and donation tax). Local government authorities have powers to enforce taxes supplying self-government units' budgets whereas the starosta and the marshal of a voivodeship operate in the structure of local government tax authorities despite the fact that **neither poviat nor voivodeship can collect their own taxes nowadays**. In the current legal status only a local council has its own taxes.

It should be remembered that in some cases organs acting, as a rule, as II instance organs (e.g. a director of a Revenue Office) will simultaneously act as I and II instance organs (**accumulation of jurisdiction**). It is applied in cases that are straightforwardly indicated in regulations. We deal with such a situation, e.g., in the case of a need to declare invalidity of a tax decision issued without a legal base by a head of a Revenue Office<sup>3</sup>. A decision in the matter of a declaration of invalidity of such a decision is made by an organ exercising jurisdictional supervision over it, which, in the discussed case, will be a director of a Revenue Office. Such an organ will issue a decision about, e.g., a declaration of invalidity of the head's decision. This decision may be appealed against to a superior organ of the II instance. This requirement results from the principle of dual jurisdiction existing in tax proceedings<sup>4</sup>. The same organ which issued the questioned decision of the Revenue Office's director will be competent to consider the appeal in this case. This may evoke doubts as to the legitimacy of functioning of the legal construction where the same organ is simultaneously reaching a settlement and supervising it. On the other hand, we should remember about the duty to exclude an employee or

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2 Wojt, burmistrz, city president are head officers of the same rank in municipal authorities Their different names depend, generally, on rural, urban-rural, or urban character of a municipality.

3 Art. 248 § 2 point 1 T.O.

4 Pursuant to Art. 127 T.O., tax proceedings are two-instance.

employees of such an organ from considering an appeal if they issued a decision that was appealed against<sup>5</sup>. What is more, we may not forget about the possibility of court monitoring such settlements a taxpayer may always take advantage of. It seems that these mechanisms are, unfortunately, insufficient to maintain the abovementioned situation where the same organ decides about the same cases acting in both instances.

**Minister of Finance** is a special tax authority. This is an organ equipped with powers to issue settlements in situations that are indicated in the statute in an enumerative way. They include, inter alia, the right to issue a general and individual advance tax rulings (see I, 5.3.) and decide in cases regarding agreements on determining transaction prices (see II, 4.2.).

Minister of Finance is not simultaneously an organ exercising direct supervision over settlements reached by state or municipal tax organs mentioned above. Therefore it is not a third instance organ one may lodge an appeal to against a decision made by a II instance tax organ. In certain situations, however, Minister of Finance may conduce to a declaration of invalidity of decisions issued by state organs acting in the II instance. Pursuant to Art. 248 § 2 point 3 of the Tax Ordinance, Minister of Finance is competent to declare invalidity of a decision if it was issued by a director of a Revenue Office, or a director of Customs Office. In this case, however, proceedings may be initiated exclusively ex officio. Therefore if Minister of Finance declares the existence of serious violation of law, which is mentioned in Art. 247 § 1 of the Tax Ordinance, of a decision made by the II instance organ (e.g. it was issued with violation of regulations on competence, or gross violation of law), he or she may declare invalidity of this decision. Acting ex officio, mentioned above, means that any motions addressed to this organ in this case do not oblige it to start any actions.

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5 See: Art. 130 § 1 point 6 T.O., where it is indicated that employees of a Revenue Office, Municipal (City) Council, Starost Office, Marshal Office, Tax Chamber, customs officers, or employees of a Customs Office, Customs Chamber, offices servicing minister competent for public finance matters, and members of self-government appeal board are subject to exclusion from participation in proceedings regarding tax liabilities and other matters regulated by tax law provisions in which they took part by issuing the decision that is appealed against.

## 2.3. Competence of tax authorities

Tax authorities are obliged to preserve their **local, material** and **instance competence** *ex officio*. It should be noted that any actions taken by tax authorities that may infringe the above competence are undertaken at a distinct disadvantage; such actions may invalidate any decisions made as the result of such infringement.

**Material competence** is a competence to settle cases of a given type, most often resulting from acts regulating the structure of individual taxes (see III)<sup>6</sup>. These statutes also include regulations which indicate a tax authority that is competent in the scope of taxes regulated in a given act. Art. 1c of L.L.T. may serve as an example here. This provision indicates that a competent tax organ in the matter of taxes and fees regulated in this statute is a village mayor (a mayor, the president of a city). It should be added that several following allowances are regulated therein: property tax, tax on means of transportation and market fee, fee on dogs, local fee and climate fee.

**Local competence** is a competence to settle cases in a specified area. According to the general rule, the place of residence or the address of the taxpayer's registered office is a criterion deciding on the local competence. In other words, a tax authority located in the area of the taxpayer's registered office or his/her place of residence shall be the competent authority to settle his/her case.

It is also essential to indicate a competent authority when during a settlement period specified for a given tax there is a change of, e.g. a taxpayer's place of residence or seat. This issue has been generally regulated in Art. 18 § 1 of the Tax Ordinance. Pursuant to this regulation if, during a tax year or another settlement period fixed in separate provisions, there occurs an event which results in a change of the competence of a tax authority, the tax authority which was competent on the first day of the tax year or settlement period shall continue to be the locally competent tax authority for the said settlement period.

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6 M. Karlikowska, Właściwość organów podatkowych w świetle przepisów Ordynacji podatkowej, [in:] B. Brzeziński, C. Kosikowski, (ed.), Studia nad Ordynacją podatkową, Łódź–Toruń 1999, p. 185 and next.

The Tax Ordinance has also introduced a rule in Art. 18b thereof, according to which tax authorities competent on the day of the institution of tax proceedings or tax control shall remain competent in a matter to which these proceedings or control relate even if, in the course of the proceedings or control, an event occurs which results in changing the competence.

**Instance competence** is a competence to settle cases in the first instance, or as an appeal authority. This issue has been precisely regulated in Art. 13 of the Tax Ordinance, and it was wider discussed in chapter 2.2 of this part.

## 2.4. A taxpayer

To define a **taxpayer it can be said that it is** a natural person, a legal person or an organizational unit having no legal personality that is subject to tax liability by virtue of tax acts. A taxpayer is, first and foremost, obliged to pay the tax s/he is encumbered with. There are also instrumental tasks that fulfill this basic duty. They include, inter alia, the submission of different tax documents (tax returns, information, statements). Taxpayers should also pay advance tax payment and keep tax books.

It results from the above definition that it is solely a statute that decides whether a given subject is, or will be a taxpayer. The issue is so significant that it cannot be regulated in a legal act of a lower rank (see I, 4.2.). Appointing a taxpayer, the legislator may take advantage of one of the two possibilities. **The statute may indicate directly that a taxpayer is a specified category of subjects.** It may also **introduce a legacy according to which tax liability burdens specified subjects** (see II, 3.1.). The first situation occurs, e.g., in excise duty, where it is indicated that a taxpayer is a natural and legal person as well as entities with no legal personality that carry out actions which are subject to excise duty (inter alia production of excise goods)<sup>7</sup>. We deal with the second situation, e.g., in tax on civil and legal transactions where it is

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7 Art. 13 of the Act on Excise Duty.



indicated that a tax liability burdens, among others, a buyer in case of a contract of sale<sup>8</sup>.

We should also pay attention to the fact that **we cannot define a taxpayer by saying that it is a subject obliged to pay tax** since the above definition connects a taxpayer's attribute with the fact that a given subject is burdened with a tax liability rather than the fact that this subject is obliged to pay tax. A tax liability burdening a given subject will not always lead to the obligation to pay tax (see II, 3.2.). It means that a taxpayer, according to the above definition, will be both a subject obliged to pay tax and the one whom this obligation will not concern in consequence of the occurrence of certain circumstances, e.g. applied tax exemptions. The above deliberations are not merely theoretical in their nature but practical too.

Adoption of a definition according to which a taxpayer will solely be a subject obliged to pay tax would lead to specific consequences. These categories of taxpayers will not be subject to specified sanctions in case of failure to fulfill duties resulting from the statute, which were mentioned earlier (the submission of tax returns, advance tax payment, and keeping tax books) since they refer solely to entities burdened with tax liability.

**A taxpayer should be distinguished in a legal and economic sense. The legal conception** has been presented above – a subject who is burdened with a tax liability. Whereas **a taxpayer in the economic sense** is a subject who bears economic burden of a given allowance. In some situations the same subject is both a taxpayer in a legal and economic sense. However, there are cases where there is a possibility of **transferring economic burden** by a taxpayer in a legal sense onto another subject. In this situation, these concepts refer to different subjects. To make it simpler, it may be assumed that we deal with a taxpayer's identity in a legal and economic perspective in income tax (e.g. income tax from natural persons) and property tax (e.g. a real estate tax). Whereas a lack of this element occurs in turnover tax (e.g. tax on goods and services). We may present the following examples

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8 Art. 4 point 1 of the Act on Tax on Civil Law Transactions.

to illustrate this issue. A businessman paying tax on his income bears this burden diminishing his income. A real estate's owner paying property tax also diminishes his income. In the above cases the same subject is therefore a taxpayer in a legal and economic sense. A subject conducting business activity is obliged to add tax on goods and services while providing specified services. Economic burden of this due, however, is borne by a buyer of this service. Sometimes the issue of tax burden transferability is not so obvious. If a taxpayer of the property tax lets the real estate which is taxed by the property tax, calculating the amount of rent he may add the tax he will have to pay. We may also assume that when a businessman paying income tax was calculating that he would have to pay tax for the income he obtained. Therefore when determining prices for goods or services he provided, he could have included this by increasing these prices respectively. This way he could actually lead to the transfer of burden of this allowance to subjects in favor of whom he provided specified services.

Taking the above into consideration, we may draw a conclusion that in every tax a taxpayer in a legal perspective has a possibility of transferring tax burden onto another subject. Perhaps we should evaluate whether we deal with transferability of tax through the criterion of tax construction alone rather than through individual factual states. Only such taxes should be deemed as transferable whose legal construction assumes that economic burden is borne by another subject than the one burdened with the tax liability. These conditions are, most of all, met by the tax on goods and services and excise duty, and to a certain extent also gaming and lottery tax and tax on civil and legal transactions.

## **2.5. A tax remitter and a tax collector**

Tax payment, as a rule, is executed by a taxpayer paying a specified amount directly into a tax organ's bank account. Taxpayers, however, may be facilitated in the fulfillment of this liability in connection with the application of the institution of a tax remitter or collector. These subjects' tasks will not only cover a transfer of the tax owed to the tax organ but also relieving a taxpayer from fulfilling technical duties connected with tax payment, e.g. calculation of the tax owed,

or submission of necessary tax returns. The tax transferred by these subjects does not burden them economically, but a taxpayer since **they are not burdened with a tax liability** in connection with holding their functions. It may solely concern a taxpayer from whose “wallet” the tax is collected and transferred.

A **tax remitter** is a subject who, in fact, plays a role of an agent between a taxpayer and tax authority, and whose task is to calculate, collect and transfer collected tax to the tax authority within appropriate time limits. A tax remitter may be both a natural and legal person and organizational units that do not have legal personality which are entrusted with the abovementioned duties by an legislator. They are not appointed individually by their name, or first and last name, but by determination of a certain category of factors or a criterion they meet. The institution of a tax remitter is used by the legislator mostly for taxes based on self-calculation of the dues without the necessity to issue a decision by the tax authority. It occurs, inter alia, in natural persons’ income tax, where an employer is a tax remitter of their employees’ revenue obtained as a result of their employment relation. A notary who draws up notary deeds referring to civil law actions is a tax remitter of the tax on civil law transactions. Executive organs and court executive officers performing acts in executive proceedings are tax remitters of VAT on sales carried out under execution procedure.

Sometimes the same subjects may be taxpayers and simultaneously play a function of a tax remitter. We may deal with such a situation when an employer is running business activity. This subject may simultaneously be, among other things:

- a taxpayer of income tax (he or she pays tax on their own income they obtained in connection with operations carried out by their companies),
- a taxpayer of tax on goods and services (he or she pays tax in connection with sale of goods within the frames of business activity they run),
- a tax remitter of income tax (he or she calculates, collects and transfers the tax owed on the income obtained by workers employed in their enterprise).

Tax remitters receive lump-sum remuneration which amounts up to 0,3% of the collected taxes for the fulfillment of their duties.

The institution of a **tax collector** is mostly used for local taxes, i.e. a real estate tax, agricultural tax, forestry tax and local charges (market fees, a local fee for dog owners). In this case the level of remuneration depends on a decision of the competent local (gmina) council which specifies this in an appropriate resolution.

A significant difference between a tax remitter and collector is that the last one, as a rule, does not calculate tax he or she is to collect, and **does not bear responsibility for the tax they do not collect**. A question arises here how the tax owed from a taxpayer may be collected when its value is not calculated. A tax collector collects the amount of tax whose value results directly from an act of the commonly valid law (e.g. the resolution in the matter of market fees, which stipulates that a daily rate amounts to PLN 10 for performing sale in a market place), or an individual act (e.g. a decision on the matter of property tax, from which it results that a value of the tax owed for a given year amounts to PLN 500).

Lack of consequences for failure to collect tax in case of tax collectors causes that the legal obligation burdening these subjects can be neither executed nor sanctioned. As opposed to tax remitters who failing to collect the tax owed from taxpayers bear responsibility, which is discussed in more detail in II, 7.3.

Tax remitters and tax collectors are also obliged to fulfill the following duties: to appoint natural persons whose responsibility is to calculate and collect taxes and pay the collected amounts to the tax authority in due time, and also to inform the locally competent tax authority as to the first names, surnames and addresses of such persons. It refers to tax remitters and tax collectors, who are legal persons and organizational units having no legal personality. These subjects are also obliged to keep documents connected with the collection or encashment of taxes until the limitation period of the tax remitter or tax collector's obligation has lapsed (see II, 5.6.).

## 3. From tax liability to tax arrears

### 3.1. Tax liability

**Tax liability** is defined as an unspecified duty, resulting from tax acts, to make a compulsory pecuniary performance in relation to the occurrence of an event specified by such acts.

Circumstances deciding about the formation of tax liability must result from a statute. Their determination may occur after the analysis of two categories of provisions that should be sought with reference to each tax law. The first one concerns a subjective and objective scope of tax. In other words, **it should be established who a taxpayer of a given tax is and what this tax should be paid on**. Seeking regulations setting forth who a taxpayer is, it should be remembered that the legislator may use one of the two legacies (see part II, 2.4.). The provisions of the tax acts indicate specified factual and legal status, the occurrence of which results in tax liability. A factual state like, for instance, the obtainment of income, results in the commencement of tax liability through natural persons' income tax and legal persons' income tax. The legal status mentioned above could be, for example, acquiring the right of ownership to a truck, which has implications for tax liability through the tax on means of transport.

The second group of regulations indicates the **moment from which tax liability arises**. The occurrence of an event specified in a statute in the effect of which a given subject is comprised by the subjective and objective scope of a given tax, e.g. due to the sale of goods covered by tax on goods and services, it does not make the subject be burdened with tax liability immediately at the same moment. **The formation of this liability may be postponed in time and occur after the lapse of certain time from the occurrence of a specified event**. In tax on goods and services, e.g. in Art. 19 par. 1, a general principle is introduced according to which tax liability arises at the moment goods are distributed, or a service performed, but at the same time many exceptions are introduced. One of them is a situation when the delivery of goods, or the performance of a service should be confirmed by an invoice. In this situation tax liability arises at the moment the invoice

is issued, not later, however, than on the seventh day as counted from the day the goods were distributed, or the service performed<sup>9</sup>. In tax on a real estate it is indicated that tax liability arises on the first day of the month following the month when circumstances justifying the formation of this liability occurred<sup>10</sup>. It means, among other things, that purchasing a land, or a building that are subject to taxation, tax liability starts to burden a new owner only from the next month following the month s/he became the landlord. If the land was purchased on 15th March, tax liability will arise only on 1st April of that year.

**The legislator does not specify the moment from which tax liability arises at all as far as some taxes are concerned. In such a situation it should be assumed that it arises directly on the day when an event covered by the subject scope of a given tax.** We deal with such a case in income tax, both from natural and legal persons. It means that tax liability will arise on the day the income was obtained.

The moment a given subject becomes burdened with tax liability raises **specified requirements**. S/he can be obliged, inter alia, to submit statements, information, returns, to make advance tax payments, to keep tax books, etc. The obligation to pay tax is not directly connected with tax liability since tax payment is connected with the transforming tax liability into tax obligation. Tax obligation may not transform into tax liability for different reasons, among others, in result of tax reliefs used by a taxpayer (see part II, 3.2.).

### **3.2. Tax obligation**

**Tax obligation is** an obligation of a taxpayer, resulting from tax liability, to pay tax in favor of the State Treasury, a voivodeship, poviát or gmina in the amount, time limits and place determined by the provisions of tax law. **Tax obligation can arise only if a given subject has been earlier burdened with tax liability.** The consequence of the transformation of tax liability into tax obligation is the obligation to pay tax of a specified amount within specified time limits and in a given place.

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9 Art. 19 par. 4 the Act on VAT.

10 Art. 6 par. 1 L.L.T.

However, this transformation does not always necessarily occur. Tax obligation will not arise when, for example, a taxpayer takes advantage of a tax exemption or tax reliefs s/he is entitled to or if tax liability becomes barred by limitation (tax authority fails to serve a taxpayer with a decision assessing the level of tax obligation within strictly specified time limits). A taxpayer may also take advantage of certain tax preferences that are not simultaneously tax reliefs or exemptions. It refers, inter alia, to income tax, where there is a possibility of reducing income that is subject to taxation by a loss suffered by a taxpayer in a previous year or years (see part III, 2.2.).

The relations between these notions may be illustrated in the following way:

tax liability → tax obligation → tax due → tax arrears

*Source: author's own study.*

### **3.3. How tax obligations are formed**

A manner how tax obligations arise is their important element. The legislator envisaged two manners of the transformation of tax liability into tax obligation, i.e. by virtue of law and as a result of serving a decision assessing the amount of tax obligation. At the same time the legislator determined the taxes that a given manner applies to. It means that neither tax authority nor taxpayers themselves decide whether tax obligation arises in this or in a different manner for a given tax as this results from the Act<sup>11</sup>.

In the context of the tax obligation arising by virtue of law the following issues should be emphasized.

**First of all**, the legislator in that cases does not introduce legacies that straightforwardly determine the moment or the day when tax obligation created under the law arise. It is introduced in tax provisions only that a tax obligation arises on the day when the event occurs, with which statutory tax law associates the creation of such an obligation<sup>12</sup>.

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11 H. Dzwonkowski, Z. Zgierski, *Procedury podatkowe*, Warsaw 2006.

12 R. Dowgier, *Prawo podatkowe. Ściąga akademicka*, Warsaw 2008, p. 29.

It seems that two principles should be introduced for obligations arising under the law. The first one applies to **taxes (incidental, not settled periodically)** referring to the occurrence of certain events (e.g., tax on civil and legal transactions, inheritance and donation tax). In this situation the amount of tax to be paid may be determined at the same moment when tax liability arose. Therefore it should be acknowledged that in such cases **tax obligation arises on the same day when tax liability arises**. The second situation concerns **taxes settled in certain periods**, e.g. per month, or quarter (tax on goods and services), per year (income tax, property tax, agricultural and forestry tax). The amount of tax may be determined in such situations not earlier than after the lapse of the settlement period. Consequently, it should be ascertained that in these cases **tax obligation arises on the end of the day when a given settlement period finishes**. Illustrating this principle based on income tax from natural persons, it should be indicated that the obtainment of income during a fiscal year may undeniably result in the formation of tax liability. Whether it will transform into tax obligation may be ascertained not earlier than in the end of the year such income was generated. Between the day income was obtained and the end of the year an event may occur which, inter alia, entitles to tax reliefs or exemptions, application of which will lead to a situation when tax liability will not transform into tax obligation. Consequently, there will be no tax to be paid too.

As far as **property taxes** are concerned (tax on a real estate, agricultural tax and forestry tax when taxpayers are legal persons or entities having no legal personality), a moment of the formation of tax obligation may be perceived in a slightly different way. The legislator adopted here a mechanism according to which tax is declared at the beginning of a year and is paid most frequently in monthly installments except agricultural tax where quarterly installments occur. If, during a year, a taxpayer experiences a change influencing tax return's correctness (e.g. he or she will sell the real estate, or change the way it is used, which will influence the value of the tax owed), he or she should correct the tax return by modifying appropriately the amount of tax to be paid (either increase or decrease it). It should be assumed, therefore, that a value of the tax owed for a given year may be determined only after the



lapse of a given year, which is here a settlement period<sup>13</sup>. The amount of tax declared at the beginning of a year may, but does not have to correspond to the amount owed for the entire year. Consequently, such a mechanism should be adequately interpreted in the context of the formation of tax obligation. At the beginning of a year a **scheduled (planned) tax obligation arises whereas the proper tax obligation** arises only at the end of a settlement period.

**Secondly**, as a rule, a taxpayer self-calculates tax in a submitted tax return. Pursuant to Art. 21 § 2 of the Tax Ordinance, if tax law regulations impose an obligation to submit a tax return upon a taxpayer and tax obligation arises under the law, the tax revealed in the tax return is the tax to be paid. A taxpayer does not always have to submit this liability. As far as income tax from natural persons is concerned, a tax remitter (e.g. a working place) may do this for a taxpayer (e.g. an employee) acting on the taxpayer's request.

If the tax authority establishes that the taxpayer, in spite of the liability borne on him/her, has not paid the tax in whole or in part, or that the amount of tax obligation is different from that disclosed in the tax return, the tax authority shall issue a **decision assessing the amount of tax obligation**. Such action should, as a rule, occur also when a taxpayer submitted a tax return indicating a correct amount of tax to be paid which, however, he or she will not pay. In such a situation, a decision should also be issued determining the value of tax obligation unless a taxpayer submitted a tax return that contained an instruction saying that this document may be the basis for the issue of the executive document with a writ of execution.

A decision determining the value of tax obligation is, contrary to a decision establishing the value of tax obligation, of a declaratory nature. It means that it does not create a new legal status. What is more, it does not create tax obligation as well, but only confirms that a specific legal status arose already some time ago. It actually confirms the formation of tax obligation under the law.

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13 As a matter of fact, it will be the last day of November because if some event influencing expiry of a tax obligation, or a change of the tax value occurs in December, it does not influence the tax for a given year any longer.

The issue of such a decision is, however, necessary to start executive actions against a taxpayer. The legislator introduces certain time limit when execution of tax may take place. It is, as a rule, five years counting from the end of a calendar year when a deadline to pay tax elapsed (see II, 5.6.). On the other hand, however, a period when a decision determining the value of tax obligation may be issued has not been introduced, as it was done with reference to a decision establishing the value of tax obligation (see also II, 5.3.). There are no obstacles, therefore, to issue a determining decision after the lapse of the termination of tax obligation. It is not possible, however, to execute tax on its basis. Nevertheless, the issue of such a decision is of fundamental importance in connection with conducting proceedings on the matter of excess payments (see II, 5.9.).

**Thirdly, tax obligation arises by virtue of law in the following taxes:** tax on goods and services, excise duty, gaming and lottery tax, legal persons' income tax, natural persons' income tax, including tax paid in the lump sum on registered revenues, tonnage tax, tax on civil law transactions, tax on means of transport and real estate tax, agricultural tax, forestry tax – if taxpayers are legal persons or organizational units having no legal personality.

**In the context of tax obligations arising in effect of the service of a decision determining the value of tax obligation, the following issues appear to be important:**

Firstly, a **tax obligation arises on the day when a decision of a tax authority is served** whereby the amount of such an obligation is determined. Therefore the **effective service** of such a decision is essential here. If a taxpayer proves that he or she has not been served this decision at all, or it has been served with serious violation of regulations valid in this scope, it will result in the ascertainment that tax obligation has not arisen (see II, 8.7.). Therefore it will neither be liable nor executed with the use of means of coercion from a taxpayer.

Moreover, tax obligation which arises in effect of the service of a determining decision is of a **conditional nature**. Its existence is conditioned by the fact whether the decision will achieve a value of a final decision. If the decision is reversed by a tax organ of the

II instance, tax obligation which arose in effect of the service of the decision by the I instance organ automatically expires despite the fact that the Tax Ordinance does not mention such a way of expiry of tax obligation (see part II, 5.1.).

What is more, attention may be paid to certain practical consequences connected with the service of a decision determining a value of tax obligation. On the one hand, a taxpayer is obliged to pay such consideration even if the decision will not become final. On the other hand, a tax organ may commence executive proceedings only if the settlement will have a character of a final decision.

Secondly, if a tax organ does not undertake actions aiming at the service of such a decision in specified time, the right to service a decision determining a value of tax obligation will expire (see II, 5.6.). It means that the service of the decision after this time will not result in the formation of tax obligation.

Thirdly, a tax organ determines tax in the analyzed decision on the basis of the data it was provided with by a taxpayer in connection with submitted document, e.g. tax returns. Pursuant to Art. 21 § 5 of the Tax Ordinance, if tax law regulations impose upon a taxpayer an obligation to submit a tax return, the value of tax obligation is established according to the data included in the tax return unless special provisions envisage another way of establishment of the value of tax obligation, or it has been ascertained during tax proceedings that the data included in the tax return that may influence the value of tax obligation are inconsistent with a factual state. It means that there is presumption of veracity of data included in documents submitted by taxpayers. It may, however, be abolished by a tax organ if it collects evidence proving a different factual state from the one declared by the taxpayer.

Fourthly, **tax obligation arises** on the day when a **decision of a tax authority is served whereby the amount of such an obligation is determined in the following taxes**: real estate tax, agricultural tax, forestry tax – when taxpayers are natural persons, natural persons' income tax on the incomes earned from unrevealed sources of revenues or not justified by the revealed sources and in the case when income tax

is paid in lump sum on the income – paid by clergy or in the form of a tax card as well as donation and inheritance tax.

### 3.4. Payment limits

As a rule, a taxpayer is obliged to calculate and pay the tax personally. The time limit for payment shall be considered the last day on which, pursuant to the provisions of tax law, the payment is to be made. In **taxes settled periodically**, payment limits are specified by calendar indication of payment limits. We deal with such a case, inter alia, in tax on means of transportation, where it is indicated that tax for a given year is payable in two installments: until 12th February and 15th September<sup>14</sup>. It is opposite to **incidental taxes**, where the obligation depends on the occurrence of specified events. In such cases payment limits are specified by indication of a certain period from the occurrence of an event the obligation of given consideration is connected with. In tax on civil and legal transactions it is indicated that payment limit amounts to 14 days from the day the tax obligation arose (e.g. from the day a loan agreement was concluded)<sup>15</sup>.

In terms of **tax obligations arising by serving the decision** whereby the amount of tax is determined, the time limit for payment is 14 days from the day the decision assessing the amount of tax obligation is served. If the provisions of tax law specify calendar time limits for the tax payment or tax installment, and the decision assessing the amount of tax obligation has not been served at least 14 days before the time limit for the tax payment, the first tax installment, the time limit for the payment is 14 days from the day of serving that decision.

This rule in practical understanding is to assure taxpayers that, on the one hand, despite circumstances connected with indolence of tax organs connected with the service of a tax decision, they will have at least 14 days to pay tax. On the other hand, it is always to allow for a more favorable time limit for a taxpayer, that is such that allows to pay tax later. In theory, the above rule is to solve a collision that may

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14 Art. 11 L.L.T.

15 Art. 10 par. 1 of the Act on Tax on Civil Law Transactions.

arise with the application of the regulation determining payment limits included, on the one hand, in the statutes regulating the construction of individual taxes, and on the other hand, in the Tax Ordinance.

The principle presented above refers to the following taxes: tax on a real estate and agricultural and forestry tax when taxpayers are natural persons. Tax obligation arises in the above situations on the day a decision determining the value of tax obligation is served (see II, 3.3.). On the one hand, the legislator indicated in the acts regulating these considerations that they are paid in four installments: until 15th March, 15th May, 15th September, and 15th November. On the other hand, the legislator indicates in the Tax Ordinance that payment limit cannot elapse before 14 days from the day the decision referring to these considerations is served. If a tax organ serves a taxpayer a decision already at the beginning of a year determining tax payment limits we will assume that he or she will have to pay the first installment until 15th March. In this case, it will be the most favorable time limit for a taxpayer if compared to another assumption, according to which tax payment will be due within 14 days from the day of the service of this decision. The situation will be different if a decision is served, e.g., on 10th March. It will be more favorable for a taxpayer to pay the first installment within 14 days from the day the decision was serviced rather than until 15th March.

**The time limit for the payment for tax remitters** shall be the last day on which, according to the provisions of tax law, the payment of the due tax is to be made.

**The time limit for the payment for tax collectors** is the day following the last day on which, according to the provisions of tax law, the payment of the tax is to be made, unless the decision-making body of the competent local authority has fixed a later date. Therefore if a tax collector collects the first installment of tax from taxpayers (payment limit is 15th March), s/he will be obliged to transfer it to a tax organ until 16th March. A municipality council, as a decision making body, may prolong payment limit of these dues to such subjects.

There is an important rule considering the time limit for the payment that states: if the last day of a time period is a Saturday or

a holiday under statutory law, the last day of the time period shall be considered the day immediately following that day.

Attention should be paid also to the fact that a taxpayer may apply for a possibility of **postponement of tax payment limit** or **arrangement of installments**. It concerns a taxpayer regardless of the fact whether tax obligation arose under the law or in effect of the service of a decision determining the value of tax obligation. It also refers to other subjects (tax remitters or collectors) (see II, 6.).

### **3.5. Tax arrears**

**Tax arrears** is tax, which was not paid within the time limits for such a payment. Tax arrears appear not only as a result of tax that has not been paid within the time limits but also when the advance tax payment or tax installment is not paid within the payment time limit. The tax arrears are also the dues of tax remitter or tax collector if not paid within the payment time limit.

The Tax Ordinance Act treats also other dues as tax arrears, for example: undue overpayment or tax refund reimbursed by the tax authority, remuneration of tax remitters or tax collectors collected unduly or in an amount higher than that due and also interest accrued on an unduly collected overpayment or tax refund and refunded or counted towards overdue, current or future tax obligations. There is a duty to pay default interest for tax arrears.

Tax arrears arise regardless of the fact whether tax was not paid by fault of the subject obliged to pay given consideration, or whether it was a situation independent of the subject's will, e.g. a delay in result of a faulty operation of a bank a taxpayer used as his/her agent.

### **3.6. Default interest**

**Default interest** is due to be paid for tax arrears. The duty to pay default interest arises as a result of failure to pay tax within specified time limits. It refers to every subject who has failed to pay due tax s/ he has been obliged to, that is mostly to a taxpayer, but also to a tax remitter and a tax collector, etc. The duty to pay default interest arises

by virtue of law. It is reflected in the fact that it is a rule for a taxpayer or another subject who is in arrears to calculate interest.

In some cases the statute **exempts some subjects from paying interest**. It mainly refers to the situations where the procedure of assessment of due tax, and in consequence, interest, takes a long time (over three months), which is not the taxpayer's fault. A similar situation occurs when the II instance organ conducts appeal proceedings for a period longer than two months. If the amount of interest does not exceed thrice the amount of additional fee collected by the Polish Post for registering a letter (PLN 6,6), default interest should not be accrued. Default interest rate is 200 per cent of the basic interest rate on pawn credits, which is fixed in accordance with the provisions on the National Bank of Poland. Another two per cent points are now added to the rate determined in this way. What is more, the act indicates that a rate of interest determined with the use of the above rules cannot be lower than 8%.

Polish tax law envisages that in some cases **lower default interest** applies. They amount to 75% of basic interest mentioned above. They apply when a taxpayer submits a legally effective correction of a tax return together with reasons for the correction's causes and the full payment of tax arrears made within 7 days from the day the correction was submitted. The introduction of lower interest is to encourage taxpayers to report situations of the occurrence of tax arrears on their own because if a tax organ acknowledges the existence of tax arrears on its own, a taxpayer will be burdened with basic interest.

### **3.7. Securing the fulfillment of tax obligations**

The Tax Ordinance envisages three manners of securing the fulfillment of tax obligations, i.e. securing on the taxpayer's property, on the joint property of the taxpayer and his or her spouse, registered pledge and compulsory mortgage. The purpose of the application of these institutions is mostly to reduce a tax creditor's risk connected with the failure to fulfill or inappropriate fulfillment of the obligations by the taxpayer s/he is encumbered with, which result from the legally binding fiscal relation, i.e. tax payment. A basic condition to apply

these measures is the existence of reasonable fear, as estimated by the tax authority, that tax obligation will not be properly met. In order to apply the instrument involving security of taxpayer's assets, this fear must emerge in the specified form. It may occur in such a way that a taxpayer does not pay due liabilities permanently, or performs actions involving a sale of the assets, which may hinder, or prevent tax execution. In order to apply security in the form of pledge or mortgage, the occurrence of these elements is not necessary.

**The essence of registered pledge and compulsory mortgage** is very similar. According to it specified objects or rights may be burdened with a certain right a tax organ is entitled to. On its basis, an organ will be able to undertake actions connected with satisfaction of its claim secured by a mortgage or a pledge on the object burdened with this right if its owner fails to fulfill this consideration voluntarily. If a taxpayer fails to pay tax, a tax organ will be able to conduce to the sale of the object of the right burdened with a ledge or mortgage, and this way satisfy its tax claim. It will not matter then whether at the moment of the sale the owner of this object will still be a taxpayer, or another subject who, after setting up a mortgage or pledge, purchased this object.

**A mortgage** may be set up on a real estate but also on specified rights concerning it (inter alia perpetual usufruct, private ownership of residential premises in housing cooperative), but recently a possibility to set up a mortgage also on ships has been introduced.

**A pledge** may be set up on taxpayer's movable objects, but also on transferable property rights (e.g. permits). As far as a pledge is concerned, however, a condition has been introduced, according to which a value of elements that are to be burdened with the right must amount at least to PLN 11.500 (this amount is subject to valorization).

We should pay attention here to the **institution of disclosure**. The main aim of this instrument is to help tax organs obtain information about objects a taxpayer disposes of and which may be burdened with a pledge or mortgage. This institution is regulated in Art. 39 of the Tax Ordinance. Thanks to this, during tax proceedings or tax audit a tax organ may summon a party to the proceedings or an audited person to



submit a declaration about real estates and property rights which may be an object of a compulsory mortgage, or about movable property and transferrable property rights which may be an object of a registered pledge. The problem with the application of this institution is that a taxpayer summoned to make a declaration mentioned above may refuse to satisfy this request without any negative consequences he or she would suffer.

A mortgage and a pledge are always set up **upon a tax organ's request**. In the case of a mortgage, it must be entered into a mortgage register, which is done by a court keeping it. In the case of a registered pledge, it is entered into a pledge register kept by heads of Revenue Offices. Through their agency, information about set up registered pledges are also entered into the Central Pledge Register kept by Minister of Finance. A mortgage or registered pledge, which are analyzed by subjects keeping registers, may be set up, as a rule, based on the service of a tax decision to a taxpayer.

The institution of **security of the execution of tax obligations on taxpayer's assets** functions on other principles. Compared to a pledge and a mortgage, a basic difference is the fact that the security with the application of this formula may occur even before the issue of a tax decision. A tax organ may apply this kind of security if conducting tax proceedings or tax audit, it decides that there is reasonable fear that tax obligation which may be determined during these procedures may not be executed. Such a situation may arise, in particular, when a taxpayer fails to pay due liabilities of a public and legal character permanently, or performs actions involving a sale of assets, which may hinder or prevent the execution.

Such a means may be applied based on a **decision on security**. In this decision, a tax organ establishes (estimates) in an approximate way the value of tax security, which will be specified or determined precisely after closing the tax audit being carried out, or already pending tax proceedings. The legislator applied here a simplified tax procedure, which hastens the issue of such a decision. It is reflected in the fact that before the issue of this decision, tax proceedings in the matter of the issue of a decision on security (see II, 8.4.) are not initiated. Moreover,

a ruling in the matter of determination of a seven–day period to get acquainted with the collected evidence (see II, 8.1.) is not issued as well.

The service of a decision on security opens up possibilities of applying two kinds of security on assets. The first one is **executive security**, whereas the second one is the so called **voluntary security**. On the one hand, a tax organ should, on the basis of a decision on security, refer to an executive authority with a motion to undertake specified actions which will secure tax obligation resulting from this decision (it submits an order to secure to an executive authority). On the basis of this motion and after the acceptance of the clause on the acceptance of the order to secure to be performed, the executive authority undertakes concrete security actions, e.g. by the seizure of money on a taxpayer's bank account, the seizure of remuneration for work, or the proscription of the real estate's sale and burdening. On the other hand, a taxpayer who has been served a decision on security may avoid undertaking of actions appropriate for executive security mentioned above. A taxpayer may himself or herself propose other forms which will secure a tax authority and which, at the same time, will not be so painful as those applied in case of executive security. The legislator envisages here several possibilities a taxpayer may choose from to refer to a tax authority. We may indicate among them a bank or insurance warranty, a bank guarantee, or a bill of exchange guaranteed by a bank bill of exchange<sup>16</sup>.

## **4. Special principles concerning the assessment of tax base**

### **4.1. Estimation of tax base**

Fulfilling obligations connected with tax payment which burden a taxpayer, he or she should, among other things, determine the tax base, e.g. the value of income in income tax (see III, 3.2.), and turnover in tax on goods and services (see III, 5.2., and 5.3.). It is necessary to

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16 All forms of the so called voluntary security are presented in Art. 33d § 2 T.O.

determine the amount of tax to be paid. The tax is actually determined in connection with comparison of a specified tax rate to the tax base. In some cases, however, a tax authority will have to undertake actions aiming at determination of the tax base on its own<sup>17</sup>. It will occur, *inter alia*, **when a taxpayer abandons the fulfillment of the obligation to pay tax, or when an organ will have doubts about the establishment concerning the tax base made by a taxpayer**. A tax authority should in this case undertake any actions necessary to assess the tax base in a way that is possibly reflecting the actual state of affairs. It is not always possible, for instance because a taxpayer did not keep essential tax documentation. In such cases, it is relevant to assess the tax base by estimation. The institution of estimation is applied exclusively with reference to the assessment of the tax base rather than the tax due.

Presenting this institution, attention should be paid to several issues. Firstly, a tax authority determines the tax base by estimation **exclusively in cases indicated in an enumerative way in the statute**. They include situations when there are neither tax books nor other data necessary to determine the tax base, or when the data resulting from tax books do not allow to assess the tax base, or when a taxpayer violated conditions that entitle him or her to apply a lump-sum form of taxation<sup>18</sup>.

Secondly, estimation of the tax base is *raison d'être* in case of **income, or turnover tax**. This institution does not concern property considerations (tax on a real estate, agricultural and forestry tax), where the tax base (inter alia the land's area) may be assessed in a way reflecting the reality in connection with, e.g., inspection of the land or building.

Thirdly, the institution of estimation is applied **within the frames of specified tax proceedings**. Most frequently these are the proceedings in the matter of the assessment of the value of tax obligation, which is finished with the issue of a decision determining the value of the tax obligation. **There are grounds, whatsoever, neither to conduct**

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17 A. Huchla, Oszacownie w przepisach podatkowych, Monitor Podatkowy 1999, No 1, p. 31 and next.

18 Art. 23 § 1 T.O.

**separate proceedings in the matter of estimation of the tax base** nor issue a separate decision determining the tax base by estimation.

Fourthly, conducting tax proceedings, a tax authority is obliged to **justify a choice of a specific method of estimation**. The legislator distinguishes among them, inter alia, an internal comparative method involving the comparison of turnover value in the same enterprise for previous periods when the turnover value is known, or an inventory method involving the comparison of the enterprise assets' value at the beginning and end of the period<sup>19</sup>.

## **4.2. Advanced price agreements**

The Tax Ordinance envisages a possibility of concluding an agreement between a taxpayer and a tax authority (Minister of Finance). On its basis a mutual liability arises between these subjects. On the one hand, a taxpayer obliges himself or herself to apply a specified method of advanced price assessment which will be binding between him or her and a subject, or subjects he or she is associated with (e.g. by the capital or family). On the other hand, a tax authority obliges itself that it will not question the advanced prices if they are accepted by it in the agreement.

The following issues seem to be of essential significance in this context: the notion of associated subjects, the issue of the abuse of such interrelations and tax consequences thereof, as well as the reasons for concluding the agreements mentioned above, their kinds and the form it is carried out.

We deal with **associated subjects** when there are capital, property, family, or employment relation associations between a taxpayer and their contractors<sup>20</sup>.

**The abuse of interrelations between the associated subjects** occurs when conditions determined, or imposed in result of these interrelations will differ from those which otherwise would have been

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19 Art. 23 § 3 T.O.

20 See: e.g., Art. 25 L.P.I.T., Art. 11 L.C.I.T. and Art. 32 par. 2–4 of the Act on VAT.

arranged between independent subjects, in effect of which the subject does not reveal income (or turnover), or reveals income (or turnover) that is lower than it should be expected if such interrelations did not exist at all. It may involve, inter alia, lowering the value of the tax paid by the associated subjects within the territory of Poland in connection with transfer of income upon a taxpayer enjoying lower taxation (e.g. covered by lump-sum taxation). If the associated subjects act in different countries, transfer of income may be connected with transfer of profit to other countries (e.g. tax havens, where taxation is lower). This aim may be achieved by price manipulation, i.e. lowering or increasing a purchase price or a sale of goods and services. The subject that has a seat in the country of a high level of taxation may entrust the associated subject from another country with the performance of specified services, or purchase goods at prices that are higher than market prices. In tax on goods and services the abuse may involve determination of remuneration for delivery of goods, or provision of services on the level that is lower, or higher than a market one<sup>21</sup>.

A consequence of the occurrence of the abuse of interrelations is a possibility, which a tax authority is entitled to, to determine a given subject's income and the tax owed without consideration of the conditions resulting from such interrelations. In effect of the income established in this way, the 50% sanction rate may apply to it. As far as tax on goods and services is concerned, the effect will be such that a tax authority determines the value of turnover based on the market value reduced by the amount of tax if it appears that this interrelation did influence the establishment of remuneration for delivery of goods or provision of services.

Nevertheless, within the frames of tax proceedings, a tax authority will have to prove the occurrence of the abovementioned prerequisites, i.e. both the occurrence of interrelation between the taxpayer and his or her contractor and the resulting tax abuse thereof.

A taxpayer may counteract situations when a tax authority will be able to question prices used between his or her associated subjects

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21 Art. 32 par. 1 of the Act on VAT.

by concluding the abovementioned agreement. Its **aim**, therefore, is to **preclude disputes between a taxpayer and a tax authority in the scope of applying advanced prices between associated subjects.**

We may distinguish **unilateral, bilateral and multilateral agreements**. In the first case, such an agreement protects transactions between associated subjects exclusively in the scope of Polish tax authorities' operations. It cannot be guaranteed, however, that a foreign tax authority, e.g. in Germany, which is competent for the Polish company's contractor, will accept the applied advanced prices. Therefore, there is a possibility of extending such protection in connection with the conclusion of a bilateral agreement. In this case, tax authorities of two countries accept advanced prices between associated subjects. Multilateral agreements provide even wider protection. It refers to the system of at least three countries where a taxpayer and his associated contractors operate.

These agreements are concluded in the **form of Minister of Finance's decision**. In this act an organ accepts a specified method of establishing advanced prices between associated subjects, which are indicated in the taxpayer's motion applying for the conclusion of such an agreement<sup>22</sup>. Such a decision is also served on the subjects associated with the taxpayer (national or foreign) the transactions are to be effected with. As far as bilateral or multilateral agreements are concerned, this document is served also on tax authorities that are competent for foreign subjects, as well as a head of a Revenue Office and a director of Tax Audit Office that are competent for the applicant and national subjects associated with the applicant that are parties to the transaction covered by the decision on the agreement. This decision may be binding no longer than 5 years. However, it is possible to prolong the duration of such an agreement for another five-year period upon the associated subject's motion, which is submitted not later than 6 months before the lapse of this time limit.

In case of bilateral agreements, Polish Minister of Finance, who conducts proceedings in this matter, issues his or her decision after the

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22 Art. 20i T.O.

consent of a tax authority competent for a foreign subject associated with the applicant was obtained. A multilateral agreement requires earlier consent of a respectively larger number of countries. For this reason, the time limit for the issue of a decision in the matter of agreements is different depending on their kind. In case of unilateral agreements, Minister of Finance should issue a decision within 6 months from the submission of the motion thereon by a taxpayer. In case of bilateral and multilateral agreements, this period is 12 and 18 months respectively.

## **5. The expiry of tax obligations and overpayment**

### **5.1. Effective and non-effective ways of tax obligations expiry**

The legislator specified a closed catalogue of situations resulting in the expiry of tax obligation. It means that a taxpayer is no longer obliged to pay tax if at least one of the prerequisites included in the catalogue mentioned above has been met. They can be divided into two groups, i.e. **effective and non-effective manners of tax obligations expiry**. The first group includes cases that lead to tax creditor's satisfaction. The other one contains situations that do not fulfill this condition.

Situations which may be classified as **effective manners of the expiry of tax obligations** are the following: tax payment, tax collection by a tax remitter or a tax collector, offsetting, taking into account an overpayment or tax refund, transfer of ownership of goods or property rights, taking over the ownership of immovable property or a property right in enforcement proceedings. Whereas we can distinguish four cases comprised by the notion of **non effective manners of the expiry of tax obligations**. This category includes annulment of arrears, limitation, exemption from the duty to pay tax under Article 14 of the Tax Ordinance Act and cessation of collection.

**Taxpayer's death, or legal persons' or units' legal existence cessation do not effect in the expiry of tax obligation.** In such cases, liability for tax debts may be taken over by legal successors. Taking over taxpayer's rights, including his or her assets, legal successors should also be liable for tax arrears that concerned their predecessors

(see II, 7.4.). The mechanism of taking over rights and debts, including tax ones, by legal successors justifies why the two abovementioned events (taxpayer's death and cessation of his or her legal existence) should not cause the expiry of tax obligations.

## 5.2. Tax payment

Tax payment is an effective manner of the expiry of tax obligation. There are three forms of tax payment envisaged by law, i.e. **by cash**, **non-cash** (a transfer order) and **auxiliary** (by securities, excise stamp duty). What is more, the legislator introduced a possibility to pay tax by a **payment card**. It concerns, however, considerations that constitute income of local self-government units exclusively. A necessary condition to be met to apply this form of tax payment is taking a resolution introducing this possibility by a competent decision-making body (e.g. Municipal Council, with regard to taxes constituting municipality's income). In effect of such a resolution, taxpayers operating within the territory of a given unit of local self-government will be able to take advantage of this form.

Tax obligation most often expires as a result of tax payment. Our analysis should include consideration of the payment forms, which individual forms of tax payment can be applied to, the moment the tax payment is accepted and the principles according to which tax payments are to be rounded up or down.

Tax law permits **freedom in choosing a tax payment form**. However, there is a significant exception to this rule. Non-cash settlement of taxes should be made by taxpayers conducting business activity who are obliged to keep an account book or a tax book of revenues and expenditures. The fulfillment of this obligation is not guaranteed by any sanction which could be applied against taxpayers who fail to respect this obligation. It means that a tax authority cannot impose any kind of punishment upon a taxpayer who, being obliged to pay tax in the non-cash form, pays in cash. What is more, it would be difficult to assume that tax obligation borne by a taxpayer who failed to fulfill the above obligation will not expire. It seems that such a sanction



could only be applied if the legislator wrote down such a consequence directly in the statute.

Above mentioned duty, however, does not apply to the payment of taxes that are not connected with business activity, tax payment in an auxiliary form, collecting taxes by a tax collector. Moreover, the so called small taxpayers do not have to pay tax in the non-cash form too. This term refers to businessmen who do not employ more than 10 workers whose sales turnover did not, simultaneously, exceed the equivalence of 2 million Euros for the sales of goods or the provision of services in a given year. Therefore since many businessmen meet the above-mentioned criteria, they may pay tax both in cash and non-cash.

When a **taxpayer pays in cash**, the date of making a tax payment is the **day when the amount of tax is paid at the tax authority's cash desk or into the account** of the said authority in a bank, at a post office, in cooperative savings and credit fund, or the day when a tax remitter or tax collector collects the tax. It results from the above that cash payment of tax is not only a situation when a taxpayer pays money at the tax authority's cash desk. It will be every situation when the money is remitted by a taxpayer to the tax authority's bank account not by a transfer from his or her own bank account. Therefore we will deal with cash payment when a taxpayer transfers money, at the post office or a bank, and at the same time gives instruction to transfer this money into a bank account of a competent tax authority

The **day when the taxpayer's bank account or the taxpayer's account** in cooperative savings and credit fund **is debited** on the basis of a transfer order **is considered the date of making a tax payment for non-cash operations**. A situation when a taxpayer transfers money for the tax revenue office from the account that has a seat abroad has been regulated in a special way. In this case, tax is considered to be effectively paid on the day the account is charged with it if the amount of tax being paid will be received on the tax organ's bank account within next subsequent working day. If this time limit is exceeded, tax

is considered to be paid on the day the tax amount is received on the tax organ's bank account<sup>23</sup>.

It seems that tax obligation will expire when the **money is transferred both from the bank account held by a taxpayer and third parties**. Such an assumption may be adopted, however, provided that there is absolutely lack of any doubts whatsoever that the transfer of the money is effected in connection with the intention to pay tax for a concrete taxpayer. If another assumption is adopted, it would mean restriction of taxpayer's freedom to shape his or her relations with other subjects. Payment of tax from another taxpayer by a third party may result from specified arrangements between such subjects a tax authority should not interfere in. It is even more justified because the arrangements thereon do not influence negatively on the situation of a tax authority. It is difficult to indicate other reasons which should justify absolute proscription of payment of tax for a taxpayer by other subjects.

Tax may be paid by **securities** provided that Minister of Finance specifies when it may occur. Therefore, due to a lack of activity of the Minister in this scope, this form of tax payment cannot be realized in practice. Tax payment with excise stamps may be perceived as the form of making advance payment for excise duty. Producers of specified products (e.g. cigarettes or alcohol) are obliged to provide their products' packaging with **excise marks**. The amount borne for their purchase taxpayers may then deduct from the excise duty owed for a given settlement period when these goods were produced (see III, 6.6.).

Before the tax is transferred or paid in cash, it **should be rounded** to full PLN in such a manner that amounts ending in less than 50 grosz shall be rounded down, and those ending in 50 grosz or more shall be rounded up to full PLN.

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23 Art. 60 § 1a T.O.

### 5.3. Deduction

Deduction involves mutual cancellation of liabilities that the State Treasury or a unit of local self-government, on the one hand, and a taxpayer, on the other hand, are entitled to. In consequence, these liabilities are cancelled to the lowest amount of one of them. If a taxpayer's debt amounted to, e.g. PLN 0.5 million, and his or her liability to the State – PLN 0.3 million, after deduction a taxpayer will have to pay the remaining PLN 0.2 million.

This institution may arise provided that both parties to the tax and legal relation are at the same time creditors and debtors to each other. A tax creditor who is represented by a tax authority is entitled to a tax debt. A taxpayer, on the other hand, is entitled to debt which must meet specified conditions, both general (**mutual, unquestionable and payable**)<sup>24</sup>, and precise, i.e. debt should **result from specified legal deeds indicted in the statute**. The Tax Ordinance<sup>25</sup> indicates, inter alia, debts connected with:

- damages connected with a harm caused by the employees of public authority bodies and resulting from a court judgment;
- acquisition of immovable property by the State Treasury or a unit of local self-government for purposes justifying its expropriation or expropriation of immovable property pursuant to the provisions on the management of immovable properties;
- indemnities for unjust conviction or temporary arrest or detention, obtained pursuant to the provisions of the Code of Criminal Procedure;
- indemnities awarded by a decision of an authority of government administration.

The legislator allows for a possibility of deducting **debts a taxpayer is entitled to against budget entities**, both state (e.g. Ministries and courts) and self-government (e.g. schools and preschools). Nevertheless,

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24 Art. 64 § 1 T.O.

25 Art. 64 § 1 T.O.

at the same time two additional conditions are introduced<sup>26</sup>. Firstly, deduction may be made if the debts originated in effect of contracts performed by a taxpayer based on agreements concluded under the regulations on public procurement. Secondly, deduction may solely be made by a taxpayer who obtained the debt mentioned above and from this debt exclusively. This element is to unable trading in debts against budget entities in order to acquire tax benefits.

Deduction may be effected **upon the motion made by both a taxpayer and ex officio**. In the first case, when an organ ascertains the fulfillment of prerequisites of deduction, it issues decisions that can be complained against. If deduction is refused, a tax decision is issued. Deduction is effected on the day the accepted motion is submitted. If, on the other hand, deduction is effected ex officio, it occurs on the day of the issue of a decision on deduction.

#### 5.4. Transfer of ownership

A taxpayer who is burdened with tax arrears may motion for the transfer of ownership of things or property rights in favor of a tax creditor (the State Treasury or units of local self-government)<sup>27</sup>. If both parties (a taxpayer and a tax creditor) reach a compromise, the tax arrears burdening a taxpayer will expire. Such an agreement must concern two elements. First, **a will to enter into an agreement** transferring ownership of things or property right must be considered. Second, **the value of things** of such a transaction must **be determined**. If a creditor is not interested in specified things, or the parties do not reach a compromise about their value, this institution cannot be applied. On the other hand, a creditor cannot oblige a taxpayer to lodge a motion for taking over his assets under this course. The need to reach a compromise indicates that the transfer of ownership of things or property rights in exchange for tax arrears is of a **civil law** rather than administrative **nature**. The subject institution, however, contains

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26 Art. 64 § 2 T.O.

27 W. Morawski, Wygaśnięcie zobowiązania podatkowego wskutek umownego przeniesienia własności rzeczy lub praw majątkowych, in: Księga pamiątkowa ku czci docenta Eligiusza Drgasa. Studia z zakresu Ordynacji podatkowej, Toruń 1998, P. Borszowski, Przeniesienie własności na rzecz Skarbu Państwa, Glosa 2003, No 3.

a certain element that is of an administrative character. After a civil law agreement is concluded, a **decision on the expiry of tax obligation** in part or in whole is issued. A kind of settlement depends on the fact whether the value of the assets being the object of the agreement covered the whole or part of the tax arrears. Nevertheless, the above does not change the civil law essence of this institution, whereas an administrative decision merely confirms the occurrence of a specified effect, which the expiry of tax obligation is.

**The course of application** of this institution depends on the fact whether this debt concerns the tax constituting the State Treasury's or municipality's income. In the first case, a motion to apply this institution is directed to a starosta. Representing the State Treasury, this subject conducts negotiations with a taxpayer and may conclude an agreement with him or her after receiving a consent of a competent tax authority (a head of a Revenue Office or a head of Customs Office). On the basis of such an agreement, the State Treasury, being the tax creditor, becomes the owner of these objects. A starosta, on the other hand, is an administrator of these assets. In connection with the conclusion of such an agreement, a competent tax authority issues a decision on the expiry of tax obligation.

In case of the arrears constituting municipal income, the situation is much simpler. A possible agreement on the transfer of ownership of things or property rights in exchange for tax arrears as well as a decision on the expiry of tax obligation is issued by the same subject, i.e. a village mayor, a mayor, or a president of a city.

The **agreement** must be concluded **in writing** unless legal regulations require a special form. We deal with such a case when a real estate is to be the object of the agreement. An agreement in the form of a notary deed is required here.

## **5.5. Inclusion of excess payment**

Tax obligation may expire in connection with the inclusion of payment for the tax obligation. This institution is applied **if the same taxpayer has made, on the one hand, excess payment, whereas on**

**the other hand, he or she is burdened with the obligation to pay tax.** Such inclusion may concern different taxes (e.g. excess payment regards income tax from natural persons whereas tax arrears regard tax on goods and services) as well as the same tax. It is important that the same tax authority be competent to ascertain both excess payment and the collection of the tax owed.

**Excess payment is subject to inclusion *ex officio*** for considerations specified in the statute<sup>28</sup>. The most important, among them, are: tax arrears as well as current tax obligation. In case of its lack, excess payment is subject to refund *ex officio* unless a taxpayer submits a motion to include excess payment in whole or in part for future tax obligation. Procedures connected with the inclusion of excess payment are reflected in the decision, which may be complained against.

A slightly different mechanism has been adopted with regard to excess payments whose value does not exceed now PLN 8.8 (four times cost of a reminder in executive proceedings). In this situation, in case of a lack of current tax obligation, a tax authority includes excess payment *ex officio* for future tax obligation unless a taxpayer applies for their refund<sup>29</sup>.

## **5.6. Statute of Limitation**

Tax law envisages two types of limitations, i.e. **limitation of the right to serve a decision assessing the amount of tax obligation**, which is also defined as a limitation of tax liability and **limitation of tax obligation**. Only the second of the above types of limitations results in the expiry of tax obligation. If the first type of limitation is applied, such an effect does not arise at all.

The first type of tax limitation concerns exclusively taxes whose tax obligation arises in effect of the service of a decision determining the value of tax obligation (see II, 3.3.). Whereas the second type concerns the situation when tax obligation has already arisen, and regardless of

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28 Art. 76 T.O.

29 Art. 76 § 2 T.O.

the fact whether it occurred under the law, or in effect of the service of a decision determining the value of tax obligation.

**Limitation of a tax obligation** is a non effective manner of the expiry of tax obligation. The essence of it is that after the lapse of a specified time period, the tax a given subject is burdened with cannot be enforced as the lapse of this time limit results in its limitation<sup>30</sup>.

Limitation of tax obligation results in such a situation that any possible payment made after this date is considered overpayment, which is subject to a refund. It does not matter here whether the payment was made voluntarily or whether it was enforced. The time limit after which it becomes effective is 5 years, counted from the end of a calendar year in which the time limit to pay a tax lapsed. During such a period, a tax authority should undertake necessary actions against a taxpayer that are indispensable to execute tax. For this reason, it is both time for the initiation of tax proceedings and the issue of a decision determining the value of tax obligation. All these actions will be ineffective if the limitation of tax obligation occurs. Similar consequences will occur if the limitation time expires during pending tax proceedings. A tax authority will be obliged then to remit pending tax proceedings.

There is a category of tax obligations which **are not subject to limitation**. It concerns obligations secured by a mortgage or a registered pledge. In this case, however, after the lapse of the period mentioned above, such obligations could be enforced exclusively from the objects burdened with the abovementioned rights.

The course of the limitation period of a tax obligation can be suspended or interrupted. The **suspension of the course of the limitation** period of a tax obligation occurs, inter alia, between the day of filing a complaint to an administrative court about the decision concerning tax obligation, and the day following the day on which a copy of an administrative court's pronouncement on the tax authority, including the statement of legal validity thereof, is served upon the tax authority.

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30 A. Nita, Czynniki czasu w prawie podatkowym. Studia z dziedziny zobowiązań podatkowych, Gdańsk 2007, p. 239 and next.

The **period of limitation is interrupted** by the declaration of bankruptcy. After the course of the limitation period is interrupted, it will run anew from the day following the day on which the ruling ending the bankruptcy proceedings becomes valid. The course of the limitation period shall be interrupted as the result of application of an enforcement measure about which the taxpayer was informed. After the course of the limitation period is interrupted, it shall run anew from the day following the day on which the enforcement measure was applied.

The essence of the **limitation of the right to serve a decision assessing the amount of tax obligation** is the fact that tax obligation, which arises as a result of serving such a decision, will not arise if the tax authority fails to serve such a decision within specified time limit. Serving such a decision with the breach of the statutory time limit will not result in the commencement of tax obligation.

The time limit for serving that decision is 3 years from the end of the calendar year in which the tax liability arose. There are some exceptions to this rule. The longer time limit (5 year–period) is applied in following circumstances:

- a taxpayer has not submitted a tax return within the time limits stipulated in the provisions of tax law,
- a taxpayer, in the submitted tax return, has not revealed all particulars necessary to assess the tax obligation,
- additional tax obligation as regards goods and services tax,
- the obligation which arises from the taxation of the income that is not justified by the revealed sources of revenues or the income from non–revealed sources. In this case a 5-year time period to serve the decision is counted from the end of the year in which the time limit lapsed for submitting the annual income tax return for natural persons' income tax payers for the tax year which the decision concerns.

The **period of limitation is suspended** if the issuance of the decision depends on solving the initial question by another authority or a court. The suspension of the course of the limitation period will last



until the day when the decision of another authority becomes final, or the court's decision becomes valid, no longer, however, than 2 years.

## 5.7. Abandonment of tax collection

One of the ineffective ways of the expiry of tax obligations is abandonment of tax collection. The essence of this institution is the fact that the tax owed in connection with the existence of specified circumstances ceases to be payable. Consequently, taxpayers do not have to pay it, but also tax remitters should not collect this tax from taxpayers.

The circumstances which are the basis for the application of this institution have been stipulated by the legislator in a very general manner<sup>31</sup> as they comprise the occurrence of situations justified by **public interest or taxpayers' important interest**. On the basis of such a general assumptions, Minister of Finance determines a kind of tax, a period when limitation occurs, and a group of taxes the limitation applies to. Applying the abovementioned criteria, it has been decided to, e.g., abandon the collection of income tax from natural and legal persons with regard to the income obtained for interest or discount on bonds issued on foreign markets by the capital city of Warsaw as well as chargeable sale of such bonds<sup>32</sup>. Such abandonment has been introduced with regard to taxpayers who reside or have a seat abroad. Thus, as it seems, the aim of this regulation was to conduce to elimination of taxation of income in a source country (see I, 3.3.3.).

Abandonment of tax collection may be applied provided that **Minister of Finance issues a decree**. Contrary to individual administrative acts (tax decisions), this preference cannot be addressed to individually indicated subjects by specification of their names, or first and last names.

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31 Art. 22 § 1 T.O.

32 Minister of Finance's Regulation of 31.12.2009 in the matter of abandonment of the collection of income tax from some kinds of income (revenues) obtained by taxpayers of personal and corporate income tax (Journal of Laws No. 7, *item* 49).

## 5.8. Tax exemption in connection with the advance tax rulings

In connection with a **wide principle of non-harming a taxpayer** who followed the advance tax rulings, the right to exemption from the obligation to pay tax in the scope resulting from the event being the object of interpretation may be applied (see I, 5.3.). It may be applied when two conditions are met. According to the first one, obligation is not correctly performed in result of the application of the a.t.r. that has been changed, or the a.t.r. that has not been considered in a resolution of a tax matter. Secondly, tax consequences connected with the event which corresponds to a factual state being the object of the a.t.r., occurred after the publication of general a.t.r. or after the service of individual interpretation<sup>33</sup>. In other words, a taxpayer failed to pay tax acting on the basis of the a.t.r., whereas a tax authority changes the interpretation to a taxpayer's disadvantage.

The **exemption period** depends on the character of the tax the a.t.r. refers to<sup>34</sup>. As far as **annual settlement of tax** is concerned (e.g. income taxes, property tax, agricultural and forestry tax), the exemption regards the period to the end of the tax year when a general modified a.t.r. was published, or a modified individual a.t.r. was served, or a tax authority was served a copy of the administrative court's decision remitting the individual a.t.r. together with ascertainment of its legal force.

In case of **quarterly settlement of tax** (it may concern income tax when there is an obligation to make quarterly advance payments, or VAT tax if a taxpayer chose such a settlement cycle), the exemption concerns the period to the end of the quarter when a general modified a.t.r. was published, or a modified individual interpretation was served, or a tax authority was served a copy of the administrative court's decision remitting the individual a.t.r. together with ascertainment of its legal force, and the subsequent quarter.

In case of **monthly settlement of tax** (it may concern income tax when there is an obligation to make monthly advance payments, or VAT

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33 Art. 14m T.O.

34 Art. 14m § 2 T.O.

tax if this consideration is settled in this cycle). The exemption covers the period to the end of the month when a general modified a.t.r. was published, or a modified individual a.t.r. was served, or a tax authority was served a copy of the administrative court's decision remitting the individual interpretation together with ascertainment of its legal force, and the subsequent month.

## 5.9. Overpayment

**Overpayment** is the amounts of overpaid or unduly paid tax and the tax collected by a tax remitter unduly or in an amount higher than that due. Among particularly important features of overpayment, attention should be paid to two of them, which allows a distinction to be made between overpayment and, above all, undue considerations. Firstly, a **payment or collection** of a specified amount of tax for the benefit of a tax authority is carried out with a **belief that it is due** and results from the tax law provisions. Secondly, the **amount due reaches a bank account of a tax authority**. The above-mentioned belief may be borne by any party to the tax and legal relation, i.e. a taxpayer, a tax authority, but also a tax remitter and tax collector. Overpayment, therefore, will be both the amount due paid by a taxpayer who was wrongly convinced that he was burdened with tax obligation (**taxpayer's conviction**). Overpayment will also occur in a situation when a tax authority demands effectively but groundlessly payment of the amount due based on the issued tax decision (**tax authority's conviction**). Moreover, overpayment will occur when a tax remitter or collector collects the amount due from a taxpayer when it appears that a taxpayer was not burdened with a tax obligation at all (**tax remitter's or collector's conviction**).

With reference to the second of the above-mentioned features of overpayment, it should be indicated that we will not deal with overpayment if a specified amount reaches a bank account not held by the tax authority (e.g. the contractor's bank account). In this case, it

will not matter that a person making payment believed that the amount being paid resulted from the burdening tax obligation.

Overpayment can be connected not only with a taxpayer but also with a tax remitter, a tax collector, a third party or a successor<sup>35</sup>. Overpayment is an obligation paid, for example, by a tax remitter or a tax collector if the tax amount to pay has been assessed unduly or in an amount higher than that due in the decision which concerns tax responsibility of the tax remitter or tax collector. Overpayment also appears when the tax obligation paid by a third party or a successor was assessed unduly or in an amount higher than that due in the decision on their tax responsibility, or in the decision fixing the amount of tax obligation of the testate or intestate deceased.

The issue of overpayment is connected with such aspects as: the procedure of assessing and refunding, and the moment overpayment arises.

**A tax authority decides on overpayment issuing a decision**, acting therein *ex officio* or upon a motion made by a taxpayer or another subject for whom the overpayment arose. The exception, here, is the situation when the indicated subjects revealed the tax higher than the one included in a tax return. In this case a tax authority can refund it without issuing a decision. Here, it is based on a **motion submitted by the taxpayer** for the statement of overpayment as well as the **corrected tax return**.

Overpayment arises on the day when the taxpayer pays undue tax or tax in an amount higher than that due. If the structure of the tax stipulates the submission of a tax return (natural persons' income tax, legal persons' income, or excise duty), the overpayment arises on the day this document is submitted.

Overpayment is refunded in an **indirect procedure**, and if the prerequisites to its application are not met, a **direct procedure** is used. In the first procedure, overpayment and interest are calculated *ex officio* towards tax arrears together with default interest and current tax

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35 M. Ślifirczyk, *Nadpłata podatku*, Cracow 2005, p. 282 and next.

obligations. In the case when there are no tax obligations, overpayment is subject to refund in cash unless the taxpayer submits a motion to count it in whole or in part towards future tax obligations. Overpayment which does not exceed the cost of caution in enforcement proceedings (now up to PLN 8,80) is, first of all, the subject to count it *ex officio* towards tax arrears together with default interest as well as current tax obligations, and in the case when there are no current tax obligations, they are counted towards the future ones unless the taxpayer applies for their refund.

## 6. Tax reliefs available to meet tax obligations

### 6.1. A description of reliefs in repayment of tax obligations

Reliefs concerning repayment of tax obligations are tax preferences granted by a tax authority. Reliefs in repayment of tax obligations cannot be identified with tax reliefs being an element of the tax construction (see I, 2.3.). To begin with, the following features prove a specific character of the reliefs:

- their **nature** is **discretionary** (even if the taxpayer fulfills statutory prerequisites necessary to apply this preference, a tax authority is not obliged to grant this relief),
- their **nature** may be **conditional** (it concerns deferment and spread of tax installments; if a taxpayer fails to pay tax in due time assigned in the decision granting this preference, it automatically expires; it may be assumed, therefore, that it is applied if the conditions indicated in the decision granting this preference are met),
- **they are not attributed to specified tax considerations** (they may be applied to all taxes and other dues the Tax Ordinance applies to),
- **they may be granted not only to taxpayers**, but also to other subjects (tax remitters, collectors, third parties, heirs; except for the relief involving depreciation of tax arrears which tax remit-

- ters and collectors cannot apply; a particular kind of preference is also abandonment of the tax collection, or its limitation by a tax remitter, which may be applied by taxpayers exclusively),
- they are **applied upon a motion submitted by a taxpayer** (however, depreciation of tax arrears ex officio may be exceptionally applied here<sup>36</sup>),
  - **the basis for the application** of these preferences is a **very general criterion** indicated in the statute (taxpayer's important interest, or important public interest).

## 6.2. Types of reliefs

Tax law envisages four basic reliefs concerning repayment of tax obligations. The first one is **deferral of the time limit for tax payment**. It applies if the time limit for tax payment has not lapsed yet. In this case, a new time limit for tax payment is the day on which the payment of the deferred tax should be made according to the decision. The benefit specified by this preference is that the tax arrears and the delay interest do not arise. However, there is a possibility of deferring the time limit for tax payment for tax arrears and ensuing interest as well. In consequence, the taxpayer benefits from it as the course of default interest is suspended during the period the tax is deferred for.

A second type of the relief concerning repayment of tax obligations is **paying the tax or tax arrears in installments**. This institution is very similar to deferring the time limit for tax payment. A basic difference is that in the case of installments a specified due (tax or tax arrears) is divided into at least two parts (installments) for which different time limits for paying those dues are determined.

A third type of the relief concerning repayment of tax obligations is **annulment of tax arrears, interest or prolongation fee**. Tax arrears can be annulled in part or in whole. The annulment of tax arrears causes automatic annulment of default interest too in the proportion falling to the main due. It is also possible to annul only interest or prolongation fee.

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36 Art. 67d T.O.

**Abandonment or limitation of tax collection by a tax remitter** may be considered as the fourth type of these reliefs. Upon a taxpayer's motion, a tax authority may exempt a tax remitter from the obligation to collect tax if tax collection threatens taxpayer's important interests, particularly his or her existence, or when a taxpayer proves that a collected tax would be disproportionately high in relation to the tax owed for a tax year or another settlement period<sup>37</sup>. A tax authority may, upon a taxpayer's motion as well, limit the collection of advance payments for tax if a taxpayer proves that the advance payments calculated according to principles stipulated in tax statutes would be disproportionately high in relation to the income expected for a given tax year<sup>38</sup>.

### 6.3. The procedure of applying relief to repay tax due

As a rule, the application of reliefs to repay tax obligations occurs **upon a taxpayer's motion**. **Exceptions** from this rule are cases when a tax authority applies this preference *ex officio*. We deal with such a situation in the case of depreciation of tax arrears. A tax organ may apply this preference without a taxpayer's motion if, among other things:

- there is a reasonable supposition that executive proceedings will not result in the achievement of the amount exceeding executive costs,
- the amount of tax arrears does not exceed a five-fold value of the costs of a reminder in executive proceedings (app. PLN 45),
- the amount of tax arrears has not been satisfied in completed liquidation or insolvency proceedings.

A basic prerequisite (which must be the object of explanatory proceedings) in this case is the establishment of the existence of taxpayer's important interest, or important public interest justifying the application of this preference. In this context, attention should be paid to a possibility of accusing a tax authority conducting the proceedings

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37 Art. 22 T.O.

38 Art. 22 § 2a T.O.

in the matter of such preferences of defective operations. They may involve contravention of admissible degree of recognition. We will deal with such a situation if a tax authority fails to carry out tax proceedings with a purpose to establish the existence of statutory prerequisites (taxpayer's important interest, or important public interest), or carries them out partially.

The **taxpayer's important interest** is, most of all, a situation when s/he is not able to settle tax arrears due to extraordinary force majeure situations (e.g. when his/ her property has been damaged in fire or flood). The **public interest** requires to respect values that are common for the entire society such as: justice, safety, confidence of citizens in the government authorities, the efficiency of operation of the state system, and correction of wrong decisions. The public interest is not only the need to assure maximum income for the state budget but also the reduction of its possible expenses, e.g. for unemployment benefits, or aid from social welfare. The application of the relief to repay the due to public interest can occur in practice if, e.g., such help is necessary to maintain workplaces in a given area.

We should be mindful of the fact that when a tax authority grants a relief to the taxpayer carrying out business activity, it is obliged to apply regulations concerning the **provision of public aid**. It means, as a rule, additional duties, which generally burden a businessman applying for a relief in repayment of tax obligations. A basic relief involves the indication of aid within the frames of which he or she applies for this relief. They may be granted such aid in three forms. First, they may apply for a relief which will not constitute the public aid. Second, they may apply for de minimis aid. Third, they may apply for granting assistance which will constitute the public aid.

With reference to the first case, attention should be paid to Art. 107 of the Treaty on the Functioning of the European Union. It results from it that the aid provided by the state, including self-government, is the public aid only when it meets four conditions simultaneously. Lack of any of them eliminates a possibility of applying for the public aid. Thus a benefit is the state aid if:

- it is granted by the state or from the state resources,



- an entrepreneur is granted it under conditions that are more favorable than those offered on the market,
- it is of a selective character (it favors certain entrepreneur or entrepreneurs, or the production of certain goods),
- it distorts or threatens to distort competition and it affects trade between the European Union Member States.

Taking the above into consideration, it appears that under this procedure, only an entrepreneur who operates locally and who, when granted aid, may not, by all means, threaten to distort or distort competition, or infringe principles of trade between the EU Member States, may apply for the relief in repayment of obligation<sup>39</sup>.

Entrepreneurs applying for *de minimis aid* do not have to prove that the relief they are granted with will not meet the conditions of Art. 107 of the TFEU. Therefore, an entrepreneur competing on the community market may also apply for this preference under this procedure. The relief, however, granted under this procedure, together with other preferences granted to this entrepreneur before, is relatively low. During three years, it may not exceed the equivalence of € 200.000. A taxpayer wishing to obtain this kind of aid, together with a motion for granting aid should submit all certificates of *de minimis aid* he has obtained during a year he or she is applying for aid, as well as during 2 previous years, or a declaration on the value of *de minimis aid* he or she received in that period. If a taxpayer did not take advantage of this kind of aid, from 5th April, 2010, he or she is obliged to submit a declaration on non-receiving such aid<sup>40</sup>. Moreover, an entrepreneur must submit information to a tax authority according to the template set forth by the decree issued by Minister of Finance. Such data are necessary to obtain *de minimis aid* concerning, in particular, his or her economic situation, business activity he or she carries out, and the value and designation of the state aid received with reference to the same costs that qualify them

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39 The literature depicts that instead of the notion of infringement trade principles the notion of inconsistency with trade principles should be used. P. Marquardt, *Pomoc publiczna dla małych i średnich przedsiębiorców*, Warsaw 2007, p. 51.

40 L. Etel, *Ulgi w spłacie zobowiązań podatkowych – zmiany w pomocy de minimis*, in: M. Popławski (ed.), *Ordynacja podatkowa. Zagadnienia proceduralne*, Białystok 2011, p. 165 and next.

to be comprised by the aid that de minimis aid is to be designated to cover.

An entrepreneur applying for a relief that constitutes the state aid must meet other conditions. First of all, he or she should indicate the aim such aid will serve. It may serve, inter alia, a repair of damage caused by natural disasters, or other extraordinary events, prevention or liquidation of serious disturbances in the economy of a supra-sector character, or trainings<sup>41</sup>. Then, depending on a kind of aid, he or she should meet requirements resulting from the Cabinet's decrees which stipule precise conditions of granting individual reliefs in the repayment of tax obligations<sup>42</sup>.

#### 6.4. Prolongation fee

**Prolongation fee** is a due paid for the State Treasury or local self-government units by the subject who was granted a relief to repay tax obligation in the form of deferred time limit to repay tax, or pay tax in installments, or deferred, or put tax arrears into installments together with default interest.

Prolongation fee is **compulsory** if the preferences mentioned above are applied in the form of taxes constituting the state budget income. On the other hand, this fee is **optional** (the body constituting a local self-government unit decides on its existence) in the case of taxes constituting income of local self-government units.

The due level of prolongation fee is 50% and in the case of reliefs concerning taxes constituting income of a local self-government unit, not more than 50% of the interest rate for the delay. The fee is calculated in the tax authority's decision granting the relief to repay.

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41 Art. 67b § 1 point 3 T.O.

42 L. Etel, Komentarz do Art. 67b ustawy z dnia 29 sierpnia 1997 r. Ordynacja podatkowa, [in:] R. Dowgier, L. Etel, C. Kosikowski, P. Pietrasz, M. Popławski, P. Presnarowicz, Ordynacja podatkowa. Komentarz, LEX, 2011, III ed.

## 7. Scope of tax responsibility

### 7.1. General remarks

The responsibility to pay tax is the right to demand tax payment from the subjects obliged to pay it, as well as the powers to apply measures envisaged by law, aiming at the enforcement of due amounts from those subjects' assets<sup>43</sup>; this right can be performed by tax creditors, i.e. the State Treasury or local self-government units.

As a rule, the responsibility to pay tax is of **financial, personal and non-limited nature**. It means that the duty of a debtor to pay refers to his/her entire property that exists at the moment of its performance. The responsibility to pay tax can concern a few subjects such as: taxpayers, tax remitters and tax collectors, legal successors and third parties. The rules thereof depend on tax obligations that a given subject is burdened with and which have been imposed on him/her by the provisions of law.

Duties concerning such subjects may involve payment of certain tax dues by them. It is connected with a possibility of transferring responsibility that was originally burdening a taxpayer upon such subjects. Their responsibility may occur **next to taxpayer's liabilities** (it refers to the so called third parties), or **in place of taxpayer's responsibility** (it refers to heirs or legal successors), or **independent of taxpayer's responsibility** (it refers to a tax remitter or collector).

### 7.2. Responsibility of taxpayers

A taxpayer is responsible with all his/her assets for taxes resulting from tax obligations. It means that if a taxpayer fails to pay tax voluntarily, a tax creditor has the right to its compulsory enforcement because the responsibility for tax obligations is independent of the taxpayer's will. His/her responsibility, however, is of a personal and non-limited nature here.

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43 B. Brzeziński, Odpowiedzialność podatnika, płatnika i inkasenta w prawie podatkowym, Toruń 1993, p. 6.

The responsibility of the taxpayer refers to each tax regardless of the form it is to be paid, therefore, it also refers to advance tax payments, or installments. Moreover, it is also applied to tax arrears and dues that are treated equally to them.

As a rule, the scope of the taxpayer's responsibility for taxes resulting from tax obligations extends throughout the entire period in which s/he is burdened with tax obligation. However, this **responsibility is limited if taxes are paid by tax remitters or tax collectors**. It means that the collection of an appropriate amount of tax by the tax remitter effects in the expiry of the taxpayer's tax obligation. If the tax remitter fails to transfer the tax collected from the taxpayer, the latter one cannot be held accountable. If the tax remitter collected tax, we deal with his/her responsibility.

The legislator introduced special rules of responsibility with reference to **taxpayers who are married**. In such cases, the responsibility for taxes resulting from tax obligations covers separate assets of the taxpayer and joint property of the taxpayer and his or her spouse. Responsibility of a taxpayer's spouse for tax obligations can be modified contractually, or by court's decision, as a consequence of limitation, exclusion, or termination of the statutory property co-ownership. Limitation or termination of property co-ownership may be performed before the contraction of, or during marriage. In the latter case, however, a taxpayer's spouse will be held responsible for tax obligations arising before such actions were performed.

Taking the above into consideration, there is certain limitation of responsibility concerning a spouse of the taxpayer who cannot be obliged to bear responsibility from his or her separate assets. Nevertheless, there is an exception from this rule. It regards a possibility of transferring responsibility on third parties, who are, inter alia, taxpayer's relatives (see II, 7.5.). In this case, it is possible to execute tax also from separate assets of a taxpayer's spouse.

### 7.3. Responsibility of tax remitters and tax collectors

A tax remitter that does not perform their duties (of calculating and collecting tax from a taxpayer and paying it within appropriate time limits to the tax authority) is liable for the tax not collected, or for the tax collected and not paid in. It means that s/he is liable for the tax not collected from a taxpayer, the tax collected from a taxpayer in a lower amount than the due one, and also for the tax collected from a taxpayer but not paid in. If the tax authority establishes the circumstances mentioned above, it should issue a **decision concerning tax responsibility of the tax remitter**, in which the amount due in respect of the tax not collected, or of the tax collected and not paid in should be determined.

A tax collector is responsible with all his/her assets for taxes collected from a taxpayer and not paid in to the tax authority. In that case, the tax authority should issue a **decision concerning tax responsibility of the tax collector**. However, in the situation when s/he has not collected taxes s/he is obliged to, they are not held accountable.

### 7.4. Responsibility of legal successors

**Legal successors** are subjects formed as a result of a merger, or consolidation of other subjects. They take over all rights and duties of a newly created subject or subjects stipulated by the provisions of the tax law. Also taxpayer's successors who are natural persons take over the deceased's tax liabilities and rights that are stipulated by the provisions of the tax law.

Indicating the scope of succession in the tax law, attention should be paid to the fact that legal successors take over not only **tax-like obligations** (e.g. an obligation to pay tax, an obligation to pay dues for a tax remitter), but also **tax-like rights** (e.g. the right to claim excess payment refund and tax refund, the right to take advantage of reliefs in the repayment of tax obligations granted to the predecessor).

A clear division can be made in tax regulations concerning legal responsibility of legal successors. The two types of **legal successors** are: legal persons (e.g. commercial law companies), organizational

units having no legal personality (e.g. state budget institutions), and natural persons.

With regards to the first category (**legal persons and organizational units having no legal personality**), the legislator introduces a basic rule, according to which subjects formed as a result of a merger, or consolidation take over *ex officio* all rights and duties of a newly created subject or subjects. It means that a tax authority does not issue a decision indicating the scope of tax responsibility of such subjects. Such a scope should be determined by the subjects set up in effect of the transformation. In some cases, however, doubts may arise as to the determination of a scope of this responsibility. It particularly regards the division of corporations, or separation of new ones from the already existing subjects. A **simple transformation** (e.g. a limited liability company transforms into a public limited company), or a merger (e.g. two limited liability companies transform into a newly set up public limited company) do not pose any problems. In both such cases, newly set up companies take over all rights and duties of their predecessors. And yet, how should a scope of **responsibility of the companies that were formed in effect of a division** be established? Are they responsible identically? Does a scope of their responsibility depend on the value of assets they are taking over, or is it independent of this? Referring to this issues, attention should be paid to the elements of assets that constitute an organized part of the enterprise which were granted to these subjects in the plan of a division<sup>44</sup>. Two issues emerge based on it. First, taking over these assets (constituting an organized part of the enterprise) by newly formed companies is an element that is necessary to create their responsibility. Second, a scope of their responsibility is established proportionally to the value of such assets. In result, if two companies set up in effect of the transformation take over assets constituting an organized part of the enterprise of the same value, each of them is held equally responsible (50%) for tax debts and takes over the rights of the company being transformed in the same proportion. Consequently, if in result of a division two companies are formed and only one of them receives the assets constituting an organized part of the enterprise

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44 See: Art. 93c T.O.

(e.g. a land with the enterprise's building), only this company should be treated as a legal successor. If the second company owns assets that are not constituting an organized part of the enterprise (e.g. taken over commodities), it may only be held responsible as a third party (see II, 7.5.). It means that realizing the original company's (a company before the division) tax debts, a tax authority first undertakes executive operations against a legal successor (a company which took over assets constituting an organized part of the enterprise), and only then, in case of this subject's insolvency, it may claim tax payment from a third party (a company which took over assets that are not constituting an organized part of the enterprise).

In the case of the **responsibility of natural persons** who are successors, the rule applied therein says that the taxpayer's successors take over the testator's tax obligations that are stipulated by the provisions of the tax law (e.g. income tax from natural person, VAT, excise duty). Tax responsibility of the successors refers also to tax obligations which result from the decisions issued on the basis of the provisions of the tax law (e.g. a real estate tax, agricultural and forestry tax).

A heir may either waive or limit his or her responsibility. It is connected with the fact that the Civil Code's provisions on the acceptance and disclaimer of inheritance and responsibility for inheritance debts apply to heirs' responsibility for testator's tax obligations<sup>45</sup>. Consequently, this responsibility will be waived if this subject disclaims inheritance. On the other hand, we will deal with limitation of such responsibility solely to the value of the assets taken over after deducting burdens when a heir accepts inheritance with the benefit of inventory.

After determining the successors, the competent tax authority transfers tax responsibility for the testator's tax obligations onto them issuing a decision regarding the scope of the successors' responsibility. The tax authority can issue this decision both if no tax proceedings were instigated against the testator (e.g. the tax authority did not manage

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45 Art. 98 § 1 T.O.

to undertake any action connected with claiming liabilities the testator was burdened with, e.g. in income tax from natural persons, during his or her lifetime), and if tax proceedings in which the testator was a party to, were concluded with a final decision (e.g. the tax authority served on a heir a decision determining the value of tax obligation confirming that this subject failed to pay, e.g., tax on goods and services).

## 7.5. Responsibility of third parties

**Third parties are the** subjects indicated in the Tax Ordinance that can be responsible with all their assets for taxpayer's tax arrears, jointly and severally with the taxpayer<sup>46</sup>. These parties are responsible with all their assets jointly and severally with the taxpayer for his/ her tax arrears. It means that the tax authority can demand from the taxpayer to meet the dues and at the same time demand that the third party does so.

It should be taken into consideration that the responsibility of the third party is: **accessory** (the issuance of a decision on the responsibility of the third party, by all means, exempts the previous debtor from the duty to settle tax obligation), as well as **auxiliary** (a tax creditor must first carry out the execution from the taxpayer, and only if it is ineffective in whole or in part, it can be directed to the third party) and **personal** (from the third party's entire property and not only from individual objects s/he possesses).

As a rule, responsibility of third parties regards tax obligations which are connected with the business activity conducted by a taxpayer. Nevertheless, there are exceptions in this scope, where third parties' responsibility also regards dues that are not connected with such an activity. In this context we may talk about a **narrower and wider scope of third parties' responsibility**. In the first case, responsibility is limited exclusively to dues connected with the business activity conducted by a taxpayer. In the second case, third parties' responsibility deducts taxpayer's liabilities which are connected both with the

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46 A. Olesińska, Odpowiedzialność osób trzecich za zobowiązania podatkowe, Lublin 2000, p. 11 and next.



business activity and those that do not refer to this sphere. Third parties generally bear the narrower responsibility. Wider responsibility regards only some categories of persons such as: taxpayer's divorced spouse, or responsibility of the real estate's leaseholder.

The responsibility of the third party is adjudicated by a tax authority in the form of a decision after conducting proceedings in this matter. A decision on tax responsibility of a third person cannot be issued if 5 years lapsed from the end of a calendar year during which the tax arrears arose<sup>47</sup>. If such a decision is served on a third person, it will be possible to claim certain dues from them within 3 years from the end of a calendar year during which it was served<sup>48</sup>.

Only the subject treated in the act as the third party can be answerable for tax obligations.

Responsibility of individual third persons depends on the occurrence of certain conditions indicated in a statute. Subjects treated by the statute as third parties are indicated below. At the same time, basic prerequisites regarding their responsibility are presented.

In the case of **divorced spouse's** responsibility<sup>49</sup>, it regards tax obligation that arose during property co-ownership, but only to the value of his or her share in the joint property. Therefore, this formula cannot be applied when there was no property co-ownership between spouses at all. The application of this formula is also limited if there was limitation of property co-ownership between spouses. The abovementioned rules concerning divorced spouse's responsibility refer also to the situation when marriage was annulled or separated.

**Taxpayer's relatives** (descendants, ascendants, siblings, descendants' spouses, adoptees and persons who remain in factual conjugal life with a taxpayer) are responsible for tax obligations connected with the business activity conducted by a taxpayer under the following conditions. First, taxpayer's arrears arose when this person was permanently cooperating with a taxpayer in this activity. Second,

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47 Art. 118 § 1 T.O.

48 Art. 118 § 2 T.O.

49 Art. 110. § 1 T.O.

this subject gained benefits from the activity conducted by a taxpayer<sup>50</sup>. Third, such remuneration exceeded the value of alimony considerations such a person would have been entitled to from a taxpayer.

A **buyer of the enterprise** or its organized part is responsible with his or her whole assets jointly with a taxpayer for tax arrears connected with the business activity being conducted that arose before the day of the purchase<sup>51</sup>. The scope of the buyer's responsibility is limited to the value of the purchased enterprise, or its organized part. Moreover, it is limited exclusively to tax arrears which were not revealed in the certificate mentioned in Art. 306g of the Tax Ordinance. A potential buyer of the above-mentioned assets may receive such a document, which is issued by a tax authority. Tax arrears which he or she may already be responsible for as a buyer may result from this document.

A name **guarantor** is responsible for tax arrears of a name guarantee. We deal with such a situation if a taxpayer (a guarantee), with the consent of another person (a guarantor), in order to conceal conducting business activity, or a real scope of such an activity, uses or will use the first and last name, business name, or company name of this person. In this case, a name guarantor bears joint responsibility with a taxpayer with his or her whole assets for tax arrears that arose when such an activity was conducted<sup>52</sup>. We may deal with such a case, inter alia, in trade carried out via the Internet. In order to, e.g., reduce tax, an entrepreneur may use the data (name) of another company actually participating in trade transaction as this company. In this case a taxpayer is a subject actually conducting business activity. In case of its insolvency, a tax authority may claim payment of tax from the enterprise which "lent" its name.

An **owner, self-contained owner, or perpetual user of things, or property right** remaining in a relation with a user of a given thing, or property right are responsible for tax arrears of the user that arose in connection with the business activity conducted by the user if a given thing or property right are connected with the business activity or serve

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50 Art. 111 T.O.

51 Art. 112 T.O.

52 Art. 113 T.O.

to conduct it<sup>53</sup>. Therefore, if a leaseholder conducting business activity in rented premises fails to pay tax (e.g. VAT tax, income tax), a tax authority may claim satisfaction of this liability from the premises' owner. Responsibility of the owner of a thing for tax debts of its user occurs exclusively when there are certain associations between these subjects of family-like, capital or property character in the understanding of regulations on income tax, or resulting from an employment relation. Such responsibility is also limited to the equivalence of things or property rights being the object of use.

We deal with a certain kind of reversal of the situation when a third party is a **real estate's leaseholder or user**. Such a person is responsible jointly with a taxpayer who is the real estate's owner, perpetual user, or self-contained user for tax arrears for tax obligations resulting from the real estate's taxation that arose during the period of lease or use<sup>54</sup>. These subjects must also be associated by family, capital or property in the understanding of regulations on income tax, or resulting from an employment relation. We will deal with such a situation in connection with, e.g., conclusion of a contract of lease of the real estate between related persons. The owner will be a taxpayer of a real estate tax. If he or she fails to pay appropriate tax, it may be executed from the leaseholder. No assets belonging to a taxpayer from whose assets the tax may be executed may occur in connection with the existing burdening of the real estate with a mortgage whose value exceeds the real estate's value.

**A partner in a civil law company, general partnership, or partnership, and limited partnership's or public limited partnership's active partner** are responsible with their whole assets jointly with the company and other partners for the company's tax arrears<sup>55</sup>. This principle also applies to a former partner. He or she is responsible for tax arrears for liabilities whose term of payment lapsed when a given subject was a partner.

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53 Art. 114 T.O.

54 Art. 114a T.O.

55 Art. 115 T.O.

**Legal persons' management members** may also be third persons. It concerns, *inter alia*, limited liability partnerships, public limited partnerships, housing cooperatives, state enterprises, etc. These subjects are responsible for tax arrears of taxpayers, that is legal persons in the organs where they held managing functions<sup>56</sup>. The above-mentioned third parties may exclude their responsibility if they prove that in due time a motion was submitted to announce bankruptcy, or proceedings to prevent bankruptcy announcement were instigated (proceedings to conclude an agreement), or prove that failure to submit a motion to announce bankruptcy or instigate proceedings to prevent bankruptcy declaration (proceedings to conclude an agreement), occurred without their fault. The exclusion of this responsibility takes place also when these persons indicate the company's property from the execution carried out from which satisfaction of the company's tax arrears will be enabled in a considerable part. In this case, similar to the responsibility of management members that was discussed above, it covers tax arrears for liabilities whose term of payment lapsed when they were holding duties of management members.

**Legal persons effecting a take-over, or legal persons formed in result of a division** (newly established persons) are responsible jointly with their whole assets for tax arrears of a legal person being divided if the assets are taken over in result of a division, a division by separation, and when assets of a legal person being divided do not constitute an organized part of the enterprise<sup>57</sup>. Other rules of responsibility apply if the assets received by the subjects formed in result of the above-mentioned divisions constitute an organized part of the enterprise. In this case, such a subject is held responsible not as a third person but as a legal successor<sup>58</sup> (see part II, 7.4.). As far as divisions are concerned, it may happen that one of the companies will simultaneously be responsible as a third party (it takes over only certain commodities, that is the assets that do not constitute an organized part of the enterprise), whereas the second one as a legal successor (it takes over, e.g. real estates, that is assets that constitute an organized part of the enterprise).

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56 Art. 116 T.O.

57 Art. 117 T.O.

58 Art. 93c T.O.

A scope of responsibility of legal persons effecting a take-over, or newly established legal persons who are third parties is limited to the value of acquired net assets resulting from the plan of a division, and it is limited to arrears for tax obligations that arose before the day of a separation.

**A guarantor or warrantor** whose security was accepted by a tax authority within the frames of the so called voluntary security (see II, 3.7.) is responsible jointly with a taxpayer for the liability that is the object of this security. This responsibility is limited to the value of the guaranteed or warranted amount and during the period indicated in the guarantee or warranty<sup>59</sup>.

## 7.6. Joint responsibility for tax obligations

**Joint responsibility for tax obligations** involves a situation when a tax authority may demand a whole or a part of the tax from all the taxpayers jointly, from some of them, or from each of them separately, and the satisfaction of the creditor gained from any of the debtors exempts the other debtors.

**Joint responsibility occurs only on the stage of tax execution** rather than establishment, or determination of the value of tax obligation. It means, inter alia, that when a decision establishing or determining the value of tax obligation is issued, it should be done against all taxpayers who are burdened with a joint obligation. Only when the tax is not paid voluntarily by taxpayers, a tax authority may claim payment of the tax from any subject, or from each subject in the proportion it deems appropriate.

Joint responsibility for tax obligations occurs exclusively in cases when such **responsibility results directly from a statute** (when the Act imposes tax liability into at least two subjects). We deal with it in the following taxes:

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59 Art. 117a T.O.

- income tax from legal persons; companies forming a tax capital group are jointly responsible for its liabilities for income tax owed for the period of the agreement duration<sup>60</sup>,
- income tax from natural persons; spouses who pay tax jointly, bear joint responsibility for the tax indicated in the annual tax return<sup>61</sup>,
- a tax on civil law transactions; joint responsibility concerns parties to the contract of exchange and civil law partnership agreement<sup>62</sup>,
- a real estate tax; in case of two or more co-owners of a land, buildings or building structures except a tax obligation for managing common land and common part of the building when the premises' ownership is separated<sup>63</sup>,
- a tax on means of transportation; if a means of transportation is co-owned by two or more natural or legal persons<sup>64</sup>,
- an agricultural tax; when lands that are subject to agricultural tax are co-owned, or are owned by two or more subjects except a situation when they make an agricultural farm conducted in whole by one of the co-owners (or co-holders)<sup>65</sup>,
- a forestry tax; with reference to co-owners or co-holders of the forest<sup>66</sup>,
- a stamp duty; in case of the submission of joint application or performing an official action upon their joint application, or the issue of a certificate, permit (license, concession) upon their joint application, whereas in the case of the submission of a document proving the provision of the power of attorney or procuration, or its copy, extract or duplicate, the obligation is borne jointly by a principal and agent, or an entrepreneur and proxy<sup>67</sup>.

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60 Art. 1a par. 14 L.P.I.T.

61 Art. 6 par. 2 L.P.I.T.

62 Art. 5 par. 2 of the Act on Tax on Civil Law Transactions.

63 Art. 3 par. 4 L.L.T.

64 Art. 9 par. 2 L.L.T.

65 Art. 3 par. 5 of the Act on Agricultural Tax.

66 Art. 2 par. 4 of the Act on Forestry Tax.

67 Art. 5 par. 2 of the Act on Stamp Duty.

We deal with a **special kind** of joint responsibility in the case of **liabilities arising in result of the service of a decision determining the value of the obligation**. In this case, taxpayers who were served with a decision determining the value of tax obligation bear joint responsibility<sup>68</sup>. Therefore, if a tax authority serves, e.g., a decision to only some taxpayers (three out of four owners of a real estate), it may claim this due only from them.

Another principle of responsibility was introduced in the case of the **so called joint pecuniary obligation**. In such a situation, the principle of joint responsibility is applied at the moment a decision (summons to pay) is served on a person who, according to separate provisions, was an addressee of the decision (summons to pay). It means that serving such a decision on even one taxpayer allows to execute tax also from other taxpayers.

## 8. Tax procedures

### 8.1. A model of tax proceedings

Tax proceedings may be perceived in a wide and narrow context. The **wide understanding of tax proceedings** covers all legal and factual transactions undertaken by tax authorities, audit organs, a taxpayer and other participants to the proceedings based on the provisions of law aiming at establishment of the existence of tax liability, concretization of tax obligation and its voluntary realization<sup>69</sup>.

**In the narrow context, tax proceedings** are a multi-stage process aiming at the issuance and delivery of a tax decision. In a further part of this chapter our considerations thereon will regard solely the narrow understanding the proceedings.

Tax proceedings comprise the following four stages:

- **the initiation of the proceedings,**
- **proceedings to take evidence,**

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68 Art. 92 § 1 T.O.

69 L. Etel (ed.), Prawo podatkowe, Warsaw 2008, p. 226

- **setting a 7-day time limit to get acquainted with the collected evidence and**
- **issuing and serving a tax decision.**

Due to the circumstances of a given case, it can be restricted, e.g. in connection with the possibility of deviation from instigating tax proceedings, or by setting the taxpayer a time limit to get acquainted with the evidence gathered in the case. Tax proceedings, however, need not be instigated, e.g., in the case of determination of tax obligations which, according to separate provisions, are set forth annually if the factual state on the basis of which the value of tax obligations for a previous period has not been changed<sup>70</sup>. In some cases, before the issuance of a tax decision a taxpayer need not be assigned a 7-day period to get acquainted with the collected evidence. We deal with such a situation, e.g. in tax on inheritance and donation if the decision is to be issued solely based on the data included in a tax return submitted by a taxpayer<sup>71</sup>.

## **8.2. General rules of tax proceedings**

**Tax rules** are basic principles of tax proceedings that are, most of all, to protect the “weaker” party to the legally binding fiscal relation, i.e. the taxpayer in tax proceedings. They are of a normative character, which means that their violation decides about the defect of these proceedings and may be the ground for the annulment of a given decision. The catalogue and the essence of general rules of tax proceedings are specified in the Tax Ordinance (Art. 120–129), which go as follows: the rule of **legality and lawfulness** (tax authorities act pursuant to the provisions of law; all actions undertaken by a tax authority, including the issuance of a tax decision, must be based on valid legal regulations; it is important to apply the provisions of the substantive law being in force when the tax liability arose, whereas in the case of the application of the provisions of procedural law we include those that are valid on the day of the issue of the decision),

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70 Art. 165 § 5 point 1 T.O.

71 Art. 200 § 2 point 3 T.O.



the rule of **inspiring confidence in tax authorities** (according to this principle, a tax authority should interpret doubts connected with the wording of the provisions being applied in favor of a taxpayer), the rule of **providing information** (as part of the tax proceedings, a tax authority should provide necessary information and explanation about regulations connected with the object of the proceedings; such an action occurs in settlements whose legal basis are indicated; tax authorities should also provide information about the applied provisions of law each time a taxpayers requests this), the rule of **objective truth** (in the course of proceedings, tax authorities undertake all necessary acts in order to explain the factual state precisely, and to settle the case in tax proceedings; therefore a tax authority is burdened with the obligation to prove that certain consideration should be paid by the addressee of a tax decision, thus a tax authority should collect necessary evidence in the matter; consequently, on the one hand, it is inadmissible to transfer on a taxpayer a burden of proof that the duty to pay tax does not burden him or her, on the other hand, a tax authority has the right to demand from a taxpayer to submit certain evidence only he or she possesses), the rule of **active participation of the parties to the proceedings** (tax authorities are obliged to enable parties to participate actively in every stage of the proceedings and, before issuing a decision, allow them to present their opinions as to the gathered evidence and material and also the claims put forward), the rule of **persuasion** (tax authorities should explain to parties the merits of the prerequisites taken into account while settling the case in order to encourage the parties to implement the decision, as far as possible, without applying means of coercion), of **diligence, promptness and simplicity of proceedings** (tax authorities should act promptly and with due diligence, using the simplest means available to settle the case; cases which do not require gathering evidence, information or explanations should be settled immediately), the rule of **a written form** (this principle refers not only to the decision but also to other settlements which may appear during tax proceedings, e.g. a ruling, or summons; on the one hand, undertaking such actions against a taxpayer allowing the principle of written form formalizes these actions, whereas on the other hand, it provides better assurance of the protection of taxpayer's rights), the rule of **two-instance proceedings**

(in every case, a taxpayer has the right to demand verification of the tax decision's correctness; the assessment of correctness of a decision issued by a tax authority is made by the II instance organ, in some cases, however, such verification is carried out by the same organ (but not by the same employee) which issued the questioned decision (see II, 2.2. and 2.3.), the rule of **permanence of final decisions** (decisions which cannot be appealed against in tax proceedings are final; revoking or changing such decisions, stating their invalidity or resumption of the proceedings may only occur in cases provided for in this Act and in tax acts), and of tax proceedings openness only to parties.

### **8.3. Parties to the proceedings and their representatives**

Parties to the proceedings are, on the one hand, a **tax authority**, whereas on the other hand, it may be a **taxpayer, remitter, collector, third party, or legal successor**. A taxpayer or other above listed subjects of the so called passive legal and tax relations (see I, 2.3.) in tax proceedings act personally, through their representatives, statutory representatives, guardians, or agents. What is more, a **social organization** may be entitled to act as a party. In the matter concerning another person, upon his or her consent, the latter one among these subjects may demand to start proceedings, or admit itself to participate in the proceedings. This subject should be awarded this right when the provision of aid in the scope of tax issues is this organization's statutory objective and when public interest advocates this<sup>72</sup>.

**Representatives** of taxpayers who are legal persons or organizational units having no legal personality are natural persons entitled to act on their behalf. They will be subjects indicated, inter alia, in the State Court Register. Statutory representatives (e.g. parents) represent a taxpayer if he or she does not have full capacity to legal actions (e.g. a taxpayer is a minor, or incapacitated).

A **guardian** is appointed by a court upon a tax authority's motion for a person incapable of legal actions, or an absentee. A similar action should take place if a legal person or organization unit having no

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72 Art. 133a T.O.

legal personality cannot conduct their matters due to a lack of bodies appointed to carry it out<sup>73</sup>.

A taxpayer has the rights to appoint his or her **agent**. He or she may be exclusively a natural person (that is, it cannot be, e.g., a company or legal office) who has full capacity to legal actions. They do not need be, however, experts who professionally deal with legal services, e.g. a solicitor, legal advisor, or tax advisor. Agency should be made in writing. As far as the scope of this document is concerned, it should be pointed out that on the one hand, agency may be wide (e.g. to all tax matters conducted against a given taxpayer), but on the other hand, this document is efficient only in the matter it was made for<sup>74</sup>. If another tax proceedings are instigated, a tax authority does not presume the agency validity in the next case as well. In case of instigation of separate tax proceedings, an agent or taxpayer should submit to the files of a new case a new agency or a copy of the earlier general agency that was already used. Otherwise, it is assumed that a taxpayer acts without an appointed agent.

Conducting proceedings, a tax authority most frequently acts through an employee of such an organ whom it may authorize in writing to, inter alia, resolve matters on its behalf and in the agreed scope, in particular to issue decisions, rulings and certificates<sup>75</sup>.

In some cases, however, there is a need to **exclude a tax authority from conducting individual tax proceedings, or exclude an employee thereof**. In the former case, neither a tax authority nor its employees can conduct a given case. Then there is a need to appoint another organ to deal with a given case. In the latter case, a tax authority will have to appoint another person from among its employees to conduct given tax proceedings. The purpose of the institution of exclusion is an endeavor to assure impartiality on the part of administrative organs conducting tax cases.

**The subject to exclusion are, most of all, first instance tax authorities** (a head of a Revenue Office or Customs Office, a village

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73 Art. 138 T.O.

74 SAC's judgment of 23.12.2008, II FSK 1344/07, LEX No. 525846

75 Art. 143 T.O.

mayor, mayor and president of a city). This situation should occur if acting in accordance with their competence, these organs (see II, 2.2., 2.3.) would have to conduct tax proceedings concerning natural persons who hold functions in these organs (e.g. a taxpayer is a head of a Revenue Office). What is more, an organ is excluded when a case which, as a rule, is subject to a given organ, is to concern deputies of such persons (e.g. a taxpayer is a deputy head of a Revenue Office), their relatives (e.g. a taxpayer is a son of a head of a Revenue Office)<sup>76</sup>, or their supervisors (a taxpayer is a director of a Tax Chamber). In the first two cases, an organ competent to indicate another tax authority to conduct tax proceedings will be the II instance organ (e.g. a director of a Tax Chamber), whereas in the latter one, a competent organ will be appointed by Minister of Finance.

**We deal with the exclusion of an employee of a tax authority** when he or she is a party to the proceedings, or remains in close relations with the party, e.g. family (e.g. a taxpayer is the employee's wife), or legal relations (a taxpayer is the employee's business partner)<sup>77</sup>. Moreover, an employee has to be excluded if:

- there are doubts as to the employee's impartiality (e.g. a taxpayer was in a legal dispute with the employee),
- the employee was a witness or expert in a given case,
- the employee took part in the issuance of the questioned decision.

If a tax authority's employee is excluded, a head of a Revenue Office, a head of Customs Office, a village mayor, mayor (president of a city), starost or province marshal, a director of a Tax Chamber, a director of Customs Chamber or Minister competent in the matters of public finance respectively, appoint another employee or officer to conduct this case<sup>78</sup>.

If a **member of self-government appeal board is excluded**, its president appoints a person authorized to substitute the excluded one.

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76 Art. 131 T.O. and Art. 132 T.O.

77 Art. 130 T.O.

78 Art. 130 § 4 T.O.

If due to the exclusion of its members, self-government appeal board cannot resolve a case due to a lack of a full composition of the bench, Prime Minister appoints another self-government appeal board to resolve the case by means of a decision<sup>79</sup>.

#### 8.4. The initiation of tax proceedings

Tax law stipulates two courses of the initiation of tax proceedings, i.e. **upon the party's request** and *ex officio*. In the first case, it is initiated on the day when the request is submitted to the tax authority. If the request is submitted in an electronic form, the tax proceedings are instigated on the day when the tax authority, or data processing support unit of tax administration receives the request. Taxpayers initiate tax proceedings **upon their request**, for example, submitting an application for a statement of tax overpayment, or applying for reliefs concerning repayment of tax obligations.

Tax proceedings are initiated *ex officio* by the issuance of a ruling in this matter. This procedure is applied, among the others, when the taxpayer does not declare output tax, which results in the necessity to assess the amount of the tax obligation by the tax authority in a decision issued in tax proceedings. The day the party is served with the ruling on initiation of legal proceedings is the date of initiation of the proceedings *ex officio*. **In some cases it is not necessary to issue and serve formally the ruling mentioned.** It occurs, inter alia, in the cases assessing tax obligations which, according to separate provisions, are assessed annually (a real estate tax, agricultural tax, forestry tax) if the factual state on the basis of which the amount of the tax obligation for the previous period was assessed has not changed.

It means that the proceedings in the matter of determination of the value of tax obligation concerning a tax on a real estate for a given year will not have to be initiated if a tax authority did not obtain any information about a change of the factual state which was the basis to the issue of the decision in a previous year. Other instances of the cases when tax proceedings are not instigated concern the following matters:

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79 Art. 130 § 5 T.O.

- depreciation of tax arrears *ex officio* (see II, 6.2.),
- making a decision immediately enforceable,
- issue of a decision on security (see II, 3.7.),
- issue of a decision on tax on inheritance and donation when the tax will be assessed based on the data indicated in a tax return submitted by a taxpayer.

Tax authorities should conduct tax proceedings in such a way as to complete them as fast as possible (the principle of prompt settlement and due diligence of tax proceedings expressed in Art. 125 of the Tax Ordinance). Therefore resolving a matter within the frames of tax proceedings should be completed **instantly**. In particular, it regards matters which may be resolved based on evidence presented by the party together with a demand to instigate proceedings, or based on facts that are commonly known and evidence known *ex officio* to the organ conducting the proceedings. In case of the matters requiring hearing of evidence be carried out, the proceedings should be closed **without unnecessary delay**, not later, however, than **within a month**. Whereas especially complex cases should not last more than 2 months from the day the proceedings were initiated<sup>80</sup>. Appeal proceedings should last **no longer than 2 months from the day of receiving an appeal** by an appeal organ, whereas a case where a hearing was carried out, or the party submitted a motion to carry it out should **not last longer than 3 months**<sup>81</sup>.

## 8.5. Hearing of evidence

In the course of the proceedings, tax authorities shall undertake all necessary acts in order to explain the factual state precisely and to settle the case in tax proceedings<sup>82</sup>. The tax authority shall estimate whether a given circumstance has been proved only on the basis of all the evidence gathered<sup>83</sup>, and then make a decision closing a given case.

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80 Art. 139 § 1 and 2 T.O.

81 Art. 139 § 3 T.O.

82 Art. 122 T.O.

83 Art. 191 T.O.

**The burden to carry out appropriate hearing of evidence lies with the tax authority, not a taxpayer.** The tax authority shall be obliged to gather and thoroughly examine the whole evidence<sup>84</sup>. It means it is burdened with determination of circumstances which should be explained and ensuing actions that will be necessary to this end. It does not mean that a taxpayer cannot suggest undertaking certain actions to the tax authority. Nevertheless, the authority is not bound by the party's motion as to evidence. The request of the party to produce the evidence shall be granted if the evidence consists of circumstances relevant to the case unless the circumstances are sufficiently confirmed by different evidence<sup>85</sup>. The tax authority should refuse the taxpayer's request, e.g., concerning hearing of evidence of a witness about the circumstance which is irrelevant to the case, or has already been explained otherwise beyond any doubt (e.g. in connection with unquestionable official documents).

Carrying out hearing of evidence, the tax authority may use different means of evidence. On the other hand, the authority is only bound by the principle according to which illegal materials cannot be used as evidence. The act indicates thereon that everything which may contribute to elucidation of the case and which is not at variance with law shall be admitted as evidence<sup>86</sup>.

In tax proceedings, the tax authority may use as basic evidence **tax books, official documents, depositions of witnesses, experts' opinions, materials and information gathered as a result of visual inspections, tax returns and other documents gathered in the course of inspection acts or tax control, as well as the materials gathered in the course of criminal proceedings or proceedings in matters of fiscal offences or fiscal petty offences**<sup>87</sup>.

Some taxpayers are obliged to keep **tax books**. Data based on which the tax base is established (most of all, income and turnover) are entered into such documents. Thus tax books are used particularly in

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84 Art. 187 § 1 T.O.

85 Art. 188 T.O.

86 Art. 180 § 1 T.O.

87 Art. 181 T.O.

income tax and tax on goods and services. For the needs of income tax, tax book of, inter alia, revenues and expenditures, or account books are kept. Taxpayers of the tax on goods and services keep, e.g., a register of sales and purchases.

The tax authority is bound by the data included in the tax books if they are kept in a reliable (the entries reflect the factual state) and non-defective way (according to principles resulting from separate provisions)<sup>88</sup>. If the tax authority states that tax books are kept in an unreliable or defective way, it shall specify in the record of the books' examination the period and part which is not acknowledged as evidence of the facts recorded in the books<sup>89</sup>.

**Official documents** drawn up in the form specified in the provisions of law by competent authorities shall be deemed the evidence of what was officially stated in them<sup>90</sup>. It means that the tax authority does not need to carry out additional actions if certain data relevant to a given case result from an official document. Such documents are, inter alia, court rulings (e.g. in the matter of confirming the acquisition of inheritance), administrative decisions (e.g. building permit, registration card), certificates issued by administrative bodies, and notary deeds.

The tax authority may decide that in some cases it is necessary to **hear a witness** who is aware of factual (e.g. he or she may confirm running certain business activity by a taxpayer) or legal events (e.g. in order to confirm the conclusion of a sales contract subject to the tax on civil law transaction) that are relevant to a given tax case.

Moreover, as part of the proceedings, if special knowledge is required in a case, the tax authority may appoint an **expert** for the purpose of giving an opinion<sup>91</sup>. Every natural person who has special knowledge (e.g. assessing a value of the real estate reported for taxation) may appoint be appointed as an expert.

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88 Art. 193 T.O.

89 Art. 193 § 6 T.O.

90 Art. 194 § 1 T.O.

91 Art. 197 T.O.



The tax authority may, if necessary, carry out an **inspection**<sup>92</sup>. As part thereof, it is possible to undertake certain actions, e.g. to measure the area of a building occupied to carry out business activity. The party shall be informed by the tax authority of the place and time limit for producing evidence from depositions of witnesses, opinions of experts or inspections at least 7 days before the time limit<sup>93</sup>. The party to the tax proceedings has the right to take part in hearing of evidence, may ask questions to witnesses and experts, and make explanations. The tax authority **may summon a party or other persons to make explanations, to give testimony, or to perform a certain act** personally, through an attorney, or in writing if this is necessary to explain the state of fact, or to settle the case<sup>94</sup>, which is a significant right the tax authority is entitled to. A taxpayer who, in spite of being properly summoned by the tax authority has not appeared personally without justified reason, may be punished by a procedural penalty of up to PLN 2700<sup>95</sup>. It is an essential legal instrument which may be used not only against a taxpayer but any other party to the tax proceedings (a tax remitter, collector, third party, or legal successor). A witness or an expert may be punished by this penalty, inter alia, when they have not appeared personally without justified reason although obliged to do so by the tax authority, or when without good reasons, they refused to give explanations, depositions, to issue an opinion, to show the object of examination, or take part in other act.

## 8.6. Decisions and rulings

The tax authority applies the rule of a written form of the proceedings, most of all, by adopting two kinds of settlements addressed and served to the parties to the tax proceedings: **decisions** and **rulings**.

The decision settles the case as far as its merits are concerned or shall otherwise terminate the proceedings in a given case (for instance, by remitting proceedings in a case). It is a rule that the tax authority

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92 Art. 198 T.O.

93 Art. 190 § 1 T.O.

94 Art. 155 T.O.

95 Art. 262 T.O.

settles the case by means of a decision unless the provisions state otherwise.

Basic elements that should be included in the **decision** are: designation of the tax authority, the issuance date, the party's description, reference to the legal basis, settlement of the case, factual and legal justification, instruction on appeal proceedings – if the decision may be appealed against, the signature of the authorized person, including the first name, surname and official position.

In the course of the proceedings the tax authority shall issue **rulings** concerning particular questions which arise in the course of tax proceedings but which do not decide on the essence of the case (a ruling on suspending the proceedings, a ruling on presenting evidence being in possession of a party). Rulings should comprise the same basic elements that are included in decisions. However, a ruling should contain factual and legal justification only if it may be complained against, or reviewed by an administrative court, and if it has been issued as a result of a complaint against the ruling.

## 8.7. Service of tax documents

Tax authorities may serve documents (decisions, rulings, and summons) against a receipt solely through certain subjects, which are: **post, tax authority's employees, or other authorized persons**. When the tax authority is a village mayor, or mayor (president of a city), the documents may be served by a soltys against a receipt<sup>96</sup>. The tax authority is entitled to choose from among the above listed subjects. In effect of the situation when a document is served by a subject outside the above list indicated in the provision, it will be possible to make a charge of illegal action. In result, the service will be ineffective.

Moreover, the legislation stipulates that documents may be served by electronic communications means if an application has been submitted to the tax authority for serving letters by electronic means by a party, or the party agrees to do so<sup>97</sup>. However, such a situation still

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96 Art. 144 T.O.

97 Art. 144a § 1 T.O.

seldom occurs in practice even though there already are legal regulations that enable the use of an electronic signature by the tax authority's employee signing a tax decision on behalf of the tax authority<sup>98</sup>.

A **place of serving** tax documents depends on the correspondence's addressee. Different principles apply when a taxpayer is a natural person and when a document concerns legal persons or organizational units having no legal personality.

If **natural persons are the addressees**, we may distinguish ordinary (private – received personally by the addressee), or substitute service (through other people, or upon admittance of the presumption of fiction of service).

**Ordinary service** should occur at a place of residence, or a working place. In the latter case, correspondence may be served directly to a taxpayer or the person authorized by an employer to receive correspondence (e.g. a secretary). A document may also be served at the seat of a tax authority. At the same time, it is stated that if a document cannot be served in a way specified above (a place of residence, working place, tax authority's seat), and in other justified cases (e.g. the need to serve due to a short period of prescription of the tax obligation (see II, 5.6.), documents are served in every place the addressee is found.

**Substitute service** occurs if the addressee is absent from his or her house. There are two possibilities thereof. According to the first one, documents are served against a receipt to an adult member of the household, neighbor, or janitor if they take upon themselves to give the document to the addressee. A notice of service of the document to a neighbor, or janitor is placed in the service mailbox, or on the addressee's house door, or in a noticeable place near the entry to the addressee's estate<sup>99</sup>. According to the second possibility, a notice on leaving a document at the post office, or local tax authority's seat for 14 days shall be placed in the addressee's mail box. If the document is not received within this time, the service shall be considered as performed

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98 Art. 143 § 1a T.O.

99 Art. 149 T.O.

after the lapse of the last day of this period and the document shall be kept in the case files<sup>100</sup>.

Different rules apply in the case of **serving documents to legal persons and organizational units having no legal personality**. In both cases, documents shall be served with letters at their seat, or at the premises where they carry on their business activity through a person authorized to receive correspondence<sup>101</sup>. In this case, correspondence may be served to a person authorized to act on behalf of this subject, but also to a person authorized by an employer to receive correspondence (e.g. a person from an applications office). If any person authorized to receive correspondence is absent, it is possible to take advantage of one of the above listed manners of the so called substitute service connected with leaving a document at the post office, or tax authority's seat for 14 days.

As far as this category of subjects is concerned, there is a negative consequence connected with documents service, which regards failure to provide information about changes of a present address of the seat in appropriate registers by taxpayers. If the address of a seat provided by a legal person or an organizational unit having no legal personality does not exist or does not match the one in the appropriate register and it is impossible to determine the place where the activity is carried on, the document shall be left in the case records with the effect of service<sup>102</sup>.

In the context of service concerning addressees who are both natural and legal persons and organizational units having no legal personality, **it is essential to determine the subject who is supposed to be an addressee of the service when such subjects act through the representatives or appointed agents**. Moreover, it is important to **indicate the principles of procedure when the addressees refuse to receive tax documents**.

With reference to the first issue, it should be indicated that **documents shall be served on a party, and if a party acts through a representative – on the said representative** (e.g. a parent of a minor

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100 Art. 150 T.O.

101 Art. 151 T.O.

102 Art. 151a T.O.

taxpayer)<sup>103</sup>. If, on the other hand, a party has appointed an attorney, the documents shall be served on the said attorney. The statute sets forth that while appointing the attorneys, the party shall choose one of them as a substituted service agent. If the service agent has not been appointed, a tax authority shall serve documents on one of the attorneys<sup>104</sup>.

If the addressee refuses to accept the letter, such letter shall be returned to the sender with an annotation of the refusal to accept and the date thereof. The letter with annotation shall be included in the case records. At the same time it is assumed that the document shall be considered as served on the day of the addressee's refusal to accept it<sup>105</sup>.

## 8.8. Ordinary appeal measures

Ordinary appeal measures are: **an appeal** and a **complaint**. The first one is applied with regard to decisions whereas the second one – to rulings. Under the rule of two–instance proceedings, an appeal against the tax decision issued in the first instance can only be made to one instance. A higher instance authority is competent to examine the appeal. In some cases the appeal is examined by the same authority which issued the first instance decision – if the decision in the first instance has been issued by the minister competent for public finances, by a director of a fiscal chamber, a director of a customs chamber, or by a self–government appeal board (see. II, 2.2., 2.3.).

**An appeal** to a competent appeal authority should be made through the tax authority which has issued the decision. The party has to appeal within 14 days from the day s/he is served with the decision. An appeal against a decision of the tax authority should include objections against the **decision**, define the merits and the scope of the request made in the appeal and indicate the evidence justifying the request. Petitions should also include other data, which should be included in every letter addressed to the tax authority. These elements are, inter alia, the contents of a request, the indication of the applicant, his or her address

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103 Art. 145 T.O.

104 Art. 145 T.O.

105 Art. 153 T.O.

(place of residence or stay, seat or place where the activity is carried on)<sup>106</sup>. If the petition does not meet the above requirements, the tax authority shall summon the taxpayer to eliminate the formal defects, with an instruction that if such condition is not fulfilled, the petition shall be left without answer. The applicant should eliminate the defects within 7 days<sup>107</sup>.

It can be underlined that, until the end of 2008, lodging an appeal against the tax authority's decision did not **suspend the implementation of the decision**, unless the tax authority ex officio or upon the party's application suspends the implementation of the decision in whole or in part.

Since 1st January, 2009, a non-final decision which imposes a duty, which is subject to execution under provisions on executive proceedings in administration, on the party is not subject to execution unless the decision was made **immediately enforceable**<sup>108</sup>. The issue of such rigor enables to start executive proceedings based on a non-final decision, that is such against which a taxpayer appealed against and the II instance body has not examined the appeal yet. The rigor is issued in the form of a ruling and its purpose is to undertake actions which, e.g., frustrate the taxpayer's actions that are to impede or unable execution of the dues, or will not lead to limitation of the tax obligation. Nevertheless, the rigor may be issued by the tax authority solely if prerequisites indicated in the statute are met. It may happen, inter alia, when a party carries out actions involving a sale of assets of a considerable value, or the period to the time limit of the tax obligation termination is shorter than 3 months<sup>109</sup>.

**A complaint** should be filed within 7 days from the day when the party is served with the ruling. Contrary to a decision, the right to complain against rulings applies exclusively when the regulation states it explicitly. A complaint may be lodged against a ruling in the matter of, inter alia, accepting the so called voluntary security<sup>110</sup> (see II, 3.7.),

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106 Art. 168 T.O.

107 Art. 169 T.O.

108 Art. 239a T.O.

109 Art. 239b T.O.

110 Art. 33g T.O.

in the matter of counting payment towards tax arrears<sup>111</sup>, in matters of counting overpayments toward tax arrears, or current tax obligations<sup>112</sup> (see II, 5.5.), in the matter of restoration of a time limit to perform certain procedural act, e.g. filing an appeal<sup>113</sup>, on refusal to initiate proceedings<sup>114</sup>, on leaving an application without examination<sup>115</sup>, in the matter of a ruling on suspending the proceedings<sup>116</sup>, on making a decision immediately enforceable<sup>117</sup>.

The ruling which cannot be complained against may be appealed against by the party only with an appeal against the decision. We deal with cases when a ruling which cannot be complained against is issued, inter alia, in the case of the appointment of another tax authority in connection with the exclusion of the tax authority<sup>118</sup> (see II, 8.3.), producing certain evidence, changing, completing or annulling the ruling on producing evidence<sup>119</sup>, in the matter of refusal to conduct a trial<sup>120</sup>.

## **8.9. Extraordinary procedures of setting aside final decisions**

According to the rule of **permanence of decisions** mentioned above, the decisions which cannot be complained against in tax proceedings are final. Such decisions are, inter alia, not questioned settlements issued by the first instance authority, decisions issued by the appeal authorities upholding the first instance decision in force. It does not mean that such decisions cannot be set aside in any way. It is possible only on the basis of the so called **extraordinary procedures of decision verification** which are: **resumption of the proceedings** (Art. 240–246 T.O.), **ruling on invalidity of the final decision** (Art.

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111 Art. 62 § 4 T.O.

112 Art. 76a § 1 T.O.

113 Art. 163 § 1 T.O.

114 Art. 165a T.O.

115 Art. 169 T.O.

116 Art. 201 § 2 T.O.

117 Art. 239b § 2 T.O.

118 Art. 131b T.O.

119 Art. 187 T.O.

120 Art. 200a § 4 T.O.

247–252 T.O.), **annulment or change of the final decision** (Art. 253–256 T.O.)

### **8.10. Inspection acts**

**Inspection acts** are the activities of tax authorities for the purpose of: verification of the observance of time limits for filing tax returns and payments of declared taxes, stating the formal correctness of the documents mentioned above, establishing the factual state of affairs to the extent necessary to determine its conformity with the documents presented.

Tax authorities are authorized, among the others, to **demand from taxpayers to submit an appropriate statement, correct it, and explain its correctness**. As part of inspection acts, the tax authority may in certain situations correct itself a tax return filed by a taxpayer. It is, however, an exceptional situation. As a rule, a tax return may be corrected exclusively by a taxpayer. The **tax authority makes a correction as part of inspection acts** when two prerequisites occur simultaneously. First, such a tax return contains miscalculations or other obvious mistakes, or when the tax return has been filled in contrary to agreed requirements. Second, the defect concerns the value of a tax, the amount of overpayment which, however, does not exceed PLN 1000. Within 14 days from serving a certified copy of the corrected return the taxpayer may file an objection against the correction<sup>121</sup>. The filing of such objection shall annul the correction.

A breach of tax liabilities revealed in inspection acts can be the basis for the initiation of tax proceedings unless the errors are corrected differently, e.g. by the submission of the corrected tax return by the taxpayer. Therefore inspection acts can be treated as actions which may precede tax proceedings.

Nevertheless, performing inspection acts, the **authority cannot impose any sanctions upon a taxpayer**. Therefore, if a taxpayer who has been summoned to make, e.g., certain explanation, or correct a tax return, refuses to perform these acts, he or she may not be punished.

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121 Art. 274 § 3 T.O.



In such a situation, the tax authority should initiate tax proceedings. Only as part of this procedure<sup>122</sup>, the tax authority may impose certain sanctions upon a taxpayer who refuses to comply with certain summons of the tax authority. Such an institution is, e.g., a procedural penalty, which now amounts to PLN 2700 (see II, 8.5.)

### 8.11. Tax audit

A **purpose of tax audit** is the verification of the fulfillment of duties resulting from provisions of tax law by persons undergoing control. It concerns the duty to pay tax as well as instrumental duties (inter alia, payment of a correct amount of the tax advance). The aim of tax audit may be achieved if inspection acts are realized as part of immediate or scheduled inspections<sup>123</sup>. In the first case, it is possible to react to various signals regarding tax irregularities straightaway. Conducted scheduled inspections are an essential element of preventive actions, thanks to which the Revenue Office's interest is secured. They are carried out according to inspection plans elaborated earlier by tax authorities<sup>124</sup>.

Tax audit can be performed only *ex officio* by a head of a Revenue Office, a head of Customs Office, a village mayor, a mayor, (president of a city), or a minister competent for public finances.

In the course of tax audit controllers are entitled, in particular, to: enter a land or buildings, premises, or other rooms which belong to the party under control, demand the property under control to be presented and inspect it, demand that records, books and all kinds of documents connected with the object of the control be made available and to make copies, reproductions, statements, notes and printouts thereof, and to collect data in the electronic form, documenting the said action.

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122 M. Popławski, Legal Sanctions In Tax Law, in: M. Popławski, D. Šramková (ed.) Legal Sanctions: Theoretical and Practical Aspects in Poland and the Czech Republic, Brno–Białystok 2008, p. 379 and next.

123 K. Lipczak, Kontrola podatkowa na tle obowiązywania przepisów ustawy – Ordynacja podatkowa, Kontrola Skarbowa i Podatkowa 1998, No. 1, p. 1.

124 M. Popławski, in: C. Kosikowski, L. Etel, R. Dowgier, P. Pietrasz, M. Popławski, P. Presnarowicz, Ordynacja podatkowa. Komentarz, Warsaw 2011, p. 1205 and next.

## Part 3

# MATERIAL TAX LAW

## 1. General remarks

This part presents individual taxes functioning in Poland. It is achieved by the presentation of individual constructive elements of these considerations. Thanks to this, it will be possible to find out about necessary elements without which tax law would not be able to function. Their analysis will allow to answer, inter alia, the following questions: who pays what tax, what a certain consideration is paid for, how a given tax is calculated and according to what tax rates, who and when may take advantage of a tax relief or exemption, and when and where tax should be paid. Taxes constituting the state's budget income (parts 2–6) will be presented first, to be followed by taxes feeding municipal budgets in the last two parts (parts 7–8). At the same time it should be emphasized that a tax card, which was described in part 4.2. is also municipal budget's income. It was included therein due to the need to put all lump–sum forms of income taxation in one place.

## 2. Personal income tax

### 2.1. Subject of taxation

Natural persons who obtain income which is subject to taxation are encumbered with tax liability. The issue whether such subjects reside in Poland, or not is important. A natural person having the place of residence in Poland is subject to **unlimited tax liability**. In this case these entities are subject to tax liability as regards the total of their incomes irrespective of the location of the sources of their revenues. A person residing in the territory of the Republic of Poland is considered to be

a natural person who has the centre of personal or economic interests (the centre of interests) located within the territory of the Republic of Poland, or stays within the territory of the Republic of Poland longer than 183 days during a tax year<sup>1</sup>. In practice, the application of this rule is limited by the application of a certain mechanism resulting from agreements on avoidance of double taxation. Otherwise, we could deal with a formation of the phenomenon of double taxation (see I, 3.3.).

In the case when someone does not reside in Poland, they can be levied with **limited tax liability** only on the income earned within the territory of Poland.

The legislator stipulates the institution of the so called **joint tax** (spouses and also single parents who bring up children have the right, after fulfilling specified conditions, to preferential tax settlement). The preference which applies therein means that the taxation base is a half of the sum total of income of both spouses, or only one spouse if another one did not obtain income in a given year. The tax is assessed by referring the tax rates of 18% and 32% (see III, 2.3.) to this base and multiplying the obtained amount by two. With respect to persons single-handedly raising children, the mechanism is identical but the taxation base is half of the income of a person single-handedly raising children increased by the income of the children who during a year could also obtain income.

**Two advantages** are connected with the application of this mechanism. The first one involves a possibility of **“transfer” from the taxation by the 32% rate to the taxation by the 18% rate**. It is connected with the decrease of the taxation base by half. In consequence, the income of one spouse amounting to, e.g. PLN 100.000, would be taxed in part by the 32% rate with the application of the basic mechanism of tax assessment (the excess over PLN 85.000). When the above preferential assessment of tax is applied, this income will be taxed in whole by the 18% rate (see III, 2.3.).

The second advantage connected with the application of the above mechanism involves **double consideration of the tax-free allowance**,

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1 Art. 3 par. 1a L.P.I.T.

which now amounts to PLN 3090. It is of particular importance when only one spouse obtains income, or when it is obtained by a person single-handedly raising children. If the annual income of such a person amounts to, e.g., PLN 50.000, the tax to be paid would amount to PLN 8444 with the application of the classic principle of tax settlement, whereas it would amount to PLN 7888 with the application of the above preference. Therefore a difference in the amount of tax to be paid amounts to PLN 556.

The legislator pays attentions to **certain conditions** which must be met so that the above preference could be applied<sup>2</sup>. With reference to **spouses**, the most important conditions regard the need to remain in marriage throughout the whole tax year, and upon the joint request to apply this preference expressed in the joint annual tax return. It is now not obligatory for both spouses to reside in Poland. This preference will also apply when both spouses, or one of them reside in the European Union, or another country belonging to the European Economic Area, or the Swiss Confederation. Nevertheless, it is important in this case for the persons to obtain the revenues subject to taxation within the territory of the Republic of Poland that jointly amount to at least 75% of the whole revenues obtained by both spouses in a given tax year, and prove a place of residence for tax purposes by a certificate of residence<sup>3</sup>. Such a certificate is a certificate of a place of the taxpayer's residence for tax purposes issued by a competent body of the state administration of a country of the taxpayer's place of residence<sup>4</sup>.

**A person single-handedly raising children** who would like to take advantage of this preference should be unmarried, widowed, divorced or separated within the meaning of separate regulations. What is interesting, it may be also a married person if the spouse has been deprived of parental rights or serves time in prison<sup>5</sup>.

S/he should maintain at least one child who is underage (up to 18 years of age), or who received nursing allowance (benefit) or social

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2 W. Wójtowicz, P. Smoleń, podatek dochodowy od osób fizycznych–prorodzinny czy neutralny, Warsaw 1999, p. 52 and next.

3 Art. 6 par. 3a L.P.I.T.

4 Art. 5a point 21 L.P.I.T.

5 Art. 6 par. 2 L.P.I.T.

pension. In the latter case, the child's age does not matter. Children maintained by a taxpayer may also attend schools, including foreign ones, referred to in the regulations concerning the schooling system, or in the regulations concerning higher education in a given country. In this situation, however, the child cannot be older than 25 years of age.

With reference to preferences regarding spouses who pay tax jointly as well as persons single-handedly raising children, the legislator introduces negative conditions, the existence of which precludes their application.

We deal with such a situation when even one spouse or a person single-handedly raising children or a child is subject to:

- a flat-rate tax (19% tax on income connected with conducting business activity),
- a tax card or lump-sum tax on registered revenues, s/he may, however, paid taxes connected with lease in this form has no influence (see III, 4.1.).

A negative condition is a situation when taxpayers submit a motion expressed in the annual tax return for the application of the above preference after deadline.

As far as personal income tax is concerned, there appears a notion of a **small taxpayer**. Such a subject is the taxpayer whose revenue from sales (including the amount of output goods and services tax), in the preceding tax year, did not exceed the amount denominated in PLN being the equivalent of Euro 1.200,000. These subjects are entitled, in particular, to choose the quarterly method of making advance tax payments, but also to apply accelerated depreciation of fixed assets (e.g. machines used to carry out business activity). It involves a possibility of one-off depreciation write-off up to 100% of the initial value of the fixed asset in the first tax year of its use. A total amount of depreciation write-offs on fixed assets entered into a register in a given year made according to this method cannot exceed, however, the equivalence of Euro 50.0006. To read more about depreciation see III, 3.2.

## 2.2. Object of taxation

All income, except the income excluded or exempted from taxation, is subject to income tax<sup>7</sup>. The **principle of income accumulation** has been adopted therein. Therefore if a taxpayer receives income from more than one source, the object of taxation in a given tax year is the sum total of revenues from all sources<sup>8</sup>. The application of this method increases the probability that the taxpayer's income will reach a higher tax threshold, which means the application of a higher, 32% tax rate (see III, 2.3.). This rule, however, does not concern several sources of revenues<sup>9</sup>. Some of them are taxed separately with the application of a flat-rate (see part III, 2.3.), and additionally, in some sources of revenues, the revenues rather than income will be taxed. Among **sources of revenues that are not subject to the principle of tax accumulation**, the following, among the others, may be listed:

- revenues from business activity if a taxpayer chose a flat-rate tax;
- winnings at games and lotteries (the revenues rather than income are taxed),
- income from unrevealed sources of revenues,
- interest on loans, bank accounts' funds, securities, dividends, other shares in profits of legal persons (the revenues are taxed),
- sale of securities,
- sale of a real estate.

In general, **income** from the source of revenues constitutes the surplus of the revenues from that source over deductible costs generated in the tax year. If, however, deductible costs exceed the sum total of revenues, the difference shall be the **loss** from that source of revenues<sup>10</sup>.

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7 D. Gajewski, Personal income tax. A compendium, Warsaw 2010, p. 33 and next.

8 Art. 9 par. 1a L.P.I.T.

9 Art. 29–30c, Art. 30e and Art. 44 par. 7e i 7f, L.P.I.T.

10 Art. 9 par. 2 L.P.I.T.

Attention should be paid to several issues as far as the above definition is considered. Firstly, **revenues are decreased by the costs exclusively as a part of a given source of revenues**. Therefore revenues received from the employment relationship cannot be decreased by the costs generated in connection with business activity carried out by a taxpayer. What is more, the catalogue of revenue sources is not closed. It comprises, inter alia, the income on: employment relationship, the activity performed personally, non-agricultural business activity.

Secondly, elements necessary to determine income for tax purposes are such notions as revenue and deductible costs. As a rule, **revenues** consist of cash and cash equivalents made available to the taxpayer in the calendar year, as well as the value of non-cash performances and other gratuitous performances<sup>11</sup>. It is different, among other things, in the case on natural persons conducting business activity. In such a case, revenues are determined the same as for the corporate income tax (see III, 3.2.).

**The revenue earning costs** are the costs incurred for the purpose of making the revenue, or retaining, or securing the source of revenue, except the costs listed in the Act<sup>12</sup>. For example, the expenditures incurred on the acquisition of land cannot be considered as revenue earning costs, even if there is a plan to build premises used for conducting economic activity. More about additional notions, e.g. depreciation, regarding deductible costs of the revenues connected, most of all, with conducting business activity is depicted in Part III, 3.2.

It is a rule that the revenue earning costs are the costs connected with actually born expenses. In some cases, however, the so called **lump sum costs** are envisaged. They refer, among the others, to the revenue obtained in employment relation (for the last few years, the revenue obtained in one employment relation can be decreased by PLN 111,25 monthly, and for a tax year by not more than PLN 1335) and the revenue obtained in certain kinds of activity performed personally, the revenue for services carried out on the basis of a mandatory agreement or service agreement, if these services are not included in the scope of

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11 Art. 11 par. 1 L.P.I.T.

12 W. Nykiel, Podatek dochodowy od osób fizycznych. Komentarz, Warsaw 2003.

economic activity of the mandatory provided for the public, it may be lowered by 20%, and if the revenue concerns copyrights and related rights used by the authors, or the disposition of these rights by them, these costs amount to 50% of the revenue.

Thirdly, calculating income that is subject to taxation, attention should be paid to the **mechanism of decreasing taxable income connected with the tax loss**. The legislator envisages a possibility of decreasing taxable income by the loss generated by a taxpayer in a previous year or years. Nevertheless, certain limitations are introduced thereon.

The amount of the loss from a source may be deducted from the income generated from that source in the consecutive five tax years, with the proviso that the amount of the deduction in any of those years may not exceed 50% of the amount of that loss<sup>13</sup>.

Fourthly, a classic definition of income presented above (revenues minus deductible costs) does not apply to all cases. In some cases we deal with **special, more complicated principles of income determination**. We deal with such situations in several cases<sup>14</sup>. However, we will present only two of them (see also III, 3.2.). The first one considers taxpayers deriving **income from business activity and keeping receipts and expenditures books**<sup>15</sup>. In this case, income is determined based on this book (revenues and costs) and its appropriate correction in connection with the value of the opening inventory (as of 1st January in a given year) and closing inventory (at the end of December in a given year). Inventory is stocktaking the value of commodities and materials, which is binding at a given moment, used in production and stored in the entrepreneur's warehouses. Correction is made at the stage of determination of tax costs borne by a taxpayer. These costs are determined by summing up the value of the opening inventory together with any expenses borne during a year in connection with conducting this activity (resulting from the book), and then by deducting them by the value of the closing inventory.

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13 Art. 9 par. 3 L.P.I.T.

14 Art. 24–25a L.P.I.T.

15 Art. 24 par. 2 L.P.I.T.



The second situation when income for tax purposes is determined in a special manner regards **income from the sale of fixed assets** (see III, 3.2). If they are sold, the income for tax purposes from the non-gratuitous sale of fixed assets is a difference between the revenues from the non-gratuitous sale and the initial value revealed in the register of fixed assets and non-financial and legal values, increased by the total depreciation write-offs made on these assets and value. Therefore if a sale regards a completely depreciated object, the income will agree with the revenues, that is the amount received from the sale of this fixed asset. The situation will be different if a sale of such a fixed asset will be effected during a depreciation period<sup>16</sup>.

### 2.3. Tax rates

Basic rates are of **progressive, mixed and percentage character**. They are presented in the chart below. It shows the sections of income and tax rates related to it, obligatory for the year 2011.

Taxable income		Tax rates
Taxable income over... in PLN	Taxable income up to... in PLN	
	85.528	18% minus PLN 556, 02
85.528		PLN 14.839,02 plus 32% of surplus over PLN 85.528

Flat, proportional rates are also stipulated in L.P.I.T. for certain kinds of income: **10%** (for instance, on prizes won in competitions, games and mutual bets, or awards connected with bonus sales), **19%** (interest on loans, except for granting loans within the scope of one's economic activity, interest, or discount on securities), **20%** (non-residents' income from the activity performed personally, copyright and related rights, rights to inventive designs, trademarks and decorative patterns), **50%** (inter alia on tax income of taxpayers performing transactions with family-related subjects; it refers to the difference between the income declared by the taxpayer and that determined by

16 Art. 24 par. 2 L.P.I.T.

tax authorities—see. II, 4.2.), **75%** (on income earned from unrevealed sources of revenues, or not justified in the revealed sources)<sup>17</sup>.

## **2.4. Tax allowances and tax exemptions**

There are three kinds of tax allowances in personal income tax. A taxpayer is entitled to have the tax base (income) reduced. S/he also has the right to reduce the amount of tax to be paid, and thirdly, to apply a preferential mechanism of the calculation of the tax to be paid. The following payments may be **deducted from the tax base**: insurance premiums on social insurance system (for retirement and other pension insurance as well as sickness and occupational accident insurance of the taxpayer), the expenses on rehabilitation, the expenses borne by the taxpayer for using the Internet in premises being his/her place of residence in the amount not exceeding PLN 760 in a given tax year, donations made for public benefit activity, for religious practice, blood donations made by voluntary blood donors, the amount of the donation, however, cannot exceed the amount which equals 6 per cent of the income, expenditures incurred by the taxpayer for the acquisition of new technologies.

**The following expenses can be deducted from the tax:** the amount of premiums spent on health insurance, not more than 7.75 per cent of the assessment base of the premium, payments made for public benefit activity, not more than 1% of the annual income. Taxpayers also have the right to deduct the amount in connection with children they live together with. App. PLN 1100 annually may be deducted for one child.

The third kind of the allowance is the adoption of a certain mechanism to calculate due tax. As part of this relief, it is necessary to indicate the existence of the **tax-free amount**, which is now PLN 3090. It means that the income which does not exceed annually the above amount is not taxable. This amount refers solely to the income covered by the tax accumulation. Whereas it does not apply to the

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17 P. Pietrasz, *Opodatkowanie dochodów nieujawnionych*, Warsaw 2007, R. Sowiński, *Uchylenie się od opodatkowania. Przyczyny, skutki i sposoby zapobiegania zjawisku*, Poznań 2009.

income subject to a flat-rate tax. This mechanism is reflected in the tax scale which is presented in the previous part (see III, 2.3.). If we intended to calculate tax in accordance with the principles thereof, the due amount from the income PLN 3090 would be PLN 0.00. This preference involves the reduction of a certain amount of due tax. Despite this, it is difficult to treat it as a classic relief involving the reduction of the tax due since a specific element of this preference is that the application of this relief does not depend in any way on the expenses borne by a taxpayer. It is a **relief connected with the technique of tax calculation**. The same kind thereof should also include a preferential mechanism of joint taxation of spouses and persons single-handedly raising children (see III, 2.1.).

The system of **tax exemptions** in personal income tax is quite complex as there are over 100 of them. For example, the amount received from property and personal insurance, death benefit and funeral allowance are exempted from the income tax. The income of individuals covered by the unlimited tax liability who temporarily stay abroad and who derive income from, inter alia, scholarships equivalent to the travelling allowance for a business trip outside of the country, which is set forth in the provisions concerning the amount and the conditions for determining the sums due to employees of state or local government units of the budgetary sphere for business trips outside of the country, for each day on which scholarship was received, is tax-free. Board and accommodation allowances paid from the state budget in connection with a transfer to do teaching at schools and academic centers abroad, granted pursuant to separate regulations, are also exempted from the tax<sup>18</sup>.

## 2.5. The procedure and terms of payment

As part of personal income tax, three regimes of tax payment may be distinguished. The first one involves **personal payment of tax advances by a taxpayer during a year and submission of the annual tax return after the lapse of a given year** when the final amount

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18 Art. 21 par. 1 point 23a L.P.I.T.

of the due tax for a given year will be revealed. It refers to subjects conducting economic activity, receiving income from an activity performed personally (such as artistic, literary, scientific, educational and journalist activities), and also to the income from pensions gained abroad, unless it is received by the mediation of the bank in Poland.

Advance tax payments are payable in the period from January to November by the 20th day of every month for the preceding month. The pre-payment for December, in the amount of the November due, shall be remitted by 20th December of the tax year. **Small taxpayers and taxpayers commencing economic activity** may make advance tax payments every quarter. There is also a possibility to pay the advance tax payments in a given tax year in a simplified form based on income shown in the statement in the tax year preceding a given tax year. In this case, a monthly installment amounts to 1/12 of the amount determined after the reference to the income in the previous year or two years ago, or tax rates in force in a current year.

Taxpayers are obliged to submit a statement on the amount of income earned (loss incurred) during the tax year according to the specified form, not later than on 30th April of the following year. They are obliged to pay in the income tax due resulting from the statement within that time limit.

The second regime involves **payment of due tax or tax advances through a tax remitter**. In this case, the obligation to submit an annual tax return by a taxpayer may, but does not have to, arise. There is an obligation to collect monthly advance tax payments imposed on certain tax remitters: insurance pension authorities, banks, higher schools, employment offices, penitentiary establishments. These subjects transfer collected taxes in a monthly cycle, which was discussed above.

The third regime involves **payment of tax by a taxpayer only after the lapse of a given tax year with the simultaneous obligation to submit an annual tax return** until 30th April of the year successive to the tax year. We deal with such a situation in case of the income derived from selling a real estate and securities.

## 3. Corporate income tax

### 3.1. Subject of taxation

There are four categories of taxpayers: **legal persons** (for example limited liability companies, joint-stock companies), organizational **units having no legal personality**, except for partnerships, (state budget entities, foreigners' representation), **foreign partnerships having no legal personality**, if in the state where **their seat, or management** is located they are treated as legal persons and are subject to unlimited tax liability there<sup>19</sup>, and **tax capital group**<sup>20</sup>.

If taxpayers have their seat, or management within the territory of the Republic of Poland, they are subject to **unlimited tax liability**. It means that, as a rule, they are obliged to pay tax on their whole income regardless of the place of its derivation<sup>21</sup>. The application of this principle in practice is limited by the application of solutions resulting from agreements on avoidance of double taxation (see part I, 3.3.).

If taxpayers do not have their seat, or management within the territory of the Republic of Poland, they are subject to **limited tax liability**. Consequently, they are obliged to pay tax only on income they derive within the territory of the Republic of Poland.

**Tax capital groups** are groups consisting of at least two commercial law companies with a legal personality, operating in capital relationships and complying with the conditions stipulated in L.C.I.T. Basic conditions to set up such a group are as follows<sup>22</sup>:

- an average share capital of the companies may not be lower than PLN 1.000.000,
- the direct share of one company, the so-called “dominant company”, in the capital of other companies, the so-called “dependent companies”, must amount to 95%,

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19 Art. 1 par. 3 L.C.I.T.

20 M. Kalinowski, *Podmiotowość prawna podatnika*, Toruń 1999, p. 247 and next.

21 W. Nykiel, A. Mariański, (ed.) *Komentarz do ustawy o podatku dochodowym od osób prawnych*. Gdańsk 2010, p. 49 and next.

22 Art. 1a L.C.I.T.

- these companies do not have tax arrears in payment of tax constituting income of the state budget,
- companies forming the group concluded a capital group corporation agreement in the form of a notary deed for a fixed term of at least 3 tax years, and this agreement has been registered by a head of a Revenue Office,
- the companies do not take advantage of income tax exemptions based on separate statutes.

In result of the formation of a tax capital group, one of the companies composing the group is obliged to pay income tax and advance tax payment thereof due from the whole tax capital group. The companies forming a tax capital group are jointly responsible for its income tax liabilities due for the duration of the agreement<sup>23</sup> (see II, 7.6.).

A basic purpose of setting up this kind of subjects is a manner of income calculation within a part of the tax capital group, which is favorable for the subjects composing the group (see III, 3.2.).

### **3.2. Object of taxation and tax base**

The object of taxation is the **total income** irrespective of the kinds of the revenue sources from which the incomes are earned (inter alia money and pecuniary values received, including also differences between the rates of exchange, the value of things, or rights received gratuitously or partly paid for). In some cases income tax is imposed on revenues, not on income (revenue from dividends and other sharing profits of legal persons having their seat within the territory of Poland).

In **tax capital groups**, the object of taxation is the income derived in a tax year which constitutes a surplus of the total income of all the companies forming the group over the sum of their losses. If during a tax year, the total losses exceed the total income of the companies, the

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23 Art. 1a par. 4 L.C.I.T.

difference constitutes the loss of a tax capital group<sup>24</sup>. This mechanism allows companies deriving income to decrease it in the same year by the loss arising in other companies forming the tax capital group. It is also important in this case that there is no limit as to the amount thereof. If the company which is not a part of the tax capital group wanted to deduct from its income generated in subsequent years the loss for previous years, it could carry it out. In this case, however, the income may be reduced in the successive five tax years. Nevertheless, the value of the reduction in any such year cannot exceed 50% of the loss value<sup>25</sup>.

Three essential elements influencing determination of taxable income, which generally is the revenue lowered by deductible costs, may be indicated. The first one is the notion of the **revenues connected with economic activity**. Such revenues are revenues due, even if not yet actually received, excluding the value of the returned goods, granted rebates and discounts. Thus the revenues will be resources received by a taxpayer, e.g., in connection with selling goods and providing services. Nevertheless, the revenues will also be amounts which a taxpayer did not receive, e.g., in connection with contractors' unreliability or dishonesty, or insolvency.

The second element discussed above is **determination of a moment which should be assumed as the formation of the revenues**. It decides about the need to undertake actions aiming at calculation of the tax due and paying it to a tax authority. When determining a date of the revenues generation, a general rule is adopted, according to which the revenues due will arise on the day a thing is issued, the financial right is transferred, or a service provided, including a partial provision thereof, but not later than on the day of the issue of an invoice, or receivables payment<sup>26</sup>. In consequence, the revenues will arise on the day when one of the three above presented prerequisites occurs as first. Therefore if a taxpayer issues an invoice in connection with selling and issuing

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24 Art. 7a par. 1 L.C.I.T.

25 Art. 7 par. 5 L.C.I.T.

26 Art. 12 par. 3a L.C.I.T.

goods, which will be effected only after certain time, it should be assumed that the revenues arose on the day the invoice was issued.

The third essential element connected with determination of the income connected with conducting business activity is the issue of **tax costs**. They are expenses incurred with the purpose either to generate, or retain, or secure the source of revenues. Thus, they will be, inter alia, expenses on paying rent for the premises where business activity is conducted, remuneration for entrepreneur's workers, stipulated penalties which are connected with the revenues earned by a taxpayer. Such costs are undeniably incurred in order to earn revenues if business activity is carried out without obstacles and certain revenues are connected with it. The same expenses may be treated as deductible costs securing the source of the revenues, e.g., if they are borne during insolvency proceedings.

It should be added that the costs directly connected with the revenues are settled in a year during which the ensuing revenues are earned. Other costs are settled in a year they are incurred.

As a rule, incurred expenses which may be treated as **deductible costs of the revenues are deducted one-off from the revenues. It is otherwise in case of the so called fixed assets, which are subject to depreciation**<sup>27</sup>.

**Depreciation** may be defined as a process, which is spread over time and lasts from few to several dozen years, during which the costs of fixed assets' purchase used to carry out business activity are included into an account. Depreciation covers **fixed assets**, that is movable (e.g. machines) and immovable property (buildings, premises, but not lands), as well as the rights (e.g. investment in foreign fixed assets, licenses, know-how, copyright or related proprietary rights, cooperative ownership right to residential property and other rights in the housing cooperative). Depreciation covers objects and rights which are owned or co-owned by a taxpayer and their value exceeds PLN 3.500, and which are used by a taxpayer for the needs connected with business activity they conduct.

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27 Art. 16a–16m L.C.I.T.



Depreciation is made from the first month following the month when this asset, or the value was entered into the register of intangible fixed assets until the end of the month in which the total depreciation write-offs equal their opening value, or in which they were liquidated or sold.

The period of time during which depreciation will be carried out depends, most of all, on two factors, i.e. the adopted depreciation method and the value of annual depreciation rates which will apply in this period.

Depreciating fixed assets, taxpayers may use various depreciation methods. The **flat-rate method** is a basic one. In this case, depreciation is made according to depreciation rates from the statute. Their value depends on a kind of fixed assets. In case of residential buildings, it amounts to 1,5%, non-residential buildings – 2,5%, computers – 30%, mobile phones – 20%, and cars – 20%. It means that the purchase cost of a car used to conduct business activity will be included into the account in whole as the cost of conducted business activity after five years from its purchase and the beginning of its use.

Moreover, a taxpayer may take advantage of other depreciation methods, inter alia, a **method based on individual rates** (it may be applied for second-hand or improved fixed assets), or a **digressive method**. In the latter case, we deal with a variable base from which depreciation write-offs are made. In all cases the calculation base is fixed and it is the opening value, that is the value of purchase or production of a fixed asset.

Similar to personal income tax (see III, 2.2.), in the analyzed consideration there are situations when income is determined in a specific manner. We deal with such a situation in the case of concluding a **leasing agreement**. It is an agreement under which one of the parties, called a “lessor”, provides another party, called a “lessee”, with fixed or intangible assets and lands that are subject to depreciation for a payable use, or for a use and collection of fruits upon conditions specified in the agreement<sup>28</sup>. In this case, two mechanisms

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28 Art. 17 point 1 L.C.I.T.

of determining certain elements influencing income for tax purposes of the subjects taking part in such transactions may take place. In the first one, whole leasing fees constitute the revenues of the lessor and deductible costs of the lessee respectively<sup>29</sup>. We deal with such a case if the agreement was concluded for a fixed term constituting at least 40% of the normative period of depreciation, or at least 10 years in case of a real estate and when the total of agreed fees (including the selling price) reduced by VAT due, corresponds to at least the opening value of the object of the agreement.

The second situation occurs when leasing fees, which in part constitute the repayment of the value of the object of the agreement, are not the lessor's revenues and the lessee's deductible costs respectively<sup>30</sup>. This rule is applied if the agreement was concluded for a fixed term, the total of agreed fees (including the selling price) reduced by VAT due corresponds to at least the opening value of the object of the agreement, and if it results from the agreement that depreciation write-offs will be made by the lessee in the basic duration of the agreement.

A specific manner of income determination may be connected with the need to **establish income by estimation** (see II, 4.1.). In corporate income tax, this need may occur, *inter alia*, in case of conducting business activity with the use of capital connections with the taxpayer's contractors by him or her. Taxpayers making transactions with affiliated subjects, or residing, or seated in the so-called "tax havens", may be obliged by tax authorities or tax inspection bodies to make **special tax documentation** of such transactions<sup>31</sup>. If the taxpayer fails to submit such transaction documentation to tax authorities, they may instigate tax proceedings. As their part, it will be necessary to establish, most of all, whether conditions different from those which would have been agreed between independent subjects were agreed or imposed, and whether in effect thereof the taxpayer did not reveal income or revealed income lower than the one that should have been expected. If these prerequisites are proved, a state authority will determine income of

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29 Art. 17b L.C.I.T.

30 Art. 17f L.C.I.T.

31 Art. 9a L.C.I.T.

a higher value (the loss of a lower value) than declared by the taxpayer using, if necessary, the mechanism of income estimation.

We deal with another instance when income may be determined by estimation in the analyzed tax in case of subjects covered by limited tax liability. In this case, if income cannot be determined based on accounts register, it is established by estimation with the use of a ratio of income against revenues, e.g. 5% from the activity in the area of wholesale or retail trade, 10% from the construction building activity, or in the area of transportation services<sup>32</sup>.

### 3.3. Tax rates

The basic tax rate for corporate income tax is **19%**. L.C.I.T. also stipulates flat, proportional rates for certain kinds of incomes: **10%** (for due payments for overseas transportation of loads and passengers accepted for the carriage in Polish harbors by foreign sea trading enterprises, except for transit loads and passengers), **20%** (revenues received within the territory of Poland by taxpayers who have no seat within the territory of Poland, from interest, copyright or related rights, rights to inventive projects, trademarks and design patterns, including revenues on the sale of such intellectual property rights, fees for the access to a secret recipe or production process, the use or the right to use an industrial, commercial or scientific device and also a means of transport, the information connected with the experience acquired in the industrial, commercial or scientific field (know-how), **50%** (on taxable income of taxpayers performing transactions with subjects, e.g. affiliated by capital; it refers to the difference between the income declared by the taxpayer and that determined by tax authorities).

### 3.4. Tax allowances and tax exemptions

A taxpayer is entitled to have **the tax base (income) reduced**. Donations made for public benefit activity, or for religious practice, inter alia, may be deducted, however, not more than by the amount

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32 Art. 9 par. 2a L.C.I.T.

equal to 10 per cent of the income, or expenditures incurred by the taxpayer for the acquisition of new technologies.

Moreover, **subjective and objective exemptions** have been introduced. The first one concerns the State Treasury, the National Bank of Poland, state budget entities, territorial self-government units that are exempted from tax. Objective exemptions refer to, inter alia, incomes of church legal persons, incomes received from conducting a school, i.e. the income which is spent on the school's objectives. **Exemptions concerning dividends**, however, seem to be particularly important. Income derived from dividends is exempted from income tax if certain conditions specified in the statute are jointly met<sup>33</sup>. Three of them seem to be significant. According to the first one, a dividend payer is a company paying income tax and seated, or managed in Poland. Secondly, a dividend payee aggregating income for it is a company (a payee may also be a foreign permanent establishment of such a company) considered as a resident of the EU Member State, including Poland, or a state belonging to the European Economic Area, which, in such a state, is subject to taxation of its whole income regardless of its source. Thirdly, a company receiving dividend must ultimately hold not less than 10% of shares in the company paying the dividend incessantly for 2 years. This period may also lapse after receiving dividend, in this case, however, we deal with **conditional exemption**. If the company fails to meet the condition of holding stock (shares) incessantly for two years, it is obliged to pay tax together with default interest on the income (revenues) until the 20th day of the month following the month when the company took advantage of the exemption for the first time.

### 3.5. The procedure and terms of payment

The income advance tax payments have to be paid during the tax year. They are payable by the 20th day of every month for the preceding month. There is also a possibility to pay the advance tax payments in a given tax year in a simplified form in the amount of 1/12 of the tax due disclosed in the statement filed in the year preceding a given tax

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33 Art. 22 L.C.I.T.

year. **Small taxpayers** (subjects whose turnover did not exceed Euro 1.200.000, see III, 2.1.) and **taxpayers commencing economic activity** may make quarterly advance tax payments.

Taxpayers are obliged to submit a statement on the amount of income earned (loss incurred) during the tax year according to the specified form, by the end of the third month of the following year. In the analyzed tax, a tax year does not have to overlap with a calendar year. A **tax year**, as a rule, is a calendar year unless a taxpayer decides otherwise in the company's articles of association or partnership agreement, or in another document duly regulating constitutional principles of other taxpayers, and informs about this a competent head of a Revenue Office; then a tax year is a period of successive twelve calendar months<sup>34</sup>.

Taxpayers should pay, within this time limit, the tax due or the difference between the tax due on income disclosed in this statement and the sum of tax pre-payments due for the period from the beginning of the year. In the case of tax collected by tax remitters, they are obliged to remit the amounts of tax by the 7th day of the month following the month in which the tax was collected.

## 4. Lump-sum forms of income tax

### 4.1. Lump-sum on registered revenues

**Lump sum income tax on registered revenues** is a lump-sum form of income taxation on revenues from non-agricultural economic activity, or a contract of lease or tenancy (things or property rights) earned by natural persons.

Natural persons who are **sole traders**, or act within **civil partnership** or **general partnership** are subject to lump-sum income tax. The persons who obtain revenue on tenancy or lease agreement, or other similar agreements may also be subject to lump-sum taxation.

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34 Art. 8 par. 1 L.C.I.T.

This form of taxation can be applied if in a year preceding a tax year a taxpayer obtained revenue on economic activity s/he solely conducted, in the amount not exceeding Euro 150000, or the amount of the revenue of the partners in the partnership did not exceed Euro 150000. If the revenue for the previous year exceeded the amounts mentioned above, the taxpayers are taxed according to general rules (they pay personal income tax) and keep a tax book of revenues, unless they fulfill the conditions to be taxed in another lump–sum form.

The lump–sum taxation may be applied provided the taxpayer submits a **motion for its application**. Otherwise the rules resulting from L.P.I.T. are applied. This motion may be submitted by the day preceding the commencement of the activity, in the case of taxpayers already conducting economic activity, by 20th January of a tax year. Another time limit has been adopted in the case of a declaration on the choice of this form of taxation in case of taxpayers deriving income from lease and tenancy. A taxpayer who starts generating such income during a year submits a written declaration on the choice of the lump–sum taxation on the revenues registered for a given tax year to a head of a Revenue Office competent according to the taxpayer’s place of residence not later than until the 20th day of the month following the month when s/he aggregated the first such revenues, or until the end of the tax year if such revenues were earned in December of the tax year<sup>35</sup>. In case of conducting business activity in the form of a company/partnership, such a declaration is submitted by all partners to heads of Revenue Offices competent according to each taxpayer’s place of residence<sup>36</sup>.

There are some taxpayers that are **excluded from this form of taxation**. It refers to those who, among the others, obtain revenue in whole or in part on, e.g., conducting chemist’s activity, performing liberal professions (however, physicians, veterinarians, nurses, translators and teachers may benefit from this form), producing goods taxed by excise duty, providing services of, for example agency in the sale of goods or architectural or legal services.

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35 Art. 9 par. 4 of the Act on Lump–Sum Tax.

36 Art. 9 par. 2 of the Act on Lump–Sum Tax.

**Liberal professions** indicated above, which may be covered by the lump–sum taxation, i.e., physicians, veterinarians, nurses, translators and teachers may benefit from this form provided that certain conditions are met. Firstly, the activity performed by such persons cannot be realized for the benefit of legal persons and organizational units having no legal personality, or natural persons for the needs of non–agricultural business activity they conduct. Therefore, e.g., a physician employed in hospital or at another physician’s conducting business activity, will not take advantage of this form of taxation. Secondly, a person performing a liberal profession cannot employ anyone based on the employment agreement, mandatory agreement, contract of specified work and other similar agreements if such persons are to perform actions connected with the essence of a given job. It means that, e.g., a physician conducting his or her business activity in the scope of the provision of health services who intends to employ another physician would have to resign from the lump–sum form of taxation. Whereas s/he may employ persons who will perform activities that are supportive in nature, e.g., a receptionist, nurse, etc., without any restraint.

The **tax base** of taxation is the revenue disclosed by the taxpayer in the register of revenues s/he keeps. It means that taxpayers cannot take into account the expenses incurred in connection with the obtained revenue. In case of taxpayers covered by this form of taxation, the revenues are amounts due even if they were not actually received after the exclusion of the value of returned goods, provided discounts and rebates. Thus, it is an identical definition of the revenue as in the case of, e.g., personal income taxpayers conducting business activity (see III, 2.2. and 3.2.). Nevertheless, it is different in the case of taxpayers generating income from lease or tenancy. In this case, cash and cash means as well as the value considerations received in kind and other free of charge considerations under the agreement of tenancy, sub–tenancy, lease, sub–lease, or other similar agreements, which were received or left for the taxpayer’s disposal in a calendar year, are subject to lump–sum taxation on registered revenues<sup>37</sup>.

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37 Art. 6 par. 1a of the Act on Lump–Sum Tax.

Apart from the register of revenues taxpayers should **make a list of fixed assets, keep an equipment register and have and keep the evidence of purchased goods**. Taxpayers may order an accountancy agency to keep the register of revenues as well as a tax book of revenues and expenses. They should also **submit annual tax returns**, which is discussed below, **make an inventory, that is stocktaking** (see III, 2.2.) in a few following cases: on the day of starting a register of fixed assets, at the end of each tax year, in case of a change of a partner or a partnership agreement, and liquidation of the activity. The obligation to keep a register of revenues and realize other above listed duties do not concern taxpayers aggregating revenues for tenancy if their value results from the written agreement.

**Tax rates** of the lump sum on registered revenues are proportional and related to revenues as follows:

- 20% of the revenues received from performing liberal professions,
- 17% of the revenues received from some intangible services, (for example, car rental, hotels, agency in wholesale trade),
- 8.5% of the revenues, inter alia, from services, including revenues from catering activities in the scope of selling alcoholic drinks (stronger than 1.5%), as well as revenues from tenancy, sub-tenancy, lease, sublease or other similar contracts,
- 5.5% from the revenues from construction and manufacturing activities,
- 3.0% from the revenues, for example, from services related to trade and catering, with the exception of the revenues from selling alcoholic drinks (stronger than 1.5%).

A special rate was also envisaged amounting to 10% of the revenues. It is applied in the case of non-gratuitous sale of a real estate or property rights being fixed assets and connected with conducting business activity. The obligation to pay such dues becomes a burden even if before selling the assets being sold were withdrawn from non-agricultural business activity unless they were sold after 6 years from being withdrawn thereof.



The legislator stipulates the so called **sanction rate** as well. It is applied when the register of revenue is not kept, or kept in that way that it cannot be recognized as evidence in tax proceedings. In such a case, tax authority assesses the value of not-registered revenue by estimation and determines a lump-sum on this amount, which is five times higher than the appropriate rate but not more than 75% of the revenue. In order to determine receivables with the application of this rate, a tax authority is required to perform three actions as part of tax proceedings. Firstly, the above-mentioned prerequisite of the taxpayer must be ascertained. Secondly, it is necessary for a tax authority to establish the value of non-registered revenues, including those in the form of estimation (see II, 4.1.). Thirdly, a tax authority determines in the decision the amount of due lump-sum with the application of the above rate.

A taxpayer subject to the lump-sum taxation on the registered revenues has the right to reduce both the **revenue and the lump-sum amount**. S/he may deduct the loss they suffered in previous years from the revenues when conducting business activity and being taxed by a personal income tax (see III, 2.2.). Moreover, they have the right to reduce the revenue before taxation by such expenses as social security premiums, the Internet, donations, and for re-medical purposes. In such a case, principles and limitations typical of reliefs occurring in personal income tax apply (see III, 2.4.). The lump sum on registered revenue is reduced by the amount of health insurance premium paid by a taxpayer during a tax year.

The lump sum on registered revenues is **payable** by the 20th day of **every month** for the preceding month, and for December – by 31st January of the following year. It is also possible to pay due amount of the lump-sum **quarterly**. In this case, the tax should be paid until the 20th day of the next month after the lapse of the quarter for which the lump-sum is to be paid, whereas for the last quarter of a tax year – within the time limit for the submission of a tax return, that is until 31st January of the year following the tax year. A possibility of a quarterly tax payment concerns solely taxpayers whose revenues did not exceed the equivalence of Euro 25.000 in the year preceding the tax year. Taxpayers interested in such a possibility are obliged to inform a head

of a Revenue Office competent according to the taxpayer's place of residence about a quarterly manner of tax payment until 20th January of the tax year.

Taxpayers of the lump sum tax on registered revenues are obliged to submit an **annual tax return** until 31st January of the year following the tax year. Such a tax return is submitted according to the template established by Minister of Finance, and should included data regarding the value of earned revenues, carried out deductions, and due lump-sum on registered revenues. If a tax return on the earned revenues, carried out deductions, and due lump-sum on registered revenues is not submitted, a head of a Revenue Office will issue a decision determining the value of the liability in the form of the lump-sum tax on registered revenues.

#### **4.2. Artisan's tax**

**Artisan's tax** is the lump-sum form of income taxation on revenues from certain non-agricultural economic activity earned by natural persons. This taxation form can be applied to natural persons conducting economic activity individually, or as a part of civil law partnership. The legislator enables to use this form of taxation for the kinds of activities that are listed in the Act on Lump-Sum Tax, inter alia: services and manufacturing, retail trade of food, agricultural and horticultural products, retail trade of manufactured goods or catering services provided alcohol is not marketed. At the same time specified restrictions concerning the possibility of benefiting from this form of taxation have been introduced.

Taxpayers may use it, among the others, if in their business activity they do not use services of the workers they do not employ on the basis of employment contracts, as well as services of other enterprises and institutions unless these are specialist services; if the taxpayer's spouse does not run activity in the same scope; if they do not manufacture goods that are taxed by excise duty by virtue of separate provisions, and if non-agricultural activity registered in the motion is not conducted outside the territory of the Republic of Poland. The essential element to apply a artisan's tax is the necessity **to submit a motion** according

to the rules that are similar to the ones referring to the lump–sum tax on registered revenues. In case of conducting business activity in the form of a civil law partnership, however, the motion for the application of taxation in the form of a artisan’s tax is submitted by one of the partners exclusively.

In order to apply this form of taxation it is absolutely required **not to exceed the maximum number of employees stipulated in the statute**. For instance, as far as clean–up of premises is concerned, a taxpayer may employ maximum 2 workers whereas in case of beauty salons services, a maximum number of employees is 5 persons. In case of conducting business activity in the form of a civil law partnership, a total number of partners and employed workers cannot exceed the statutory maximum number of employees.

On the other hand, the legislator introduces certain mechanisms which are, as it seems, to encourage taxpayers to **employ certain categories of individuals**. Assessing the conditions justifying taxation in the form of a artisan’s tax, a number of workers employed does not include, inter alia, adult members of a taxpayer’s family, individuals employed with the intention to learn a profession during the apprenticeship, students of high schools and universities employed during summer and winter holiday, workers employed solely to sell goods, receive orders for services, maintain cleanness in the working plant, keep cash and accounts, and drivers and guards provided that the taxpayer specified in writing the scope of functions of such employees, and altogether not more than three unemployed or graduates<sup>38</sup>. Employing such individuals does not deprive the taxpayer from the possibility of taking advantage of taxation in the form of a artisan’s tax if a number of other employed individuals does not exceed a maximum number thereof set forth in the statute.

A basic advantage of this form of taxation, which may encourage other taxpayers to choose it, is a **lack of the obligation to keep tax books**. The exemption from this duty, however, does not regard taxpayers who, in the year preceding the tax year paid income tax

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38 Art. 25 par. 6 of the Act on Lump–Sum Tax.

upon general principles, or in another form than a artisan's tax, as well as taxpayers who, during the tax year, commenced business activity. During the period before the service of a decision determining taxation on the form of a lump-sum paid by, which is no longer, however, than four months, taxpayers are obliged to keep a tax book of revenues or expenditures which is appropriate for taxpayers of personal income tax, or a register of revenues appropriate for the lump-sum tax on registered revenues (see III, 4.1.). It is connected with the fact that a tax authority may reject a taxpayer's motion for being taxed in the above mentioned form of taxation if they do not meet statutory conditions thereon. In such a situation, from the beginning of a tax year or the commencement of business activity by a taxpayer, they must pay tax according to general principles, that is on income, or the lump-sum on registered revenues where the tax base is the value of the earned revenues<sup>39</sup>. If such registers were not kept, determination of income or revenues would be much more difficult.

A tax authority **assesses output tax** in the **form of a decision** after having confirmed that the taxpayer fulfills the conditions necessary to apply a artisan's tax. If the activity is conducted in the form of a company/partnership, the decision lists all its partners. If a head of a Revenue Office states a lack of conditions to apply taxation in that form of a taxation, it issues a **negative decision**. In such a case, a taxpayer is obliged to pay lump-sum tax on registered revenues if they meet the conditions specified for this form of taxation (see III, 4.1.), or income tax according to general principles (see III, 2.). In such a case, taxpayers are obliged to open and keep appropriate books or registers starting from the first day of the month following the month when they were served a negative decision refusing them the application of taxation in the form of lump-sum paid by artisans.

The amount of lump-sum is assessed on the basis of **monthly rates** for particular kinds of activities resulting from the Act on Lump-Sum Tax. **They mostly depend on: a number of employees, a number of inhabitants in a place the activity is run, and a kind of activity being run.**

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39 Art. 30 of the Act on Lump-Sum Tax.

The rates stipulated in the statute are given in monthly amounts. Their average level amounts to several hundred PLN.

Taxpayers covered by taxation in that form of taxation are entitled to three kinds of **tax reliefs**. The first kind is typical of a preference inherent under the law and involves the reduction of a tax rate from 10% to 80%. The reduction of the rate by 10% per each employee is inherent if the employees suffer from at least a light degree of disability. The reduction by 20% regards employees who turned 60 years of age, or suffer from at least a light degree of disability. The reduction by 80% regards employees who are simultaneously employed based on the full time employment agreement and provide services without employing any workers.

The second kind of the preference is granted exclusively **upon the taxpayer's motion**. A head of a Revenue Office may reduce a tax rate of a lump-sum paid by artisans in special cases by not more than 50% if the scope of the taxpayer's activity, with the employment which does not exceed one worker, suggests that the rate determined in the table would apparently be too high.

The third kind of relief is the right to reduce tax resulting from the decision by the amount of health insurance paid in a tax year.

**Taxpayers pay lump-sum** by the 7th day of a month for the previous month, and for December – by 28th December of a tax year. After the lapse of a tax year, until 31st January, a taxpayer is obliged to submit an annual tax return in the Revenue Office in accordance with the prescribed template regarding the value of a health insurance premium.

Taxpayers who conduct business activity are taxed in that form are exempted from the obligation to keep books, submit tax returns, or pay income advance tax payment. However, they are obliged to issue invoices that are mentioned in separate provisions and which prove the sale of goods, products or provision of services upon a client's demand, and keep copies of these invoices for five tax years counting from the end of the year the invoice was issued.

The institution which is not found in other tax allowances is the right of a tax authority to **increase the tax rate**. Within this legal instrument, it is possible, e.g., to increase a basic tax rate appropriate for a given taxpayer by not more than 50% if they conduct business activity suggesting that the rates established in the table would apparently be inappropriate. The right to increase a basic rate takes place when a taxpayer employs adult family members.

Another interesting legal institution typical for lump–sum paid by artisans is the taxpayer’s **right to waive taxation in that form**. A taxpayer may waive taxation in the form of artisan’s tax within the period of 14 days from the day of the service of a decision determining the value of income tax artisan’s tax. In such a case, a taxpayer is obliged to pay lump–sum on registered revenues starting from the next month if they meet the conditions set forth for this form of taxation (see III, 4.1.), or income tax according to general principles (see III, 2). The taxpayer is obliged to pay income tax according to general principles until the end of the month when they waived the application of taxation in the form of lump–sum paid by artisans.

### **4.3. Lump–sum paid by clergy**

**Lump–sum tax paid by clergy is** lump–sum income tax on the revenues of clergy paid by the clerics of the legally recognized denominations obtaining revenues from the fees received in connection with performing their pastoral functions.

On principle, clergy (rectors, vicars, etc.) who obtain revenues on charges in connection with the performance of their pastoral work pay income tax on these revenues in the form of lump–sum tax on clergy’s revenues. They may renounce this form of taxation by the submission of an appropriate statement to the competent head of a Revenue Office by 20th January of a tax year, or by the day preceding the day they started to hold their pastoral post. As a consequence, they will be obliged to pay tax according to general rules (see III, 2).

The amount of a lump–sum tax for a given tax year is assessed by a decision of a head of a Revenue Office on the basis of quarterly rates

specified in the Act. The amount of the rate depends on a clergyman the rate is applied to and on a number of inhabitants in a given parish. The lump-sum tax is paid by the 20th day of the month after the lapse of the quarter, and for the fourth quarter – by 28th December of a tax year. Clergymen paying lump-sum tax are exempted from the submission of a tax return on the amount of obtained revenue for the activity covered by the lump-sum.

#### 4.4. Tonnage tax

A tonnage tax, different from the lump-sum forms of income taxation mentioned above, refers both to natural and legal persons. **Subjects who are ship owners exploiting sea merchant ships in international navigation** can benefit from this form of taxation. Certain conditions, however, must be met. First of all, the ships must have gross capacity over 100 GT<sup>40</sup>. Secondly, ships must have polish affiliation<sup>41</sup>.

In order to tax income by a tonnage tax a ship owner must **submit a statement** according to the accepted form to a competent head of a Revenue Office by 20th January of the first tax year of a taxation period, and if a ship owner starts their activity in the tax year – by the day preceding the day they initiated the activity. Otherwise, general rules of income taxation are applied (see III, 2. and 3.). The choice of taxation in this form occurs for the period not shorter than 5 tax years<sup>42</sup>. Taxation by a tonnage tax may be prolonged for another 5 years unless a ship owner submits a written letter of resignation from this form of taxation until 20th January of the tax year following the taxation period to a tax authority competent in the tonnages tax cases<sup>43</sup>.

The tax covers only the income involving the services in international navigation in the scope of, inter alia, transport of cargos and passengers, lease and use of containers, high seas rescue. Whereas the income aggregated, inter alia, in connection with fishery, fish industry,

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40 Art. 3 par. 1 of the Act on Tonnage Tax.

41 Art. 2 point 5 of the Act on Tonnage Tax.

42 Art. 10 par. 1 of the Act on Tonnage Tax.

43 Art. 10 par. 3 of the Act on Tonnage Tax.

extraction of mineral resources from the sea floor, construction of wind power stations, or building transmission pipelines on the sea floor, are not subject to taxation by a tonnage tax<sup>44</sup>.

The **tax base** here is the income specified in a lump–sum tax which corresponds to the ratio of a 24-hour rate resulting from the Act (from Euro 0,1 to Euro 0,5) and the exploitation time in a given month of all the ships belonging to the ship owner. This income is taxed at a **19% tax rate**.

There is also a **special rate** which amounts to **15%**. It applies to the revenues (not the income) earned by a ship owner who is a tonnage tax payer for selling ships in a part not used for the purchase of ownership or share in co–ownership, and repair, renovation, modernization or reconstruction of ships, within 3 years from the day of selling<sup>45</sup>.

The tax for every month is calculated and paid without summons of the tax authority by the 20th day of each month for the previous month, and for December – within the time limit to submit a tax return for a given tax year (by 31st January of the next year). Taxpayers are also obliged to submit a tax return with a tax authority in accordance with the prescribed template on the value of a tonnage tax due for a given tax year until 31st January of the following year.

## 5. Goods and Services Tax

### 5.1. Subject of taxation

Taxpayers are legal persons, organizational units having no legal personality and natural persons who individually conduct business activity regardless of the purpose or results of such activity. Such business activity includes any activity of manufacturers, traders or service providers, including subjects acquiring natural resources and farmers, as well as the activity of people performing liberal professions,

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44 Art. 3 par. 3 of the Act on Tonnage Tax.

45 Art. 8 par. 1 of the Act on Tonnage Tax.



also when a given activity was performed once in the circumstances indicating an intention to perform such activities frequently<sup>46</sup>.

The taxpayers that do not have their seat, a permanent place of conducting activity or permanent place of residence in Poland are obliged to appoint a **tax representative**. Such a subject is a legal person or an organizational unit having no legal personality having its seat in the territory of the country, or a natural person having their permanent place of residence in the territory of the country, who is liable, jointly and severally with the taxpayer, for tax obligations of the taxpayer represented thereby.

A taxpayer is also each subject performing **intra-Community supplies of new means of transport** when the circumstances do not indicate an intention to perform this activity frequently<sup>47</sup>. It means that if, e.g., a natural person imports a new car (if a mileage does not exceed 6 000 km, or not more than 6 months elapsed from the moment it was permitted to the use<sup>48</sup>) from Holland to Poland, s/he will have to pay tax with the Polish tax authority according to the rate that is binding in Poland. On the other hand, the seller in Holland will have the right to claim a refund or deduction of the earlier paid tax in this country. A purpose of the introduction of this rule with reference to such cars is to eliminate competition and tax dislocation of budget receipts in individual countries<sup>49</sup>. Otherwise, it could lead to situations of substantial increase of cars sale in the countries with a lower tax rate, and simultaneous decline of the sale in the countries where the rate would be lower and where cars from other countries would be imported.

A taxpayer should be a person who conducts their activity as an entrepreneur acting in the conditions of uncertainty of economic risk<sup>50</sup>.

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46 H. Litwińczuk, (ed.) *Prawo podatkowe przedsiębiorców*, Vol 1, Warsaw 2008, P. Borszowski, *Działalność gospodarcza w konstrukcji prawnej podatku*, Warsaw 2010, p. 131 and next.

47 Art. 16 of the VAT Act.

48 Art. 2 point 10 lett. a) of the VAT Act.

49 A. Bartosiewicz, R. Kubacki, *Komentarz do Art. 2 ustawy z dnia 11 marca 2004 r. o podatku od towarów i usług (Journal of Laws No. 54, item 535)*, [in:] A. Bartosiewicz, R. Kubacki, *VAT. Komentarz*, Lex, 2011, ed. V, thesis 25.

50 ECJ's judgement in the matter of C-202/90 between Ayuntamiento de Sevilla and Recaudadores de Tributos de las Zonas primera y segunda.

Therefore, the definition thereof excludes individuals performing actions based on the **employment agreement** as well as actions performed based on a **mandatory agreement and a specific work contract** because of the performance of these actions, such individuals are connected with a principal by legal ties creating a legal relation between a principal ordering the performance of the actions and an agent performing ordered actions as to the conditions of their performance, remuneration and the principal's responsibility for the performance thereof against third parties<sup>51</sup>. The last condition regarding the responsibility of the principal rather than the agent against third parties seems to be particularly important for the application of the exclusion. Therefore, an agent, e.g., a lecturer running training, who provides certain actions in favor of third parties, will not be a taxpayer if the responsibility thereof against such subjects (e.g. training participants for its proper organization) is held by the principal (e.g. an entrepreneur organizing training).

The following are **excluded from the subjective scope**: public authorities and offices servicing such authorities shall not be considered taxpayers within the scope of implemented tasks imposed by separate provisions of law for the implementation of which they have been appointed, save for the activities performed pursuant to civil law contracts concluded<sup>52</sup>.

## 5.2. Object of taxation

The object of taxation of goods and services tax concerns: **supply of goods for consideration and provision of services for consideration in the territory of Poland, export of goods, import of goods, intra-EU acquisition of goods for remuneration in the territory of the country, intra-EU supply of goods**. As far as these notions are concerned, the notion of goods plays an important role. Goods are movable things, all forms of energy, buildings and constructions or their parts, which are the object of activities subject to goods and

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51 Art. 15 par. 1 point 3 of the VAT Act.

52 Art. 15 par. 6 of the VAT Act.

services tax which are listed in classifications issued on the basis of provisions on public statistics, as well as land<sup>53</sup>.

As part of the transactions effected within the territory of Poland, there appear two kinds thereof covered by the analyzed tax. The first one is the **supply of goods**. It is a transfer of the right to dispose the goods as an owner. Most frequently it is the transfer of ownership. However, it will also be every other action which effects in the possibility of factual disposal of the goods which can be defined as payable delivery, or actions connected with the delivery of goods, e.g. transfer or consumption of the goods for the taxpayer or his/her employees' personal purposes, are also subject to taxation. A second kind of the action covered by taxation and realized within the territory of Poland is the **provision of services**. It is each performance for the benefit of a natural person, legal person or organizational unit having no legal personality which does not constitute a supply of goods. It is also every gratuitous provision of services if they are not connected with running the enterprise and if the taxpayer had the right to reduce the amount of output tax by the amount of input tax for acquisition of the goods and services connected with these services, in whole or in part.

As part of transactions covered by the tax on goods and services performed in international relations two categories are distinguished. The first one regards those which concern **subjects acting within the EU Member States**, whereas the second one refers to **subjects acting in relations with entrepreneurs from third states**, that is those which do not belong to the EU.

With reference to the first category, attention should be paid to the **intra-EU acquisition of goods**. It is an acquisition of the right to dispose of the goods, like their owner, which, in result of the realized supply, are dispatched or transported into the territory of the EU Member State other than the territory of the EU Member State where dispatch, or transport by a supplier, or acquirer of the goods, or for their benefit, was commenced.

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53 Art. 2 point 6 of the VAT Act.

As part of this kind of transaction, attention should also be paid to the **intra-EU supply of goods**. It is an exportation of goods from the territory of Poland into the territory of another Member State of the European Union.

As part of the transaction covered by taxation which occurs with reference to a country that is not the European Union Member State, attention should be paid to the **export of goods**, which is an exportation of goods confirmed by a Customs Office specified in customs law provisions from the territory of Poland outside the territory of the EU, and, on the other hand, the **import of goods**, which is an importation of goods from the territory of a third country into the territory of Poland.

The fact that the above mentioned actions are subject to the tax on goods and services does not mean, however, that each of them is connected with the obligation to pay the tax. It will not be necessary in case of intra-EU delivery of goods and export of goods. Performance of such actions is connected with the application of the **0% rate** (see III 5.4.). In consequence, a taxpayer who is a selling party has the right to regain the tax s/he paid earlier. It will happen in connection with the application of the mechanism according to which the tax to be paid is assessed in such a way that the input tax is deducted from the output tax (see III, 5.7.).

### **5.3. Tax base**

The turnover understood as the whole payment due from the acquirer is the tax base. That payment should be increased by the received grants, subventions and other additional payments of a similar character exerting a direct influence on the price (amount due) of goods delivered, or services provided by the taxpayer, reduced by the amount of output tax. On the other hand, it should be reduced by the amounts of documented, legally admissible and obligatory rebates (abatements, discounts, granted complaints and cash discounts) and by the value of returned goods, refunded undue amounts within the meaning of provisions on prices and refunded amounts of grants, subventions and other additional payments of a similar character, as well as the amounts resulting from invoice corrections.

## 5.4. Tax rates

The standard rate in goods and services tax imposed in Poland is **23%**. It covers all goods and services, where lower rates cannot be applied. There are also preferential rates of **8%** (it is applied to pharmaceuticals and medical equipment, some processed foods, passenger transport, hotel accommodation and some goods for infants) and of **5%** (unprocessed food, e.g. fruit, meat, fish, and apart from this, books and specialized magazines). In addition, a **0%** VAT rate is applied mainly to exports of goods and intra-EU supplies of goods.

The rates of the tax on goods and services that are binding in Poland meet the requirements resulting from the EU regulations, which stipulate that from 1st January, 2011 to 31st December, 2015, the tax rate cannot be lower than **15%**<sup>54</sup>. At the same time it is emphasized that Member States may apply one or two lowered rates<sup>55</sup>, whose value cannot be lower than **5%**.

A rate of the **lump sum tax refund** should be differentiated from tax rates in this tax. In Poland, it applies to lump sum farmers. On the one hand, they take advantage of the exemption. Making sales, they do not add the VAT tax. In consequence, they are not entitled to the right to deduct the input tax from the output tax (see III, 5.7.). On the other hand, however, they are entitled to certain compensation for the paid tax on goods and services in connection with purchase of goods and services used to conduct agricultural activity. This compensation is not paid in the amount of **7%** of the value of sold goods<sup>56</sup>. It is paid to entrepreneurs buying agricultural fruit for whom this due constitutes the input tax.

## 5.5. Tax exemptions

There are two kinds of tax exemption in goods and services tax. The first group are exemptions concerning certain **actions performed in the**

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54 Art. 97 Council Directive 2006/112/EC of 28.11.2006 on the common system of value added tax (Official Journal of the EU L.06.347.1).

55 Art. 98 and 99 Council Directive 2006/112/EC of 28.11.2006 on the common system of value added tax (Official Journal of the EU L.06.347.1).

56 Art. 115 par. 2 of the VAT Act.

**public interest** which result from Polish regulations<sup>57</sup>, but implementing obligatory preferences resulting from the EU regulations<sup>58</sup>. Within this category, inter alia, the following are subject to exemption: hospital and medical care, excluding veterinary services, services provided by dental technicians within the scope of their profession, education of children or youth, general or tertiary education, and the provision of some cultural services.

Within the exemptions which are not directly connected with actions in the public interest, the following exemptions should be indicated: insurance transactions, provision of credits and credit agency, betting, lotteries and other games of chance or gambling. Moreover, attention should be paid to the exemption of the sale of buildings, building structures or their parts. Nevertheless, it is not applied if this action is performed as part of the first occupancy, or before it, or if between the first occupancy and delivery of a building, building structure, or their part, a period shorter than 2 years elapsed<sup>59</sup>.

Taxpayers who are tax exempt cannot enjoy the right to reduce the amount of output tax by the amount of input tax.

## **5.6. The procedure and terms of payment**

Taxpayers who pay goods and services tax are obliged **to submit a registration entry** before performing the first action (being subject to taxation) to a head of a Revenue Office. Taxpayers who intend to effect transactions within the European Union are obliged to inform a head of a Revenue Office about it. They are registered by Revenue Offices as “EU VAT taxpayers” and are given an appropriate number before they perform the first action.

Taxpayers who conduct economic activity, as a rule, have to submit **tax returns** by the 25th day of the month following each subsequent month. Exceptionally, small taxpayers (inter alia, taxpayers whose sales value, including tax, did not exceed the equivalence of Euro 1.200.000

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57 Art. 43 of the VAT Act.

58 Art. 132–135 Council Directive 2006/112/EC of 28.11.2006 on the common system of value added tax (Official Journal of the EU L.06.347.1).

59 Art. 43 par. 1 point 10 of the VAT Act.

expressed in PLN in a previous tax year) who selected a cash method, submit returns quarterly by the 25th day of the month following the subsequent quarter. This rule is also applied to lump-sum farmers who resigned from the exemption.

According to the **cash method** described above, the tax liability arises on the day of payment of a whole or part of the dues not later than on the 90th day counting from the day of the goods issue, or service provision. Whereas a partial payment of the dues causes the formation of the tax liability in this part<sup>60</sup>.

Taxpayers who are exempted from the tax subjectively as well as those who only perform actions exempted from tax **do not submit tax returns**. Otherwise, tax returns are submitted within time limits when the term of tax payment is due.

The tax on imported goods is calculated and disclosed in the **customs notification**. Taxpayers conducting business activity who enter into transactions within the European Union disclose the tax on these actions in the submitted returns. Apart from the returns they are obliged to submit the **information summarizing** transactions concluded within the European Union for quarterly periods by the 25th day of the month following the lapse of the quarter.

Taxpayers are encumbered with the duty to draw up **invoices** which, in particular, specify the transaction, a date of sale, a unit price before taxation, a tax base and the details of the taxpayer and the purchaser. The invoice is a document which provides the mechanism of deduction of input tax from output tax. Taxpayers are obliged to keep a **register** (a full or simplified version – taxpayers subjectively exempted, or a special version with the use of cash registers) to settle taxes on goods and services.

## 5.7. Due tax and tax refund

Due tax is the difference between **output and input tax**. As a rule, the output tax is decreased by the input tax in the settlement for

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60 Art. 21 par. 1 of the VAT Act.

a period (a month, or a quarter) a taxpayer received the invoice, or the customs document for. **Output tax is** the amount of tax that encumbers turnover obtained by a taxpayer. Drawing up an invoice to document a sale of goods, a taxpayer is obliged to disclose thereon the amount of the output tax.

On the other hand, the **input tax is** the sum of tax amounts shown on the invoices received by the taxpayer by virtue of the purchase of goods and provision of services, and in the case of import, it is a sum of tax amounts resulting from the customs document. Therefore, this is the tax paid by a taxpayer in the price of purchased or imported goods that s/he needs to perform activities that are subject to taxation.

If the amount of the input tax in the settlement period exceeds the amount of the output tax, a taxpayer has the **right to reduce** the output tax by this difference for the following periods, or the **right to refund** the difference on the bank account<sup>61</sup>. The refund should be returned, as a rule, within 60 days from the day of submission of a tax return by a taxpayer. The refund is made on the taxpayer's bank account. If the grounds of the refund require additional verification, a head of a Revenue Office may prolong this period until the end of the taxpayer's settlement verification as part of the inspection acts, tax control, or tax proceedings pursuant to the provisions of the Tax Ordinance, or control proceedings based on the regulations on tax control. If the actions carried out by the control body reveal the grounds for the refund mentioned in the previous sentence, a Revenue Office pays the taxpayer the amount due together with interest in the amount corresponding to the prolongation fee applied in the case of the tax payment prolongation, or its spread into installments<sup>62</sup>.

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61 Art. 87 par. 1 of the VAT Act.

62 Art. 87 par. 2 of the VAT Act.



## 6. Excise duty and gambling tax

### 6.1. Subject of taxation in excise duty

Taxpayers of excise duty are natural persons, legal persons and organizational units having no legal personality performing taxable acts. These subjects are, inter alia, producers of excise goods, salesmen and importers or exporters of these goods. Taxpayers are also subjects who acquire or hold excise goods on which excise duty has not been paid in due amount, and subjects who hold goods where excessive wastage or shortage has occurred, as well as contractors of services to manufacture excise goods under a contract to perform specific work, or other contracts.

At the same time the legislator introduced a rule according to which if the tax obligation burdens several taxpayers with reference to the same goods, excise payment connected with them by one of the taxpayers causes the expiry of the tax obligation of other taxpayers<sup>63</sup>. It means that if, e.g., a producer of goods covered by excise duty pays this consideration, the owner of such goods is not burdened with the tax liability in the scope thereof. The aim of the application of this rule is to eliminate a possibility of the formation of double taxation by excise duty.

### 6.2. Object of taxation in excise duty

The objective scope of excise duty includes: **manufacture of excise goods, dispatch of excise goods from a tax warehouse, sale of excise goods within the territory of Poland, import of excise goods, intra-Community acquisition, acquisition or holding excise goods** on which excise duty has not been paid in due amount.<sup>64</sup> The term of **sale** mentioned above refers to, inter alia, situations of giving or using excise goods for the purposes of official entertainment or advertising, using excise goods for the payer's personal needs, their partners and shareholders.

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63 D. Mączyński, *Podatek akcyzowy w prawie polskim i europejskim. Komentarz*, Warsaw 2004.

64 K. Lasiński-Sulecki, *Polish Excise Legislation? The Potential Incompatibilities with EC Law, European Taxation 2008*, vol. 48, No. 5.

Four groups may be distinguished within **excise goods**. The first one is composed of **power energy goods** such as engine fuels, fuel oils, gas and electric energy. In the case of electric energy, the object of excise taxation is the inter-Community purchase by a final purchaser, the sale of electric energy to a final purchaser within the territory of the country, including the subject having no permit for the production, distribution, or trade in electric energy where they produced such energy. Moreover, taxation covers electric energy consumption and import by a final purchaser if no excise duty was paid for it in due amount and the subject who sold this electric energy to a final purchaser cannot be established<sup>65</sup>.

The second group of the goods covered by excise duty are **alcoholic beverages** such as ethyl alcohol, beer, wine, fermented alcohol-based beverages and intermediate products<sup>66</sup>. The third group contains **tobacco products** such as cigarettes, smoking tobacco as well as cigars and cigarillos. Whereas the fourth group is made up of **passenger cars**. In the latter case, taxation covers import of passenger cars which were not registered earlier in the territory of the country in accordance with traffic regulations, intra-EU purchase of passenger cars which were not registered earlier in the territory of the country in accordance with traffic regulations, as well as the first sale of passenger cars, which was effected in the territory of the country, which were not registered earlier in the territory of the country in accordance with traffic regulations and which were produced in the territory of the country, or on which no excise duty was paid for the above mentioned actions<sup>67</sup>.

The terms of export, import, intra-EU acquisition and supply have similar meanings to these which refer to the goods and services tax. Whereas as far as the notion of the **tax warehouse** is concerned, it is a place specified in a permit issued by the competent head of a Customs Office and liable to special tax supervision by virtue of provisions on the customs service, where excise goods are placed under excise-

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65 Art. 9 of the Act on Excise Duty.

66 Art. 92 of the Act on Excise Duty.

67 Art. 100 of the Act on Excise Duty.

suspension procedure and may be subject to acts performed under specified conditions.

### 6.3. Tax base in excise duty

If the excise rate is expressed as an amount of goods per unit, the tax base is the **quantity of excise goods** (e.g. in the case of fuels, liquor, gas, electric energy). The tax base can also be the **retail price fixed and printed on a single packaging** (e.g. cigarettes). In that case, the excise rate is expressed as an amount of goods per unit and a percentage of the maximum retail price. In the case of passenger cars taxation, the tax base is a **number of imported vehicles**, wherein the value of taxation depends on engine capacity.

### 6.4. Tax rates in excise duty

Excise tax rates can have three forms. The first one is the **amount rate**. We deal with such a situation in the case of the taxation covering, most of all, alcoholic products. In the case of ethyl alcohol, the rate amounts to PLN 4,960,00 for 1 hectoliter of 100% vol. of ethyl alcohol included in an off-the-shelf product<sup>68</sup>, PLN 158 for 1 hectoliter of wine<sup>69</sup>, and PLN 7,79 for 1 hectoliter of beer for each degree Plato of an off-the-shelf product<sup>70</sup>. Moreover, the amount rate occurs in case of one kind of tobacco products, that is cigars and cigarillos, for which the rate amounts to PLN 244,40 for every 1 000 pieces<sup>71</sup>, and energy taxation (PLN 20,00 for MW per hour)<sup>72</sup>.

The second kind of excise tax rates is a **proportional rate**. We deal with it in the case of passenger cars. The excise rate for such cars depends on engine capacity, and amounts to 18,6% of the tax base for passenger cars of the engine capacity over 2.000 cm<sup>3</sup> and 3,1% of the tax base for other passenger cars<sup>73</sup>.

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68 Art. 93 par. 4 of the Act on Excise Duty.

69 Art. 95 par. 4 of the Act on Excise Duty.

70 Art. 94 par. 4 of the Act on Excise Duty.

71 Art. 99 par. 1 point 3 of the Act on Excise Duty.

72 Art. 89 par. 3 of the Act on Excise Duty.

73 Art. 105 of the Act on Excise Duty.

The third kind of the rates occurring in excise duty is a **mixed rate**. It is the amount of goods per unit and a percentage of the maximum retail. We deal with such a situation in the case of tobacco products<sup>74</sup>. For cigarettes, this rate amounts to PLN 158,36 for each 1 000 pieces, and 31,41% of maximum retail price, whereas for smoking tobacco, the rate is PLN 102,32 for each kilogram and 31,41% of maximum retail price.

## 6.5. Tax exemption in excise duty

The Tax Act regulates two categories of exemptions: **subjective** (inter alia the European Union institutions, diplomatic agencies, armed forces of NATO) and **objective** (e.g. the electrical energy produced from renewable sources of energy; beer, wine and fermented drinks made at home by natural persons for their personal needs and not intended to be sold, ethyl alcohol completely denatured by denaturants permitted to denature ethyl alcohol based on the European Commission regulation No. 3199/93 of 22 November 1993 on the mutual recognition of procedures for the complete denaturing of alcohol for the purposes of exemption from excise duty, including alcohol contained in products not intended for human consumption<sup>75</sup>).

## 6.6. The procedure and terms of payment

Taxpayers who conduct business activity connected with excise goods are obliged **to submit a registration entry** before performing the first action being subject to taxation to a head of a Customs Office.

Taxpayers are obliged to calculate and pay monthly amounts of excise duty by the 25th day of the month following the month in which the tax liability arose into a competent Customs Chamber's account. They should submit tax returns within the same time limit.

With regard to excise goods, the payers shall also be obliged to calculate and pay the **initial daily excise amounts**. It concerns registered merchants, subjects running tax warehouses and taxpayers authorized

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74 Art. 99 par. 2 of the Act on Excise Duty.

75 Art. 30 par. 9 point 1 of the Act on Excise Duty.

to exit goods from tax warehouses when they are not their owners<sup>76</sup>. Initial payments of daily excise amounts shall be made not later than on the 25th day following the day on which the tax liability arose. The payments of daily amounts made for a given settlement month shall be taken into account during the settlement of the excise for a given settlement month. Daily payments which are made in a settlement month are, on the other hand, reduced by the amount equal to the tax value of excise duty marks paid to receive them, as well as the amount of the excise exemptions and reductions a taxpayer is entitled to. The amount of the excise duty calculated from given excise products may be reduced by the equivalence of excise duty marks provided they are appropriately placed on given products or single packaging.

With reference to the above mentioned notion of **excise duty marks**, it should be pointed out that these are marks specified by Minister of Finance to mark excise products that are subject to obligatory marking covering tax excise marks, which confirm payment of the amount equivalent to the value of tax excise marks, as well as legalizing excise marks, which confirm the right of the subject obliged to mark excise products by excise marks to designate them for sale<sup>77</sup>.

Taxpayers importing excise goods are obliged to pay excise duty within the time limit and under conditions specified in the customs law provisions for customs duties.

There is an obligation to designate excise goods with tax excise duty marks. It refers to producers, importers, subjects who acquire intra-Community goods and tax representatives in the case of packaging, dispensing or weighing goods into single packaging, repackaging, re-dispensing or subsequently weighing excise goods into other single packaging.

In excise duty the **procedure to suspend the collection of excise duty** plays an important role. This procedure is applied during production, storage, reloading and moving excise products during

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76 Art. 23 par. 1 of the Act on Excise Duty.

77 Art. 2 point 17 of the Act on Excise Duty.

which, if statutory conditions are fulfilled, the obligation to pay this duty does not arise from the tax obligation.

The procedure of the excise duty collection suspension applies, most of all, when excise products are stored in a tax warehouse (see III. 6.2.). It is also applied, inter alia, when goods are trans-located between tax warehouses located both within and outside the territory of the country within the EU.

## 6.7. Gambling tax

**Gambling tax** is paid by taxpayers who are natural persons, legal persons and organizational units having no legal personality who conduct business activity in the area of games of chance and gambling based on the granted license or permit, subjects arranging games covered by the state monopoly, as well as participants of poker tournaments. It means that, on the one hand, taxpayers are entrepreneurs conducting business activity in the gaming area, whereas on the other hand, natural persons participating in one kind of a game (poker)<sup>78</sup>. The tax liability the gambling tax arises on the day of the activity commencement. In the case of poker played in the form of a tournament, the tax liability arises at the moment of joining the tournament.

In consequence, the **object of taxation** is a organization of games of chance and gambling and participation in poker played in the form of a poker tournament. In case of a poker tournament organization, participation in the game rather than its organization will be taxed, which is important for the indication of a taxpayer. It will be the game participant, not its organizer.

The **tax base** depends on the kind of a game conducted. In gambling, tombola and TV bingo, it is the total receipts obtained from the sale of prizes, cards or other proofs of the game participation. In an audio-text lottery, the tax base is the revenue earned by this lottery organizer for it, whereas in a numbers game, the total paid stakes. In case of betting transactions, the tax base is the total of paid stakes.

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78 Art. 71 par. 1 of the Act on Gambling Activities.

In poker played in the form of a tournament, it will be the amount of winning reduced by the amount of the entrance fee for participation in the tournament. On the other hand, in case of slot machines, the tax base is the difference between the amount obtained from the exchange of game tokens, or paid at the checkout and credited in the machines' memory, or paid into the machine, and the total winnings obtained by the game's participants<sup>79</sup>.

**Tax rates** on the gambling tax take the form of proportional, flat rates (**10%** for tombola, bingo and bets, **15%** for money lotteries, **25%** for cash bingo games, TV bingo, audio–text lottery and poker played in the form of a tournament, **20%** for numbers games, **50%** for slot machines games, cylindrical games, dice games, cards games, excluding poker played in the form of a tournament<sup>80</sup>).

Taxpayers, excluding taxpayers in the game of poker played in the form of a tournament, are obliged to **submit tax returns** on gambling tax with a competent head of a Customs Office, as well as calculate and pay gambling tax into the bank account of a competent Customs Chamber. Both above actions are realized for monthly periods until the 10th day of the month following the month of the settlement<sup>81</sup>. Apart from this, such subjects are obliged to calculate and pay gambling tax into the bank account of a competent Customs Chamber initially for daily periods. Such dues are paid not later than within 10 days from the day of the draw. They are included in tax returns and constitute advance payment for the gambling tax.

A taxpayer who an organizer of a tournament of poker pays out winnings reduced by the amount of the gambling tax since they act as a **remitter** (see II, 2.5.). It means that such a subject is obliged to calculate, collect and pay the gaming tax into the bank account of a competent Customs Chamber, as well as submit tax returns on the gambling tax for monthly periods until the 20th day of the month

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79 Art.73 of the Act on Gambling Activities.

80 Art. 74 of the Act on Gambling Activities.

81 Art. 75 of the Act on Gambling Activities.

following the month of the settlement with a competent head of a Customs Office<sup>82</sup>.

## 7. The taxation of real estates

### 7.1. General remarks

There are three following property taxes on a real estate: a **real estate tax, agricultural tax and forestry tax**<sup>83</sup>. The real estate tax has the widest subjective scope since it taxes lands, buildings and structures. In agricultural and forestry tax only lands are taxed. It does not mean, however, that a given land must be taxed at a given moment by more than one tax. In such a case, double taxation would arise, where two taxes of a similar character (property taxes) would apply to the taxation of the same object of taxation. As a consequence, settling, e.g. real estate tax, as an appropriate one to be levied in the given case, eliminates the possibility of burdening this real estate with other property tax (agricultural or forestry tax).

### 7.2. The taxpayer

In the real estate tax, agricultural tax and forestry tax, the legislator introduced very similar rules denominating the taxpayer. They can be all subjects, aside from their legal status, such as natural persons, corporate bodies and organizational entities<sup>84</sup>. The duty shall be levied on them if they possess properties on the grounds of a definite, valid legal title like **ownership** or **perpetual usufruct**<sup>85</sup>. It can also be the contract or other act, on the ground of which one subject becomes a **possessor of a real estate** (for example, tenancy, lease, or hire). However, a possessor of a real estate (the tenant, the user, etc.) shall be a taxpayer only when the contract refers to the property of the State Treasure, or territorial self-

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82 Art. 75 par. 6 and 7 of the Act on Gambling Activities.

83 M. Popławski (ed.), *Stanowienie i stosowanie prawa podatkowego w gminach*, Białystok 2007, p. 124 and next.

84 L. Etel, S. Presnarowicz, G. Dudar, *Podatki i opłaty lokalne. Podatek rolny. Podatek leśny. Komentarz*, Warsaw 2008, p. 119 and next.

85 Perpetual usufruct is a contract where the land owned by the State Treasure, or territorial self-government units is delivered into the prolonged use to a given subject.



government units. It means that the transfer of possession of private property is not effective with the transfer of the tax liability on the possessor as in such a case, the owner shall still be the taxpayer.

The legislator stipulates that there are cases when a taxpayer shall be the subject which has no valid legal title, in the case of the existence of the autonomous possessor and in the possession of real estates of the State Treasury, or territorial autonomy units without the valid title.

Special principles of taxation occur in the case of **co-ownership** or **co-possession** of a land, building, or building structure subject to taxation. In such a situation, this object constitutes a **separate object of taxation** whereas the tax liability on the real estate or building structure **burdens jointly** all co-owners or holders<sup>86</sup>. Two consequences result from this principle. Firstly, the real estate constituting co-ownership cannot be taxed jointly with the real estate constituting the exclusive ownership of any of the co-owners. Such a situation could arise if a taxpayer, apart from, e.g., the land constituting their co-ownership, would own a land constituting their exclusive ownership. Then two documents should appear where the tax would be indicated separately on these real estates. This will be a tax decision, or a tax return depending whether a taxpayer is a natural person, legal person or organization unit having no legal personality (see III, 7.7.). Secondly, when the value of the tax due is established or determined, each co-owner (co-holder) should be indicated in a tax decision, or tax return where the tax due to be paid that is calculated from the whole property rather than just their part of the share thereof (see II, 7.6.). It is to protect a tax authority in the situation if any co-owner failed to pay tax on his or her part. In such a case, a tax authority may demand payment of the tax from any other co-owner.

### 7.3. The object of taxation

The real estate tax refers to **structures, buildings and lands** which are not taxable by agricultural tax or forestry tax. **Arable lands** are only

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86 See: e.g., Art. 3 par. 4 L.L.T. This principle is binding not only in the tax on a real estate but also in agricultural and forestry tax.

taxable to the agricultural tax and **forests** are taxed with the forestry tax. It means that buildings and structures are taxed by a real estate tax, while lands, depending on their character, by one of the three above-mentioned taxes.

A **building** is a building structure which is permanently connected with the ground, possesses walls, foundations and the roof. Analyzing this definition in practice, particular doubts may arise in case of the definition of permanent connection with the ground. It is assumed that this element will be fulfilled when such an object cannot be lifted off the ground without its damage, and when simultaneously it is not an object erected for transient use<sup>87</sup>. Taking the above into consideration, it may be indicated that a building must be connected with the ground both in a physical and legal sense. At the same time, both features must be fulfilled jointly. Therefore a building work which will be permanently connected with the ground but erected based on a temporary building permit, e.g., for 10 years, will not be a building since there will be no permanent legal connection with the ground therein<sup>88</sup>.

**Structures** are building structures which are not buildings or accessory buildings. Technical networks, telecommunication networks, water conduits and sewerages, other conduit systems, energy distribution structures, etc., reservoirs, antenna masts, etc. are examples of taxed structures. In contrast to buildings, the structures are taxed only when they are commercially used. Buildings, on the other hand, will be taxable regardless of their purposes (residential or commercial ones).

The entry in the **register of property** decides on the character of lands. It is binding both for taxpayers and tax authorities. Sometimes the real estate tax can be levied on arable lands and forests. This will take place in the case of the factual seizure of these grounds for the business activity other than agricultural one. Thus, the real estate tax should be paid. It happens if, for example, there is a gravel pit commercially used on the arable land. The real estate tax should be imposed in spite of the

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87 The judgment of PAC in Bydgoszcz of 15.3.2006 (I SA/Bd26/06).

88 R. Dowgier, L. Etel, B. Pahl, M. Popławski, *Leksykon podatków i opłat lokalnych*, Warszawa 2010, p. 131.

fact that there are no changes concerning it in the register of lands and buildings.

#### 7.4. The tax base

The tax base for buildings or their parts is determined by their **usable area** expressed in square meters. These data can be fixed based on the physical quantity survey of the area of the building according to the internal length of walls. The building's tier has impact on the usable area too. The size of rooms, or their part and the part of a tier of the height in the light from 1,40 m do 2,20 m is classified as the usable area in the building in 50%, whereas in the case of the height shorter than 1,40 m, this area is ignored<sup>89</sup>. It is of particular importance in the case of tiers with slants (e.g. in attics). It may lead to a situation when due to the large usable area located under slants, the area to be taxed will be small. The quantity survey is made by the taxpayer who shows the usable area in the tax return.

The **depreciation value of the structures** determines the tax base, which may be used when the object is redeemed. Otherwise, the tax base is the **trading value** fixed by the taxpayer after the examination of the state and the degree of the structure wear and tear.

The depreciation value is not reduced by made depreciation write-offs. It means that during the whole depreciation period, the tax is calculated from the same value. The exception is a situation when a digressive method of depreciation is adopted, where we deal with the changeable tax base (see III, 3.2.). The application of the same value of the tax base during the whole depreciation period, e.g. 5 or 10 years, may be deemed unjustified since some taxable building structures wear out in time and lose their value, e.g. telecommunication network. Nevertheless, it does not change the rule according to which during the whole depreciation period the depreciation value constitutes the building structure's tax base. In the case of fully depreciated building structures, the tax base is the value of the structure as of 1st January

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89 Art. 4 par. 2 L.L.T.

of the year when the last depreciation write-off was made<sup>90</sup>. It means that after full depreciation of the building structure, the depreciation value will continue to be the tax base. Even though the statute indicates that it is to be the value constituting the depreciation base in the last year when depreciation was made, in practice it will be the same value which was taken into consideration at the beginning of the process of making depreciation. It will be different only if during depreciation the building structure was improved, that is its value was increased, or a digressive depreciation method was applied.

If building structures are not depreciated and were not subject of depreciation with a given taxpayer, the tax base is their market value. This value should be determined by the taxpayer himself or herself. The ensuing risk here, however, is that the subject will underrate the real value of the building structure. In order to limit this phenomenon, the legislator introduced a mechanism thanks to which a tax authority may appoint an expert who will establish this value. If the value established by an expert is at least 33% higher than the value determined by the taxpayer, the costs of determination of the value by an expert are borne by the taxpayer<sup>91</sup>.

The **tax base for lands** is expressed in meters (when taxed with the real estate tax), or hectares (when taxed with the agricultural tax or forestry tax). The area of such lands is usually taken from the register of lands and buildings.

## 7.5. Rules of establishing the rates

Communes/municipalities where taxable real estates are located, decide on the amount of the rates in the real estate tax, agricultural tax and forestry tax. **In the real estate tax a municipal council is obliged to estimate the amount of rates.** The rates estimated by a municipal council cannot exceed maximum rates, valorized annually for the inflation level. The rates in the tax on a real estate are of various nature. In the case of lands and buildings, we deal with **amounts of**

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90 Art. 4 par. 1 point 3 L.L.T.

91 Art. 4 par. 7 L.L.T.

**the rates**, whereas in case of building structures, the **percent rate**. The legislator envisaged considerably higher maximum rates with reference to buildings compared to lands.

Determining the rates for buildings or lands, a municipal council should introduce certain differentiation resulting from the statute. It means that in the case of buildings, municipality should establish the rates for five categories, inter alia for residential estates, buildings connected with conducting business activity, and the so called other buildings. Maximum rates for such objects are now PLN 0,67 for 1 m<sup>2</sup>, PLN 21,05 for 1 m<sup>2</sup>, and PLN 7,06 for 1 m<sup>2</sup> respectively. The rates are annual. It means that a burden connected with their application may be borne by a given person if they are taxpayers (e.g. owners) throughout the whole year. In the case of lands, the legislator ordered to introduce the rates for three kinds thereof, i.e., for the lands connected with conducting business activity, the lands located under lakes, and the so called other lands. Determined rates for such objects cannot exceed now PLN 0,80 for 1 m<sup>2</sup>, PLN 4,15 for 1 hectare of the area (i.e. 10000 m<sup>2</sup>), and PLN 0,41 for 1 m<sup>2</sup> respectively.

With reference to building structures, the legislator introduced the principle according to which the rate introduced in a given municipality cannot be lower than 2% of the tax base.

In the case of **agricultural and forestry tax**, the rates depend on **annually estimated prices of the rye** (agricultural tax) and **wood** (the forestry tax). A municipal council can reduce prices of these goods to decrease these taxes.

## **7.6. The commencement and expiry of a tax liability**

Tax liability in the real estate tax, agricultural and forestry tax arises **on the first day of the month following the month in which a certain circumstance appeared being the ground for this duty**. It means that the subject who purchased the land or the building shall be burdened with this tax liability starting from the next month after the month in which the real estate was purchased. The exception refers to newly built buildings or structures. In this case, the **tax liability**

**arises from the beginning of the year following the year in which the construction of the mentioned objects was finished, or in which the building or its parts were used before their final finish.** It means that if the object's construction is finished, it is not subject to taxation from this moment to the end of a given year. The tax obligation will arise only from 1st January of the following year. It will be different if before final finishing works this object will start to be used in part or in whole. We may deal with such a situation, e.g., in the case of a several-storey building where only the ground floor is suitable for use. If such a part is used, e.g., to conduct business activity, then from 1st January of the next year, i.e. following the year when this event occurred, the entire building will be taxed by the tax on real estate. Not only the used floor will be taxable but also the entire object, including the floors which have not been eventually finished yet.

The period between finishing the object's construction, or between a new object starts to be used and 1st January of the next year is called the **tax vacation**. During this period the taxpayer does not pay the tax even though s/he may use the real estate.

The **tax liability expires** at the end of the month in which the circumstance based on which this duty arose disappeared (e.g. the sale or disposal of the real estate). Therefore if a land is sold on 10th March, the previous owner will have to bear the tax already before the end of this month. Whereas the tax obligation will burden the buyer from 1st April.

## **7.7. Tax allowances and tax exemptions**

The catalogue of preferences in local taxes imposed on the possession of real estate is quite complex. They can be classified as tax allowances and tax exemptions. **Tax allowances** appear **only in the case of the agricultural tax** (e.g. the abatement of a tax in connection with investment expenses), or in the forestry tax (reducing the price of wood). Tax allowances do not appear in the tax on a real estate.

**Tax exemptions** refer to all three taxes. They can **arise out of tax acts**, or tax resolutions introduced by municipal councils.

Nowadays the following cases are exempted from the real estate tax: railway infrastructure and the grounds occupied under it, buildings, or their parts with the forestry activity, buildings, or their parts used exclusively for agricultural activity, the real estate occupied for the purposes of associations that conduct educational activity among children and youth, museums, schools, colleges, and places of employment of disabled people.

In the agricultural tax, the following cases are exempted: lands of the poor class (qualities), farm grounds on which farming production was ceased, lands acquired in order to increase the existing farm, or form a new one. Forests with the stand aged to 40 years and forests inscribed individually to the register of monuments are exempted from the forestry tax.

A municipal council can introduce additional exemptions in tax resolutions<sup>92</sup>. Such exemptions must be of an **objective nature**. Therefore natural or legal persons fulfilling certain features cannot be exempted. On the other hand, lands, buildings or structures fulfilling the criteria indicated in the statute may be exempted. If the introduced preferences were to refer to entrepreneurs, a resolution should be adopted with the consideration of the regulations on the public aid<sup>93</sup>. It means, most of all, determination therein under what aid such preference should be granted. It is most often realized under de minimis aid (see II, 6.3.).

Municipalities often take advantage of this right to exempt buildings and lands of farmers who are retired, communal real estate the possession of which has not been transferred to other subjects, or buildings used for charity or cultural and educational purposes.

## 7.8. Time limits and payment rules

Taxpayers of the real estate tax, agricultural tax and forestry tax who are **natural persons** are obliged to pay the tax in installments in

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92 L. Etel, M. Popławski, R. Dowgier, Gminny poradnik podatkowy, Volume I, Warsaw 2005, p. 68 and next.

93 Art. 20b L.L.T.

time limits: by the 15th day of March, 15th day of May, 15th day of September and 15th day of November, of the tax year. This duty is, however, enforceable only after the taxpayer has been served with the tax decision. It is due to the fact that in these cases tax due arises only as the result of the service of the tax decision (see II, 3.3.)

A village mayor, mayor and president of a city are subjects who are authorized to pass such decisions. Tax returns filed by taxpayers should constitute the grounds for the decisions. They should indicate all the data indispensable to taxation. Taxpayers who are natural persons have been obliged to submit these forms within 14 days from the day when the circumstances determining the tax liability appeared.

Taxpayers that are **corporate bodies** or **organizational units** are obliged to pay the real estate tax calculated individually by them in a tax return without summons. They ought to pay tax monthly into the competent community budget account by the 15th day of each month. The agricultural tax is an exception payable by these subjects in four installments.

Moreover, taxpayers are obliged to appropriately correct the information, or the tax return in case of the occurrence of the event which influences the value of the tax due. Such obligation should be realized within 14 days from the day when such an event occurred.

## 8. Other local taxes

### 8.1. Tax on means of transport

**Subjects** who are obliged to pay this tax are: **owners** of means of transport, organizational units having no legal personality (e.g. state budget entities) that are **registered owners** of the means of transport as well as possessors of means of transport registered within the territory of the Republic of Poland as those entrusted to a Polish subject by a foreign natural or legal person who are owners of such vehicles. If means of transport constitute co-ownership of two or more natural or



legal persons, the tax obligation within the scope of the tax on means of transport burdens all co-owners jointly (see II, 7.6.)<sup>94</sup>.

The **tax liability arises** in connection with the occurrence of one of the three events from the first day of the month following the month when such an event occurred. The first event is registration of a taxable vehicle within the territory of the Republic of Poland. Nevertheless, it does not apply to temporary registration. The second event resulting in the formation of the tax liability is the purchase of a means of transport already registered within the territory of the Republic of Poland. Whereas the third event is repeated administrative authorization for entry into service in road traffic after the lapse of a period for which the decision on temporary withdrawal from service in road traffic of the vehicle was issued by a registration body. Such a decision is issued upon the owner's motion, who may temporarily withdraw the vehicle from service in road traffic for a few months. S/he submits a registration card together with registration plates with a body competent for the issue of, inter alia, vehicle registration<sup>95</sup>.

The **tax liability expires** with the end of the month when: a means of transport was registered, a decision on temporary withdrawal of a vehicle from service in road traffic was issued by a registration body, the time limit for which a vehicle was consigned (the owner is a foreign subject) elapsed, a vehicle was sold<sup>96</sup>.

The following means of transport are **subject to the tax on means of transport**: trucks of permissible total weight over 3,5 tones; truck and ballast tractors adapted for use together with a trailer or a semi trailer of permissible total weight of the set of vehicles over 3,5 tons; trailers and semi trailers which together with the motor vehicle have permissible total weight over 7 tons except those that are exclusively connected with agricultural activity run by the taxpayer who pays agricultural tax; and buses.

**Tax rates** are expressed in the form of fixed amounts. They are assessed by the resolution adopted by a municipal council. While

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94 Art. 9 par. 2 L.L.T.

95 Art. 9 par. 4 and 4a L.L.T.

96 Art. 9 par. 5 L.L.T.

adopting the resolution, a municipal council cannot exceed **maximum rates** specified for all categories of means of transport. Moreover, for vehicles whose permissible total weight exceeds 12 tons, **minimum tax rates** have been envisaged, which must be also taken into account by a municipal council in the resolution on the tax rates.

By virtue of the Act, the means of transport that are, inter alia, mobilization reserves, special or historical vehicles, are **exempted from the tax**. In a resolution a municipal council can introduce other tax exemptions than those stipulated in the Act except those means of transport the legislator envisaged the minimum rates for.

Taxpayers who use means of transport in combined transport within the territory of the Republic of Poland are entitled to the **refund of the tax paid**. The amount of the refund is assessed according to a number of drives with or without cargo made by the means of transport in railway transportation in a given tax year.

Taxpayers are obliged to **submit tax returns** for the tax on means of transport for a given tax year by 15th February to a competent village mayor, or mayor (president of a city), and if the duty arose after this date, within 14 days from the day the circumstances justifying this duty appeared. The tax disclosed in the tax return is paid without summons into the tax authority's account as a rule in two installments by 15th February and 15th September of each year.

**Local competence of a tax authority** in the analyzed tax is established, most of all, based on the criterion of a taxpayer's place of residence or seat. Therefore a competent authority is a village mayor, mayor, president of a city where a taxpayer's place of residence or seat is located. In the case of a multi-plant enterprise or a subject containing separated organizational units, a competent body will be a tax authority where a plant or unit having taxable means of transport is located. In the case of co-ownership of a means of transport, a competent body is a tax authority appropriate for a person or organizational unit who was entered as first in the vehicle's registration card<sup>97</sup>.

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97 Art. 9 par. 7 L.L.T.

## 8.2. Donation and inheritance tax

**The taxpayers are natural persons** who obtain the possession of things that are located within the territory of the Republic of Poland, or property rights executed within the territory of the Republic of Poland. Obtainment of the possession of things located abroad, or property rights exercised abroad, is subject to the tax if at the moment of opening the inheritance, or a conclusion of a contract of donation a buyer was a Polish national, or had a place of permanent residence located within the territory of the Republic of Poland<sup>98</sup>.

**Obtainment** of the possession of things located within the territory of the Republic of Poland, or of property rights executed within the territory of the Republic of Poland effected by natural persons by virtue of, among the others, succession, bequest, further legacy, testamentary instruction, donation, donator's instruction, acquisitive prescription, gratuitous dissolution of co-ownership, is subject to taxation.

The tax base is the value of the things and property rights obtained after deduction of debts and burdens (**pure value**), assessed according to the conjuncture and property rights on the day of the obtainment and market prices as of the day the tax liability arose<sup>99</sup>. This value is assessed according to the conjuncture and property rights on the day of the obtainment and market prices as of the day the tax liability arose.

The obtainment of the possession to the things and property rights effected by the obtainer from one person of the pure value exceeding PLN 9637 is subject to taxation if this person belongs to the **I tax group** (a spouse, descendants, ascendants, a stepson, a son-in-law, a daughter-in-law, siblings, a stepfather, a stepmother and a father-in-law); PLN 7276 if the obtainer belongs to the **II tax group** (siblings' descendants, parents' siblings, descendants and spouses of stepchildren, siblings' spouses, spouses' siblings, spouses of spouses' siblings, spouses of other descendants); PLN 4902 if the obtainer belongs to the **III tax group** (other obtainers who have been classified neither

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98 Art. 2 of the Act on Inheritance and Donation.

99 Z. Ofiarski, Ustawa o podatku od spadków i darowizn. Komentarz, Warsaw 2003, P. Smoleń, Kształtowanie obciążenia w podatku od spadków i darowizn, Lublin 2006, p. 133 and next.

in the first nor the second group). In consequence, the obtainment of the possession to things and rights whose pure value does not exceed the amounts mentioned above is not subject to taxation. However, it should be emphasized that if the obtainment is effected after the same person, the amounts obtained during 5 years are added to calculate a free amount.

The tax rates are included in the tax scale and they embrace specified amount ranges and tax groups. They are of a **progressive, percentage and mixed percentage–amount nature** (e.g. in the case of obtainers classified in the I tax group, the tax rate, calculated from the surplus over the free amount, amounts to: up to PLN 10278 – the rate amounts to 3%, between PLN 10278 and PLN 20556 – the rate amounts to PLN 308,30 and 5% of surplus over PLN 10278. There is also an flat **rate** in the analyzed tax (7% in the case of the obtainment by acquisitive prescription and 20% in the case of donation and if the tax liability arose as result of the circumstances effecting this donation by a taxpayer before a tax authority or fiscal control authority in inspection acts, tax proceedings, tax control or inspection proceedings.

The catalogue of reliefs and exemptions is quite extended. For instance, the exemption is applied in the case of gratuitous dismissal of co–ownership between people classified in the I tax group.

Donation and inheritance tax can be collected by a public notary (if he or she certifies that a given action has been performed). As a **tax remitter**, a notary is obliged to calculate and collect tax on donation deeds made before him or her. The collection of the tax by the notary exempts the taxpayers from submitting tax returns. In other cases, the taxpayers are obliged to submit **tax returns on the obtainment of the possession to the things and property rights** to competent heads of Revenue Offices within a month from the day the tax liability arose. On the basis of the data included in the tax return the tax authority **issues a decision assessing the amount of the tax obligation** in the donation and inheritance tax. The tax which arises from this decision must be paid within 14 days from the day it was served.

### 8.3. Tax on acts in civil law

Tax liability encumbers the following parties to the civil law transactions covered by the analyzed tax: the **purchaser** – in the case of a sales agreement, the **parties to the action** – in the case of an exchange agreement, the **donatory** – in the case of a donation agreement, the **purchaser of the real estate's ownership** – in the case of a life–rent agreement, the **subject purchasing things or property rights exceeding the share of the inheritance or in the co–ownership** – in the case of agreements on inheritance division/partition or dismissal of co–ownership, the **user or the purchaser of easement** – in the case of the establishment of payable use of rights, including incorrect or payable servitude, the **borrower or keeper** – in the case of a loan agreement or incorrect deposit agreement, the **person making a declaration of will to establish mortgage** – in the case of mortgage establishment, the **partners** – in the case of a civil partnership contract, and the partnership – in the case of other partnerships contracts.

**Civil law transactions are subject to the tax if their objects** are things located within the territory of the Republic of Poland, or property rights executed within the territory of the Republic of Poland, or if the things are located abroad, or property rights are executed abroad. In the latter case, the purchaser must have a place of residence or a seat within the territory of the Republic of Poland and the civil law transaction must be carried out within the territory of the Republic of Poland<sup>100</sup>.

The tax base is varied depending on the object of taxation. For instance, in the case of a sales agreement it is a **market value** of the thing or property rights, in the case of a loan agreement and incorrect deposit agreement – the **amount or value of the loan** or deposit.

As a rule, tax rates are of a percentage nature, **from 0,5%** (in the case of a partnership contract) **to 20%** (when referring to the fact of concluding, e.g., a loan agreement before a tax authority or fiscal control authority in inspection acts, tax proceedings, tax control or

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100 Z. Ofiarski, Ustawy: o opłacie skarbowej, o podatku od czynności cywilnoprawnych. Komentarz, Warsaw 2009, p. 215 and next, A. Gorgol, Reforma opłaty skarbowej i wyodrębnienie z niej podatku od czynności cywilnoprawnych, Glosa 2001, No 4.

inspection proceedings). There is also an amount rate of PLN 19 applied for mortgage establishment to secure claims of unspecified amounts. Taxpayers are obliged to submit a tax return in the matter of civil law transactions according to the specified pattern without summons to a tax authority and to calculate and pay the tax within 14 days from the day the tax liability arose, excluding cases when the tax is collected by a tax remitter. Public notaries are **tax remitters** of the tax on civil law transactions made in the form of a notary deed. They are obliged to make the performance of a civil law transaction dependent on a prior payment of the tax.

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