

Aleksandra Tychmańska
Warsaw University

TAX AUTONOMY AND NON-DISCRIMINATION RULES IN THE ERA OF CONFLICTING POLITICAL GOALS: INTERNATIONAL AND POLISH PERSPECTIVE¹

OVERALL INTRODUCTION OF THE RESEARCH WORK

The aim of this paper is to discuss non-discrimination rules concerning tax matters on the example of Polish case analysis. Author wishes to conduct research work in broader context. In this regard it is necessary to outline the current globalized world in which tax systems of states operate, discuss the concept of state's tax autonomy and examine how the role of a state on tax matters has recently changed. Subsequently the non-discrimination rules from an international perspective shall be presented. It is also important to answer the question about the impact of those rules on state's tax autonomy and about the role which they could play in reconciling political goals in the current globalized world. All of this contexts enable to examine non-discrimination rules from Polish perspective. Author introduces all of non-discrimination rules concerning taxation in Polish legal order, accordingly presents and studies Polish case law regarding those rules. Finally, overall conclusions of the research work are introduced which are intended to discuss the role, significance and the future of non-discrimination rules in contemporary globalized world, both from international and Polish perspective.

CHAPTER I – CHALLENGES TO TAX AUTONOMY IN AN ERA OF CONFLICTING POLITICAL GOALS

The purpose of this chapter is to discuss current globalized world in which tax systems of states operate. This consideration is very important in order to identify the meaning of non-discrimination rules in contemporary globalized environment.

¹ Praca naukowa finansowana ze środków budżetowych na naukę w latach 2018–2022 jako projekt badawczy w ramach programu „Diamantowy Grant”.

At first author will discuss the concept of tax autonomy in order to examine state's power on tax matters. Next it will be demonstrated that processes of globalization have changed the traditional meaning of states' sovereignty on tax matters and states in order to effectively manage their tax systems need to cooperate between each other.

1. THE CONCEPT OF STATE'S TAX AUTONOMY

On the basis of this research work the term tax autonomy of states is understood in a strict connection with the concept of states sovereignty.

Traditional understanding of the concept of state sovereignty means that state bears supremacy, control and legitimacy over a physical place and people within it². It could be defined as "a self-referential claim to ultimate authority over a certain body politic"³. Traditionally one of main fields which was manifestation of state's sovereignty was power over tax matters, especially power of state to tax on its territory and power to introduce tax law. Power of taxation is crucial in order to guarantee internal sovereignty and external independence of a state⁴. In this regard it could be said that tax autonomy is a part of state's sovereignty enabling states to shape and control their tax systems.

2. IMPACT OF PROCESSES OF GLOBALIZATION ON TAX MATTERS

Globalization has strong impact on states' tax systems. Because of processes of globalization institutional barriers to the movement of goods, services and capital have relevantly decreased⁵. It is much easier to move capital and taxable profits between jurisdictions. International capital mobility decreases taxes on global basis⁶. There is also much bigger difficulty in defining the localization where assets and activities which generate income are. Also in a situation when assets of activities are located in more than one state, the source of income is less clear⁷. Globalized world creates opportunities for countries to attract capital by favorable tax regimes leading to aggressive tax competition within countries. Another point is that it enables tax avoidance in fact leading to a double non-taxation.

² I. Pak, *International Finance and state sovereignty: global governance in the international tax regime*, "Annual Survey of International and Comparative Law" 2004, No 10, p. 166.

³ M. Isenbaert, *The Contemporary Meaning of "Sovereignty" in the Supranational Context of the EC as Applied to the Income Tax Case Law of the ECJ*, "EC Tax Review" 2009, Vol. 18, issue 6, p. 265.

⁴ M. Lehner, *Limitation of the national power of taxation by the fundamental freedoms and non-discrimination clauses of the EC Treaty*, "EC Tax Review" 2000, Vol. 9, issue 1, p. 5.

⁵ R. Griffith, J. Hines, P. Sorensen, *International Capital Taxation*, (in:) J. Mirrlees (ed.), *Dimensions of Tax Design*, New York 2010, p. 915.

⁶ J. Michie, *The Handbook of Globalisation*, Cheltenham 2011, p. 193.

⁷ United Nations, *Committee of Experts on International Cooperation in Tax Matters Report on the seventh session*, New York 2012, p. 9.

We can observe the global conflict of international taxation where two values clash with each other: freedom of taxpayers to move around the globe and objectives of tax fairness⁸. Another point is that in international relations between states a strong tension between cooperation and competition on tax matters occurs⁹.

3. THE NEED OF COOPERATION BETWEEN STATES ON TAX MATTERS

These remarks show that in globalized world state in order to successfully manage its tax system needs to cooperate with others states to fairly distribute tax revenue. Designing their domestic tax rules, sovereign countries may not sufficiently take into account the effect of others countries rules¹⁰. These times taxes are not only domestic matter, but also very important international issue. These days states start to understand that many issues that traditionally considered as pertaining to domestic jurisprudence and policy, have now risen to the international level and need to be influenced there¹¹.

Overtime states become more aware of a fact that leaving their taxpayers with an unlimited freedom is a cause of creating loopholes in the changing international society of “states and individual”¹². Recently important initiatives at international level in order to combat aggressive tax planning could be observed.

At the international level crucial role in cooperation between countries in tax field plays Organization for Economic Co-operation and Development¹³, The World Trade Organization¹⁴ and European Union¹⁵ at the regional, European level.

⁸ C. Peters, *On the Legitimacy of International Tax Law*, Amsterdam 2014, pp. 137–138.

⁹ K. Bottenham, M. Maikawa, *State sovereignty and multilateral instrument*, “Canadian Tax Journal, Revue fiscale Canadienne” 2016, Vol. 64, No 2, p. 466.

¹⁰ OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013, <http://dx.doi.org/10.1787/9789264202719-en> (accessed: 3.10.2018), p. 9.

¹¹ S. Matias, *Globalisation, international level and the state*, Keynote Speech On October 17, 2008 at the Georgetown University Law Center’s event on Globalization, p. 5.

¹² C. Peters, *On the Legitimacy...*, p. 133.

¹³ Hereinafter: “OECD”. OECD is an intergovernmental economic organization founded in 1960. It includes 34 member countries; also collaborate with more than 100 other economies, many of which participate in its committees and adhere to its instruments. In order to join the OECD a state must be willing to adhere to the basic principles of the Organization: open market economy and a democratic political system. Also, all joining states must commit to and prove they can meet numerous conditions of the OECD. The aim of OECD is to help countries develop policies together to promote economic growth and healthy labour markets, boost investment and trade, support sustainable development, raise living standards and improve the functioning of markets (OECD, 2016). OECD has huge role in developing new solutions in tax matters at the international level and cooperation between states.

¹⁴ Hereinafter: “WTO”.

¹⁵ Hereinafter: “EU”.

Most of the double tax conventions¹⁶ signed by countries conform to the Model Tax Convention on Income and on Capital¹⁷ proposed by the OECD or the United Nations Model Double Taxation Convention¹⁸.

OECD leads also many others, worthwhile initiatives. Nowadays OECD is a very influential organization on matters regarding international tax competition and cooperation¹⁹. The very important initiative at international level coordinated by OECD is Base Erosion and Profit Shifting²⁰ project which refers to tax avoidances strategies aimed at exploiting gaps and mismatches in domestic tax law of states in order to artificially shift profits to low or no-tax jurisdictions²¹. One of the outcomes of BEPS is the introduction of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS²². MLI is a multilateral convention implementing anti-avoidance measures into DTCs. This document has been developed in order to quickly and efficiently implement the solutions developed within the BEPS project to existing DTCs.

WTO is an intergovernmental organization formed in 1995 aimed to regulate international trade and engaged in economic integration. It associates 163 member states. The creation of WTO and the initiatives undertaken at its level are a result of processes of globalization²³. WTO has some impact on tax matters, also on income taxation²⁴.

European Union has strong impact on tax systems of its Member States. Taxes which are harmonized at the European level are Value Added Tax, excise and Indirect Tax on the Rising of Capital. By contrast there was little done in the field of harmonization of direct taxation except Merger Directive, the Parent Subsidiary Directive, Interest and Royalty Directives and most recent, Anti-Tax Avoidance Directive which contains five anti-abuse measures, which all Member States should apply in order to combat aggressive tax planning. There was also a proposal of Common Consolidated Corporate Tax Base directive, however this project has failed. Despite the fact that direct taxes are not harmonized at EU level strong impact on direct taxation of Member States fundamental freedoms of Single Market have.

¹⁶ Hereinafter: "DTC".

¹⁷ Hereinafter: "MTC OECD".

¹⁸ B. Blonigen, L. Oldenski, N. Sly, *The differential effects of bilateral tax treaties*, "American Economic Journal: Economic Policy" 2014, Vol. 6, issue 2, p. 5.

¹⁹ K. Buttenham, M. Maikawa, *State sovereignty...*, p. 468.

²⁰ Hereinafter: "BEPS".

²¹ <http://www.oecd.org/tax/beps> (accessed: 18.03.2018).

²² Hereinafter: "BEPS".

²³ G. Wang, *Radiating Impact of WTO on Its Members' Legal System: The Chinese Perspective*, Hague 2011, p. 13.

²⁴ S. van Thiel, *General Report*, (in:) M. Lang, J. Herdin, I. Hofbauer (eds.), *WTO and Direct Taxation*, Wien 2005, p. 15.

To conclude, in today's world the extent to which national governments can enact reforms is constrained by their membership in international organizations. Today's state often finds itself in a position where it must enter into a new international agreement or accede to an existing one, if it wishes to stay a significant actor in the international community and globalized economy²⁵. The process of harmonization of standards and mechanisms for enforcement in topics previously considered as domestic could be observed²⁶. Currently domestic tax law of states is being strongly affected by international law; probably this process will deepen. In today's globalized world in order to have some kind of control on the evolution of the tax law it is necessary states to cooperate and build some "international society of states and individuals"²⁷. Stronger effect of international tax law and cooperation between states sets a minimum standard to hinder aggressive and harmful tax competition²⁸. Today's world has changed dramatically and the new global economic order including not only states, but also international organizations and nongovernmental organizations, has come²⁹.

4. CONCLUDING REMARKS

Traditionally states possessed unlimited control over taxation at its territory having tax autonomy in shaping own tax system. However processes of globalization changed the environment in which tax systems of states operate. In today's world traditional meaning of tax autonomy lost its significance. In order to successfully manage its tax system state cannot act in isolation from other states and their tax systems. The cooperation between states in order to develop a fair mechanism of division of world's tax base is unavoidable.

Indicating the need of cooperation, it should also be mentioned that states' participation in international projects can limit their sovereignty to enact domestic legislation³⁰. The fear of states of weaken their sovereignty was the reason why projects on international tax regulation has often failed³¹. However on the other hand the states may experience loss of sovereignty because of harmful tax competition³². Interesting mark is that for example member states had little difficulty

²⁵ S. Matias, *Globalisation...*, pp. 6–9.

²⁶ *Ibidem*.

²⁷ C. Peters, *On the Legitimacy...*, pp. 134–135.

²⁸ *Ibidem*, p. 146.

²⁹ R. Gilpin, *Global political economy: Understanding the international economic order*, Princeton and Oxford: Princeton University Press, 2001, p. 402.

³⁰ K. Bütünham, M. Maikawa, *State sovereignty...*, p. 485.

³¹ *Ibidem*, p. 480.

³² C. McLure, *Globalisation, Tax Rules and National Sovereignty*, "Bulletin for International Fiscal Documentation" 2001, Vol. 55, issue 8, pp. 328–341.

in reaching an agreement in the event of a fight against fraud and abuse³³. However the cooperation between states on tax matters should have broader coverage, consequently having a positive impact on their tax systems. There is a need to develop solutions at the international level that would allow states more effectively manage their tax systems and in fact retain their tax autonomy understood in up-to-date way.

CHAPTER II – NON-DISCRIMINATION RULES – INTERNATIONAL PERSPECTIVE

1. THE ROLE OF NON-DISCRIMINATION RULES

Historically states used to charge foreigners with higher burdens than its nationals³⁴. Such actions were in connection with traditionally understood meaning of state's tax sovereignty and tax autonomy.

International tax law started to develop at the turn of the XIX and XX century. First DTCs was concluded between neighboring states between which the trade exchange was the most prominent³⁵. As mobility increased³⁶ and processes of globalization deepened, states noticed how discriminatory treatment of foreigners can negatively affect international relations and trade between them. As the level of investment increased, also the need to protect against discrimination increased³⁷. Therefore DTCs were provided with non-discrimination rules.

The term of discrimination means “unequal treatment of identical or similar cases”³⁸. The principles of non-discrimination concerns situations that are “different enough to be distinguished, but comparable enough to deserve equal treatment”³⁹.

Currently non-discrimination rules play very important role in many fields of law. Also direct and indirect taxation are affected by various types of non-dis-

³³ H. van Arendonk, *The European Cooperation Project, Tax & Sovereignty*, “EC Tax Review” 2016, Vol. 25, No 5–6, p. 244.

³⁴ N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, Amsterdam 2012, p. 33.

³⁵ D. Mączyński, *Międzynarodowe prawo podatkowe*, Warszawa 2015, p. 25.

³⁶ N. Bammens, *The Principle...*, p. 33.

³⁷ A. Rust, *International Tax Neutrality and Non-Discrimination – A Legal Perspective*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties: Building Bridges between Law and Economics*, Amsterdam 2010, p. 646.

³⁸ K. van Raad, *Nondiscrimination in International Tax Law*, Deventer 1986, p. 11.

³⁹ N. Bammens, *The Principle...*, p. 9.

crimination provisions⁴⁰. The role of non-discrimination rules regarding tax matters is to protect foreigners from more burdensome taxation and providing them with equal treatment in relation to nationals. In current world those provisions are of increasing importance, as trade between states grows. On the other hand taking into account increasing processes of globalization and the difficulty in determining where taxable income arises states could be more willing to interpret the provisions of domestic tax law in a way that enables them to tax foreigners in a more burdensome way. In this regard the significance of non-discrimination rules should increase and it is important that state interpret them in a way that will provide their real effectiveness.

2. TYPES, DIFFERENCES AND SCOPE OF VARIOUS NON-DISCRIMINATION RULES

There are various types of non-discrimination rules covering tax matters. They differ scope and character, however some of them share many similarities. This section discusses the following non-discrimination rules: those contained in OECD Model Tax Convention on Income and on Capital, in European Union law, in European Convention on Human Rights, those of World Trade Organization and in the end, those contained in bilateral investment treaties.

2.1. NON-DISCRIMINATION RULES CONTAINED IN MODEL TAX CONVENTION ON INCOME AND CAPITAL

The provision on non-discrimination rules are contained in Art. 24 of Model Tax Convention on Income and on Capital⁴¹. W. Haslehner describes the purpose of non-discrimination rules on the basis of DTC as follows “(...) the purpose of the non-discrimination article is very much aligned with the overarching objectives of a double taxation convention and serves a complementary role to the remaining provisions: to safeguard the balance of taxation that has been agreed between them in the distributive rules and to support a mutually beneficial commercial relationship between the contracting states”. Further he notes that Art. 24 has special features which “(...) extend the scope of Article 24 beyond that of the rest of the double taxation convention and thus also act as a reminder that it indelicately aims at the removal of discrimination in cases with no immediate relation to the avoidance of double taxation”.

⁴⁰ K. Dziurdź, C. Marchgraber, *Non-discrimination in European and Tax Treaty Law, Open Issues and Recent Challenges*, Wien 2015, p. 2.

⁴¹ Version of 2014, https://www.keepeek.com/Digital-Asset-Management/occd/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en#Wq27QLyJy1s (accessed: 17.03.2018), hereinafter: “OECD MTC”.

Article 24(1) forbids discrimination on the grounds of nationality; it protects only non-nationals, not including non-residents. Some researchers opine that because of that its effect has minor significance in practice⁴². Next paragraphs of Art. 24 encompass its scope also non-residents, but only in specific areas. Under Art. 24(2) stateless persons must be accorded national treatment. Art. 24(3) guarantee the most important non-discrimination provision in practice⁴³. It establish the principle that discrimination of residents of a Contracting State who have permanent establishment in the other Contracting State is forbidden. Art. 24(4) establishes the principle under which discrimination which consists in deduction of interests, royalties and others disbursements allowed without restrictions when the recipient is resident, but not is a situation when he is a non-resident, is forbidden. Art. 24(5) forbids to discriminate by giving less favorable treatment to an enterprise the capital of which is owned or controlled, wholly or partly, directly or indirectly, by one or more residents of the other Contracting State.

There is no minimum standard under Art. 24⁴⁴. Also there is lack of well-articulated scope of Art. 24, leading to uncertainty about its application⁴⁵. This is because Commentary on OECD MTC sometimes only mentions some arguments in favor and against certain view not giving clear answer⁴⁶. Non-discrimination rules are not in apparent relationship with the rest of the OECD MTC⁴⁷. Moreover it is interesting to note that DTC work to eliminate double taxation through tax rules concerning tax base, not tax rates⁴⁸.

During history of OECD MTC changes non-discrimination rules of Art. 24 have slightly changed⁴⁹. There are also some ideas to improve Art. 24, for example by adding an overriding provision prohibiting taxation and similar requirements that are “arbitrary, unjustified or unreasonable” and a need of transparency principle regarding national legislation and administration with respect to those taxpayers⁵⁰.

⁴² A. Rust, *International Tax*..., p. 634.

⁴³ *Ibidem*, p. 638.

⁴⁴ N. Bammens, *The Non-Discrimination Analysis under the OECD Model as Compared to the EU Fundamental Freedoms*, (in:) J. Englisch (ed.), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism*, Amsterdam 2016, p. 98.

⁴⁵ A. Green, *The trouble rule of nondiscrimination in taxing foreign direct investment*, *Law & Policy in International Business* (1994–1995), No 26, p. 123.

⁴⁶ K. Dziurdź, C. Marchgraber, *Non-discrimination*..., p. 11.

⁴⁷ M. Bennett, *The David R. Tillinghast Lecture – Nondiscrimination in International Tax Law: A concept in Search of a Principle*, “*Tax Law Review*” 2006, Vol. 59, p. 439.

⁴⁸ B. Blonigen, L. Oldenski, N. Sly, *The differential effects*..., p. 5.

⁴⁹ N. Bammens, *The Principle*..., p. 56.

⁵⁰ C. Brown, J. Mintz, *On the Relationship between International Tax Neutrality and Non-Discrimination under Tax-Treaties for Source-Based Taxes*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties: Building Bridges between Law and Economics*, Amsterdam 2010, pp. 605–606.

2.2. NON-DISCRIMINATION RULES IN THE LAW OF EUROPEAN UNION

The most important provisions concerning EU non-discrimination rules in the field of direct taxation are the following:

– Prohibition of discrimination on grounds of nationality (Art. 18 of Treaty on the Functioning of the European Union⁵¹);

– Prohibition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment (Art. 45 of TFEU);

– Prohibition of any restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State (Art. 49 of TFEU);

– Prohibition of restrictions on freedom to provide services within the Union in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended (Art. 56 of TFEU);

– Prohibition of any restrictions on the movement of capital between Member States and between Member States and third countries (Art. 63 of TFEU).

Court of Justice of the European Union⁵² states that in general residents and non-residents are not at the same circumstances⁵³. EU non-discrimination rule encompass its scope also cover discrimination⁵⁴. There is an exception to the application of the EU non-discrimination rules; the discriminatory measure could be justified if national legislation ensures a proportionate means of achieving a legitimate aim and those discriminatory measure is necessary in order to satisfy mandatory requirements relating to public interests⁵⁵. Objective of the EU non-discrimination rule is to develop Single Market through elimination of discrimination and restrictions against EU nationals⁵⁶. Although the matter of direct taxation falls within the competence of the Member States, they must take into account EU freedoms when exercising those competences⁵⁷. CJEU by using non-discrimination rules in some way forces sovereign, in matters of direct taxation, states to adapt

⁵¹ Consolidated version (OJ.U.E.C of 2012, No 326), hereinafter: “TFEU”.

⁵² Hereinafter: “CJEU”.

⁵³ Court of Justice of the European Union, 14 February 1995, ref. No C-279/93, *Finanzamt Köln-Altstadt v. Schumacker*, paragraph 31.

⁵⁴ *Ibidem*, paragraph 19.

⁵⁵ Court of Justice of the European Union, 20 February 1979, ref. No 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*.

⁵⁶ B. Garrido, *Interaction between the Interpretation of the Non-discrimination Provisions in Tax Treaties and in the EC Treaty: An Apparent Rather than Real Conflict*, “EC Tax Review” 2009, Vol. 18, No 4, p. 169.

⁵⁷ Court of Justice of the European Union, March, 11, 2004, ref. No C-397/98, C-410/98, *Metallgesellschaft Ltd and others*.

domestic tax law in accordance with EU principles⁵⁸. Those rules are a way to limit the freedom of states in designing their domestic law of direct taxation.

2.3. NON-DISCRIMINATION RULES CONTAINED IN EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights⁵⁹, was opened for signature in Rome on 4 November 1950 and came into force in 1953. ECHR was the first instrument to give effect to certain rights stated in the Universal Declaration of Human Rights and make them binding⁶⁰.

Complaints in tax matters may be submitted by individuals, groups of persons, non-governmental organizations, as well as by States Parties to the ECHR. In order for the complaint to be resolved it must meet the following requirements: the infringement must concern the applicant directly and in person, only the allegation of rights contained in the ECHR and in its Protocols can be considered as infringement of rights, only the actions or omissions of the authorities of the states which are the Parties to the ECHR or to ECHR's Protocols may be the subject of the complaint. Moreover the European Court of Human Rights may only consider the matter after all legal remedies have been exhausted.

ECHR contains general provision on non-discrimination in its Art. 14 which states that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Article 14 has no independent existence and has to be invoked in conjunction with others human rights of ECHR⁶¹. In most cases concerning taxation Art. 14 is applied together with Art. 6 of ECHR which provides right to a fair trial and Art. 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶² which provides protection of property.

Article 14 expresses an absolute prohibition of tax discrimination. It prohibits both direct and covered discrimination⁶³. However ECHR give states some mar-

⁵⁸ G. Teixeira, *Tax Systems and Non-Discrimination in the European Union*, “INTERTAX” 2006, Vol. 34, issue 2, p. 50.

⁵⁹ Hereinafter: “ECHR”.

⁶⁰ <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> (accessed: 19.03.2018).

⁶¹ The judgment of the European Court of Human Rights in Magnus Gunnar Gudmundsson, Application 23285/94, given 17 January 1996, unreported.

⁶² Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9 (Dz.U. of 1995, No 36, Item 175).

⁶³ R. Attard, *Discriminatory Taxation and the European Convention on Human Rights*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016, p. 286.

gin of appreciation and on the basis of ECHR countries have very broad margin of appreciation in tax matters⁶⁴. Therefore, in practice non-discrimination rule provided in Art. 14 of ECHR finds a small application by the European Court of Human Rights in matters concerning taxation.

2.4. NON-DISCRIMINATION RULES OF WTO

There are some acts at WTO level concerning non-discrimination rules. The most prominent is The General Agreement on Tariffs and Trade⁶⁵ which was signed in Geneva and entered into force on January 1, 1948. It concerned international trade policy. On January 1, 1995, when the WTO was established, it adopted the basic principles of GATT. GATT in its Art. 1 contains General Most-Favoured-Nation Treatment principle which prohibits states to discriminate between their trading partners. Further in Art. 3 of GATT National Treatment on Internal Taxation and Regulation principle is contained which prohibits a state from discriminating against other states.

Another important agreement is Agreement on Subsidies and Countervailing Measures⁶⁶ and The General Agreement on Trade in Services⁶⁷ which entered into force on January 1995. GATS contains two provisions on non-discrimination: Most-Favoured-Nation Treatment in its Art. II and National Treatment (NT) in Article XVII. There are also two central exceptions from those provisions: Economic Integration exception provided in Art. V and the General Exceptions in Art. XIV.

Non-discrimination rules provided in WTO's acts refer to international trade law. To establish if a measure is compatible with non-discrimination rules similarity and "less favorable treatment" test should be applied. General exceptions from rules of non-discrimination are available. The question of similarity of particular situations to a large extent depends on the particular provisions and the context⁶⁸. Those rules cover also indirect discrimination.

2.5. NON-DISCRIMINATION RULES CONTAINED IN BILATERAL INVESTMENT TREATIES (BITS)

Bilateral Investment Treaties⁶⁹ are treaties concluded between states, where each of the party to the treaty abide to refrain from acts harmful to the investor

⁶⁴ European Commission Justice, The prohibition of discrimination for the EU non-discrimination directives – an update, Luxembourg 2011, p. 16.

⁶⁵ Hereinafter: "GATT".

⁶⁶ Hereinafter: "SCM".

⁶⁷ Hereinafter: "GATS"

⁶⁸ K. Dziurdź, *Non-Discrimination and Harmful Tax Competition under WTO Law and Article of the OECD Model*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016, p. 173.

⁶⁹ Hereinafter: "BIT".

who is a citizen of the other party to the treaty. The main beneficiaries of the regulations are investors who are either natural persons or legal entities, or other entities without legal personality.

Non-discrimination rules provided in BITs include both most-favored nation treatment, national treatment obligations and requirement of transparency in national laws⁷⁰. BITs in tax matters enables protection for investors in situations when host government abuses its taxation powers⁷¹. In practice it could be a situation when host government discriminates between domestic investors (which have strong political influence) and foreign investors, or when there is application of general and non-discriminatory rules, but in a way to intentionally damage foreign investor⁷².

It is worth mentioning that recently European Commission indicated that some Member States should terminate their intra-EU BITs as far as all Member States are subject to the same EU rules in the Single Market, including those on cross-border investments. According to European Commission “All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality)”⁷³. This is very interesting remark, because it indicates that protection against discrimination on the basis of BIT could have different scope than those provided by EU law.

3. HOW NON-DISCRIMINATION RULES AFFECTS TAX AUTONOMY OF STATES AND WHAT ROLE COULD THEY PLAY IN RECONCILING POLITICAL GOALS?

As trade exchange with other countries intensified, the need to protect non-residents from discriminatory treatment in terms of tax burden have occurred. The idea of international tax neutrality and non-discrimination comes from times when states had almost exclusive political power and authority within their territory⁷⁴.

⁷⁰ C. Brown, J. Mintz, *On the Relationship between International Tax Neutrality and Non-Discrimination Clauses under Tax-Treaties for Source-Based Taxes*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties...*, p. 599.

⁷¹ T. Wälde, A. Kolo, *Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty*, “*INTERTAX*” 2007, Vol. 35, issue 8–9, p. 427.

⁷² *Ibidem*, p. 434.

⁷³ European Commission, *Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties*, Brussels, 18 June 2015, http://europa.eu/rapid/press-release_IP-15-5198_en.htm, (accessed: 17.03.2018).

⁷⁴ C. Peters, *International Tax Neutrality Plea for a More Explicit Dialogue between the State and the Market*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties: Building Bridges between Law and Economics*, Amsterdam 2010, p. 607.

Non-discrimination rules limit the autonomy of state to tax. Their provisions in some way restrict the right to tax of the source state, while transferring taxable income to the state of residence⁷⁵. However as previously described nowadays state is not sovereign within its borders in a traditional way – state has to take into account also interest of foreigners⁷⁶. Also non-discrimination rules having its basis at state's will for economic openness does not violate state sovereignty⁷⁷. Contemporary tax system has to be both – open and competitive in order to attract economic activities⁷⁸. Therefore, there is a need to find appropriate balance between those values. It is important that states participating in new international initiatives to fight aggressive tax competition shape provisions of tax law in a non-discriminative way. Very important point is that even when states participate in international or EU initiatives they can be willing to broaden its tax autonomy and apply the kind of interpretation of international agreements which limit their scope and in fact, violate them.

It is important to strongly highlight that tax non-discrimination rules shape the objectives of tax fairness and justice⁷⁹. The design of non-discrimination rules is connected with expectations about openness and competitiveness of states on global market and as a result removing barriers to trade and investments⁸⁰. The non-discrimination rules can be seen as a tool of allocation of powers between states. If the non-discrimination provisions would be drafted too broad, they would give states power to allocate taxing rights⁸¹. Currently the idea of tax autonomy of state in the context of non-discrimination rules could gain new dimension as far as it could be seen also as a part of international law, not only national domestic law. It is important that initiatives undertaken at the international level are supported by the principles of tax justice and non-discrimination.

4. CONCLUDING REMARKS

There are various types of non-discrimination rules regarding tax matters. Each of them has its own special features and character. Non-discrimination rules provided in OECD MTC are very similar to EU non-discrimination rules. How-

⁷⁵ A. Rust, *International Tax...*, p. 646.

⁷⁶ I. Kaul, *Blending external and domestic policy demands – The rise of intermediary state*, (in:) I. Kaul, P. Condeicao (eds.), *The new public finance: Responding to global challenges*, Oxford 2006, p. 73.

⁷⁷ *Ibidem*, p. 607.

⁷⁸ *Ibidem*, p. 609.

⁷⁹ N. Bammens, *The Principle...*, p. 14.

⁸⁰ C. Peters, *International Tax Neutrality Plea for a More Explicit Dialogue between the State and the Market*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties...*, p. 627.

⁸¹ *Ibidem*, p. 628.

ever there are also some differences between them: rules contained in OECD MTC refers to certain precise circumstances, while the catalog of situations to which EU rules applies is open. Another important difference between them is that there are no exceptions from non-discrimination rules provided in OECD MTC, while discriminatory treatment under EU non-discrimination rules could be justified. Another important point is that OECD countries remain supreme entities including their DTC and handling cross-border situations⁸². On contrary UE member states has a common market and their sovereignty is limited by EU law and jurisdiction of CJEU⁸³.

For needs of this research work it was worth mentioning non-discrimination rules provided in ECHR, those resulting from specific WTO's acts and those provided in BITs. However they are less important in matters relating taxation. WTO and BITs provides different measures in identifying discriminatory treatment: most favored treatment and national treatment. Non-discrimination rules provided in WTO's acts refer to specific situations occurring from international trade law, rules provided in BITs also refers to specific situations, namely the situation between the investor and the state. Instead non-discrimination rules provided in ECHR are of a general scope, however they has to to be invoked in conjunction with others human rights of ECHR. Those rules have little relevance in practice because the European Court of Human Rights gives states the broad margin of appreciation in tax matters. Important feature of non-discrimination rules provided in BITs and ECHR is that they enable taxpayer to protect against actual discrimination manifested in the behavior of the tax authorities.

Taxpayers should realize how much rights non-discrimination provisions could guarantee them⁸⁴. At a time when many initiatives are being undertaken at international level in order to combat tax avoidance and tax evasion, it is important that solutions designed by particular states do not have discriminatory character. There is danger that states could try to justify discriminatory measures by referring to the need to fight tax avoidance and tax evasion. In this regard, it should be emphasized that it is very important that those international initiatives are build at the grounds of non-discrimination rules which reflects objectives of tax justice and fairness. Moreover it should remember that danger of violation of non-discrimination rules is even more serious in times of globalization and tax competition.

⁸² F. Vanistendael, *Non-Discrimination: Can the EU Learn from the OECD Model Convention and Vice Versa?*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016, p. 254.

⁸³ *Ibidem*, p. 254.

⁸⁴ K. van Raad, *Nondiscrimination...*, p. 347.

CHAPTER III – NON-DISCRIMINATION RULES – POLISH PERSPECTIVE

1. POLAND – GENERAL OVERVIEW

1.1. HIERARCHY OF SOURCES OF LAW

Constitution of the Republic of Poland dated 2 April, 1997⁸⁵ is the highest law in Poland, constituting the basis for other sources of law. Poland is also a member of European Union from 2004 and a member of OECD. For this moment⁸⁶ Poland has concluded 93 DTCs, most of them are based on OECD MTC. On January 23, 2018, Poland submitted to the OECD a document confirming the ratification of the MLI. Poland is the fourth country that has completed internal ratification procedures⁸⁷. In the case of Poland, MLI assumes a change of 78 DTCs concluded by Poland.

The case concerned an American order DTC is categorized as a ratified international agreement with prior consent expressed in statute. Article 89 of Constitution of RP provides that ratified international agreements belong to sources of law of general application. Further according to Art. 91 of Constitution of RP an international agreement, ratified with prior consent expressed in statute, takes precedence over act, if this act cannot be reconciled with the statute. Accordingly, provisions of DTC have priority over the provisions of statute, if the statute cannot be reconciled with provisions of DTC⁸⁸. Also EU law should take precedence over act, if the statute cannot be reconciled with it.

In the light of the Constitution of RP, international legal norms are introduced into the domestic legal order by the reception method, which consists in the fact that the content of a norm or a set of international norms by virtue of state law becomes its integral part⁸⁹.

1.2. JUDICIAL ARCHITECTURE AND THE INSTITUTION OF TAX RULINGS

In Poland ordinary courts and administrative courts are distinguished. There is also Constitutional Tribunal of the Republic of Poland⁹⁰ which is responsible

⁸⁵ Journal of Laws of 1997, No 79, item 483, hereinafter: Constitution of RP.

⁸⁶ March 20, 2018.

⁸⁷ http://www.mf.gov.pl/ministerstwo-finansow/dla-mediow/informacje-prasowe/-/asset_publisher/6PxF/content/polska-zakonczyła-ratyfikację-konwencji-mlj/pop_up?_101_INSTANCE_6PxF_viewMode=print (accessed: 18.03.2018).

⁸⁸ A. Gomułowicz, *Podatki i prawo podatkowe*, Warszawa 2016, p. 189.

⁸⁹ R. Kwiecień, *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, Warszawa 2000, p. 52.

⁹⁰ Hereinafter: “Constitutional Tribunal of RP”.

among others for adjudication on the compliance of domestic legislation and international agreements with the Constitution of RP.

That's administrative courts which have jurisdiction in cases concerning taxation. There are two levels of administrative jurisdiction in Poland: voivodship administrative courts as courts of first instance (altogether: 17) and Supreme Administrative Court as a court of second instance.

Moreover in Poland exists institution of individual tax rulings. The taxpayer is entitled to apply to tax authority for an individual tax ruling on a particular tax problem. It can be obtained in reference to the tax law, including DTCs. Tax ruling do not have a direct binding effect outside the individual case. When a taxpayer does not agree with decision of tax authority, he is able to challenge it before administrative court. The institution of individual tax rulings is very popular in Poland, in 2016 tax authorities issued more than 34 000 tax rulings⁹¹.

2. NON-DISCRIMINATION RULES IN CONSTITUTION OF THE REPUBLIC OF POLAND

There is abundant case-law which refers to principles of equality and non-discrimination. However predominantly cases concerning the issue of discrimination are decided on the basis of Constitution of RP⁹². That's because EU principle of equality and non-discrimination was inferred by CJEU mainly from the constitutional and democratic tradition of member states⁹³.

Under Constitution of RP the concept of tax fairness covers equality of taxation principle and universality of taxation principle⁹⁴. These principles in the process of adjudication, if particular tax satisfies the requirements of tax fairness, should be taken into consideration as a whole⁹⁵. In the light on Constitution of RP fair tax is a tax which is paid by everyone on the basis of equality principle⁹⁶.

According to Art. 32 of Constitution of RP "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities". Further para 2 provides that: „No one shall be discriminated against in political, social or economic life for any reason whatsoever”.

⁹¹ <http://podatki.gazetaprawna.pl/artykuly/1024986,liczba-interpretacji-podatkowych-male-je.html> (accessed: 10.03.2018).

⁹² M. Bącal, *Zasady ogólne prawa unijnego. Charakterystyka i zastosowanie wybranych zasad prawa unijnego – zasada równości (zakaz dyskryminacji)*, (in:) E. Fronkiewicz (ed.), *Zasady prawa unijnego w VAT*, Warszawa 2013, p. 162.

⁹³ *Ibidem*, p. 160.

⁹⁴ K. Działocha, *Uwaga 7 do art. 84*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. III, Warszawa 2003, p. 7.

⁹⁵ A. Krzywoń, *Podatki i inne daniny publiczne w Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2011, p. 80.

⁹⁶ *Ibidem*, p. 80.

The contemporary understanding of the principle of equality to a large extent is shaped by the jurisprudence of the Constitutional Tribunal⁹⁷. It emphasized that Art. 32 creates an obligation to treat legal entities within a identified category in the same way. All entities characterized equally by a given significant feature should be treated equally, according to the same measure; both discriminatory and favoring treatment of the same situation is forbidden⁹⁸. In relation to taxation, a given class will usually be distinguished on the basis of, for example obtaining income from the same source, having the same property or obtaining certain benefits from this property⁹⁹.

Differentiation is justified on the basis of the following criteria: relevance, proportionality, justification through other values, principles and constitutional norms¹⁰⁰. Certain differentiation of entities with even the same characteristics is acceptable on the basis of principle of equality, if it is consistent with the principle of social justice, as well as other constitutional principles¹⁰¹.

In its judgement of 5 May 2010¹⁰² the Supreme Court stated that “From the principle of equality, the Constitution of the RP does not know any deviations. However, different treatment not always constitutes a lack of equality and discrimination. Assessment of this differentiation of the situation of entities always results from determining whether this variation can be attributed to a legitimate character. Diversity is justified, if it is in direct relation with the purpose of the provisions, the weight of the interest for which the differentiation is introduced, if it is in proportion to the interests violated and if the diversity does not fundamentally diminish different values”.

At the same time, it is possible to distinguish additional categories having the same relevant characteristic, for example self-raising of children. The relevant feature should take into account the economic situation and economic opportunities¹⁰³.

Non-discrimination rule provided in Constitution of RP can apply to all kind of taxes. However the Constitutional Tribunal rather does not decide on cases regarding taxation. There is no case law of Constitutional Tribunal regarding the constitutional non-discrimination rule on tax matters.

Normally courts applies (as shown in some cases presented below) the following analysis on the basis of Constitution of RP in cases concerning taxation which relates to non-discrimination rules: they refer to Art. 87 in connection with

⁹⁷ *Ibidem*, p. 84.

⁹⁸ Constitutional Tribunal of the Republic of Poland, judgement of 9 March 1988, U 7/87.

⁹⁹ A. Krzywoń, *Podatki...*, p. 84.

¹⁰⁰ B. Banaszak, *Zasada równości w orzecznictwie Trybunału Konstytucyjnego*, (in:) L. Garlićki, A. Szmyt (eds.), *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, Warszawa 2003, p. 25 or Constitutional Tribunal in Poland, U 17/97, Lex nr 32606.

¹⁰¹ Supreme Administrative Court judgment of October 23, 2013, ref. No I FSK 2145/11.

¹⁰² The Supreme Court judgment of May 5, 2010, ref. No PK 201/09.

¹⁰³ A. Krzywoń, *Podatki...*, p. 84.

Art. 90 and Art. 91 of the Constitution of RP and reach the conclusion that under those provisions it is necessary to apply EU law or DTC before discriminatory provisions of statute, because statute is lower in hierarchy of laws than EU law and DTC.

3. NON-DISCRIMINATION RULES IN THE LAW OF EUROPEAN UNION

Poland is a member of European Union since 2004. Since that time Polish legislator and Polish tax authorities has to respect EU non-discrimination rules, also in reference to tax law.

The most of the cases brought before CJEU concerned indirect taxes, however there is less than few judgements of CJEU on compliance of Polish tax law concerning direct taxes with EU non-discrimination rules. Polish administrative courts not often refer a question to the CJEU for a preliminary ruling on matters concerning direct taxes, however they often refer a question on the interpretation of cases concerning VAT.

There is one significant case of CJEU on the basis of Polish tax law regarding direct taxes. It concerned an exemption from tax which was provided for investment funds being investment funds operating in accordance with the provisions of the The Act on Investment Funds of May, 27, 2004 (Dz.U. of 2004, No 146, Item 1546)¹⁰⁴. In practice, foreign investment funds could not benefit from this exemption, because Polish tax authorities recognized that they are not the kind of investment funds specified in The Act on Investment Funds. In the case *Emerging Markets*¹⁰⁵, an American investment fund tested the national provisions against the European non-discrimination rules. The CJEU found that if the American investment fund operates within a regulatory framework equivalent to that of the EU, it cannot be discriminated.

Author has conducted broad survey of Polish administrative courts' judgements referring to EU non-discrimination rules in order to identify some main tendencies and to analyze the way courts understand those rules.

One of the arrays discriminatory treatment of taxpayers occurred was the provisions concerning thin capitalization. In the period from January 1, 2000 to December 31, 2004, Polish thin cap regulations were applied only to taxpayers who were not subject to unlimited tax liability in Poland and those who used exemption from corporate income tax. Since January 1, 2005¹⁰⁶ the provisions of

¹⁰⁴ Hereinafter: "Act on Investment Funds".

¹⁰⁵ Court of Justice of the European Union, 10 April 2014, ref. No C-190/12, *Emerging Markets Series of DFA Investment Trust Company v. Dyrektor Izby Skarbowej w Bydgoszczy*.

¹⁰⁶ Pursuant to the provisions of the Act amending Corporate Income Tax Statute, Art. 16(1) point 60 has been changed.

Corporate Income Tax Statute of February, 15, 1992 (Dz.U. of 2017, Item 2343)¹⁰⁷ regarding thin capitalization rules started to encompass its scope all of shareholders, also Polish tax residents. However, in order to protect acquired rights¹⁰⁸, it was specified that the amendment will not apply to loans granted by Polish legal entities prior to January 1, 2005. Those regulation infringed both non-discrimination rule on the basis of DTCs and EU non-discrimination rules. In the case concerning Danish shareholder¹⁰⁹ tax authority, recalling art. 9 of the DTC with Denmark, claimed that in accordance with the principle adopted on the basis of DTC, each state has the right to effectively exercise its tax jurisdiction over income received in its territory, including the introduction of tax regulations aimed at preventing tax avoidance. Therefore, in the case of thin capitalization cases, there was a basis for unequal treatment of entities, resulting from Art. 9 par. 1 of the DTC concerning related enterprises. Court considered the position presented by the tax authority to be incorrect and stated that the exception provided in Art. 9(1) of the DTC do not apply. Instead, pursuant to Art. 23 of the DTC and Art. 91(2) of the Constitution of RP, thin capitalization rules should not apply also to loans granted by non-resident before January, 1 2005. In another case concerning British resident¹¹⁰ court broadly referred to the allegation of violation of Art. 43 of TFEU¹¹¹. Court stated that introduction of a transitional provision led to different treatment of taxpayers only because of the place of registered office of their significant shareholder. It is also difficult to conclude that such a solution was forced by reasons related to public interest and proportionate to achieve the objective of protecting interests of taxpayers, if previous prohibition of including interests into tax deductible costs did not apply to such a taxpayer. Contrary to claims of the Minister of Finance, it was possible to protect interests in progress and at the same time maintain equal treatment of taxpayers irrespective of the place of residence of their significant shareholders, including loan agreements granted by entities not subject to unlimited tax liability in Poland in the period after Poland's accession to the European Union. As a result of judgments of CJEU concerning the similar case and judgments of Polish administrative courts¹¹², Polish legislator repealed the discriminatory provisions in 2007.

Another interesting issue considered by Polish administrative courts concerned taxation of dividends. In accordance with the general principle provided in the provisions of Corporate Income Tax Statute in force in 2007, dividends

¹⁰⁷ Hereinafter: "Corporate Income Tax Statute".

¹⁰⁸ Art. 9 of the Amending Act.

¹⁰⁹ Voivodship Administrative Court in Gliwice judgment of January 28, 2016, ref. No I SA/Gl 714/15.

¹¹⁰ Supreme Administrative Court judgment of September 21, 2010, ref. No II FSK 595/09.

¹¹¹ Referring to allegation of Art. 24(3) of DTC with Great Britain Court used similar arguments as referred in Case on the basis of DTC with Denmark.

¹¹² CJEU, *Denkavit Internationaal BV and Denkavit France SARL against Ministre de l'Économie, des Finances et de l'Industrie*, C-170/05, 13 December 2006, EU:C:2006:783.

paid by Polish capital companies to other companies (both Polish and foreign) were subject to a flat-rate tax of 19%. In the case of payment of dividends by Polish companies to other companies being Polish tax residents, the dividend of the receiving entity was not taken into account in the calculation of taxable income. At the same time, the company receiving the dividend was entitled to deduct the 19% tax collected, pursuant to Art. 23 of Corporate Income Tax Statute. If it wasn't possible to benefit from a deduction in a given tax year, this deduction could have been made in the following years. The above-mentioned system resulted in the fact that the dividends were effectively subject to a zero rate. However, in respect of dividends paid to companies that were taxpayers in other EU countries, it was possible to benefit from the flat tax exemption, if that certain requirements were met¹¹³. In the event of failure to meet these conditions, dividend was subject to a flat rate tax at a rate of 19% (including the provisions of DTCs). One of interesting cases on the basis of this issue concerned a company being tax resident in United Kingdom¹¹⁴. In 2007, the company received a dividend from bank. Due to the insufficient block of shares held by the Company in the share capital of the Bank, the Company did not meet the requirements to benefit from the flat tax exemption provided in the provisions of the Corporate Income Tax Statute implementing Council Directive 90/435/EEC¹¹⁵. Consequently, when the dividend was paid, bank collected a withholding tax. Court referred to *Banco Bilbao* judgement¹¹⁶ in which was stated that national regulation may be discriminatory when different provisions are applied to comparable situations or when the same provisions apply to different situations. Next referring to the case under consideration stated that both resident and non-resident taxpayers bear the same risk of cascading taxation in the case of dividend payments. Therefore they should be treated equally when it comes to solutions to avoid this risk. In conclusion Court indicated that reserving in 2007 the right to deduction of dividend tax for residents and thus applying to them a mechanism to avoid cascading dividend taxation where a non-resident taxpayer, such as the applicant, was not provided with any mechanism to prevent such taxation, violates the principle of the free movement of capital. The similar case was the subject of a Court judgment regarding the Austrian tax resident receiving dividends¹¹⁷. In this judgment Court held that

¹¹³ From the provided for in art. 23 sec. 1 u.p.d.o.p. the right to deduct the tax paid on the received dividends from the amount of tax charged in accordance with art. 19 of this Act, both Polish residents and entities based in other member states could take advantage. The condition was to conduct business in the Republic of Poland.

¹¹⁴ Supreme Administrative Court judgment of April 26, 2013, ref. No II FSK 1521/11.

¹¹⁵ Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

¹¹⁶ Court of Justice of the European Union, 8 December 2011, ref. No C-157/10, *Banco Bilbao Vizcaya Argentaria SA v. Administración General del Estado*.

¹¹⁷ Voivodship Administrative Court in Poznań judgment of January 14, 2016, ref. No I SA/Po 1631/15.

Polish regulations in a different way shape the tax and tax status of Polish tax residents and residents from other Member States, while shareholders in a similar situation should be treated similarly.

Different arrays discriminatory treatment of taxpayers occurred was previously mentioned taxation of investment funds. Before the amendment of provisions in 2011 the tax exemption of foreign investment funds was derived by Polish administrative courts through pro-EU interpretation of provisions of Art. 6(1) point 10 of Investment Funds Act, in order to avoid a conflict with the provisions of EU law regulating the fundamental freedoms of the Single Market. In the case which was a subject of judgement of Voivodship Administrative Court in Warsaw¹¹⁸ the Applicant was an investment fund with its seat in Luxembourg, operating in accordance with the principles of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities¹¹⁹. Tax authority claimed that this investment fund is not a kind of fund which operates in accordance with the provisions of The Act on Investment Funds therefore it is not entitled to exemption. Court stated that every foreign fund operating in Poland is a fund operating under The Act on Investment Funds, because in the period of its activity on the territory of Poland in the scope of its powers and duties, as well as sanctions arising from their violation, the provisions of this law were applicable to it. Another important judgment is a judgment of Supreme Administrative Court of June 28, 2012¹²⁰. Court stated that the interpretation of law presented by tax authority is in conflict with the provisions of EU law. First of all, it violates the principle of the freedom of capital, but also the freedom of establishment and the prohibition of discrimination on grounds of nationality. Next the Court found that the basic principles of creating and operating investment funds and exercising supervision over them have been harmonized in a large part at the level of EU, therefore funds of the same type cannot be in an objectively incomparable situation. The Investment Funds Act was amended after the judgment, however tax authorities did not change their interpretation of the discussed provision. Therefore, foreign investment funds were still not able to benefit from the exemption. The way in which tax authorities infringed non-discrimination rules is demonstrated in the case brought before Supreme Administrative Court¹²¹. In this case tax authority indicated that although under the German tax regulations investment funds are taxpayers of German income tax, in the light of Polish tax regulations they will not have such a statute for the purposes of Polish income tax. These funds do not fit to the catalog of entities

¹¹⁸ Voivodship Administrative Court in Warsaw judgment of March 14, 2008, ref. No III SA/Wa 1577/07.

¹¹⁹ Hereinafter: "the UCITS Directive".

¹²⁰ Supreme Administrative Court judgment of June 28, 2012, ref. No II FSK 1308/11.

¹²¹ Supreme Administrative Court judgment of September 29, 2015, ref. No II FSK 2002/15.

listed in Art. 1 of Corporate Income Tax Statute – they are not legal entities or capital companies in the organization, nor are tax capital groups, nor can they be classified as organizational units without legal personality. They constitute only separate assets owned by the German Company, which have neither legal capacity nor organizational structure. The Court pointed out that the provision of Art. 6(1) point 10 of Corporate Income Tax Statute should be read in a way that would ensure the implementation of the EU rules – the free movement of capital principle and the freedom of establishment principle. Interpretation of Art. 6(1) point 10 should not be limited to literal interpretation and should also be made in systemic terms, including the context of the provisions of the Law of the United Nations relating, e.g. to management companies. While analyzing Polish provisions regarding investment funds, it was necessary to take into account the actual economic functions that the foreign entity meets, not its legal form. The similar conclusions were reached in the following judgment of the Supreme Administrative Court: judgment of 28 June 2012¹²², judgment of December 5, 2012¹²³ and judgment of 7 November 2014¹²⁴. The change of situation enabling foreign investment funds to benefit from the exception was a result of judicature of domestic administrative courts and the judgment of CJEU.

Another important issue concerned deduction of losses by a parent company incurred in another Member State by a non-resident subsidiary. In a Polish regulation there is no provision regarding the deduction of losses that arose as a result of activities carried out by a permanent establishment in another country. In one of the cases concerning this issue¹²⁵ the court held that considering the principle of primacy of EU law and taking into account the basic principles of the EU legal system (in particular freedom of establishment, the principle of non-discrimination and equality of competition), it is necessary to interpret Polish law in a way that excludes less favorable taxation of the non-resident company. This means the need to grant the non-company the right to settle losses in the settlement made in Poland after the permanent establishment will be liquidated in Germany. The settlement should take place on the same basis on which the loss settlement would be carried out in Poland. The Court also stated that it has to be remembered that the contemporary system of Polish law consists of three elements: national law created by the national legislator, EU law and public international law. This view is grounded in the wording of Art. 87 in connection with Art. 90 and Art. 91 of the Constitution of RP. In the case under examination, both the provisions of the Corporate Income Tax Statute and the provisions of the DTC with Germany should be interpreted in accordance with the postulate of the doc-

¹²² Supreme Administrative Court judgment of June 28, 2012, ref. No I FSK 1308/11.

¹²³ Supreme Administrative Court judgment of December 5, 2012, ref. No II FSK 725/11.

¹²⁴ Supreme Administrative Court judgment of November 7, 2014, ref. No II FSK 2691/12.

¹²⁵ Voivodship Administrative Court in Poznań judgment of January 14, 2016, ref. No I SA/Po 1631/15.

trine, taking into consideration the substantive provisions of EU law and in a way which won't infringe the principle of primacy of EU law. In another case concerning deduction of losses by permanent establishment¹²⁶ Supreme Administrative Court referred to CJEU judgment *Lidl Belgium*¹²⁷ and found that in order to determine the violation of freedom of establishment, it is sufficient to establish that the taxation of a company established in Poland and operating in another Member State is less favorable than if the branches were located in Poland.

It is also worth mentioning the case concerning residency relief. From January 1, 2007 to December 31, 2008, the Personal Income Tax Act of July, 26, 1991 (Dz.U. of 2018, Item 200)¹²⁸ included in its provisions Art. 21(1) point 126, which granted a special residency relief. Pursuant to this article free from income tax were revenues from paid disposal of: a) a residential building, its part or a share in such a building, b) a dwelling constituting a separate property or a share in such a building, c) a cooperative ownership right to a dwelling or a share in such a right, d) the right to a single-family house in a housing cooperative or participation in such a law – if the taxpayer was registered in the building or premises mentioned above for permanent residence for a period not shorter than 12 months before the date of disposal. The Applicant argued that such a regulation is discriminatory against foreigners. Court of first instance¹²⁹ stated that by introducing the condition of permanent residence for a definite period of time in order to obtain a residency relief, the national legislator in various ways grants the right to prove it by fulfilling the criteria for obtaining it, differently towards the Polish citizen and differently towards the foreigner. For a Polish citizen it is a residence with the intention of permanent residence (permanent stay) for a period of at least 12 months, while for a foreigner – 10 years preceding the 12-month period, standing in Poland on the basis of consent for tolerated stay or 5 years in connection with obtaining refugee status or subsidiary protection. According to the Court, this situation should be seen as indirect discrimination, as far as the element of citizenship is not basic, but by creating an additional criterion – registration for permanent residence, the achievement of which depends on length of residing on Polish territory, *de facto* puts the foreigner in a less favorable situation than the citizen of Poland. The criterion of permanent residence determined by the period of residence on the territory of Poland is unfavorable for citizens of other countries and is aimed against (mainly) citizens of another Member States. The case reached the Supreme Administrative Court. The Court found that, at the outset, it should be considered whether Polish regulation is not a form of indirect

¹²⁶ Supreme Administrative Court judgment of October 15, 2014, ref. No II FSK 2401/12.

¹²⁷ Court of Justice of the European Union, 15 May 2008, ref. No C-414/06, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn*.

¹²⁸ Hereinafter: "Personal Income Tax Statute".

¹²⁹ Voivodship Administrative Court in Łódź judgment of May 23, 2012, ref. No I SA/Łd 468/12.

discrimination. The right of permanent residence in Poland can be obtained also by citizens from another EU Member State, however in order to obtain it the requirement of uninterrupted residence for a period of 5 years must be fulfilled. The place of residence or residence criterion may be aimed primarily at citizens of another Member State, because non-resident persons are most often foreigners. However, on the other hand Court considered that resignation from the obligation to confirm residence by permanent registration would place in a privileged situation those citizens from other EU Member States, who apart from staying and willing to reside in Poland, still have permanent residence and registration in the territory of another Member State and do not intend to abandon it. In such a situation, Polish citizens would be harmed because, due to the lack of permanent residence registration, they would lose the right to use the residency relief. This provision could potentially constitute a violation of art. 18 of TFEU, but all depends on the assessment of the actions taken by the taxpayer¹³⁰.

In the end the reference should be made to cases concerning discriminatory treatment on the basis of Value Added Tax. One of interesting cases concerned the appointment of an inadequate deadline for submitting a tax return certificate¹³¹. Tax authority has set an inadequate deadline for the German taxpayer to submit a certificate for VAT refund. The taxpayer was not able to present the desired certificate in such a short time, what deprived him of the possibility of getting a VAT refund. Court stated that the proceedings of the tax authority who imposed unrealistic obligations on foreign taxpayer to meet its deadline, deprives the taxpayer of the right to obtain tax refund, therefore it is discriminatory to a foreign applicant and disproportionate to the purpose of the institution of the Eighth Council Directive¹³² which is to ensure taxpayers are able to comply with the principle of recovering invoiced tax in connection with the supply of goods or services in another Member State. Another important case concerned a Swiss taxpayer¹³³. Tax authority refused to charge and pay him interest due to late refund of VAT, because nor the provisions of Act of 11 March 2004 on Value Added Tax¹³⁴ nor Regulation¹³⁵ regulated the payment of interest for failing to receive a refund of VAT within 6 months which was filed by a taxpayer who does not have his registered office, residence or place of business in Poland and unregistered for VAT purposes in Poland. The Court stated that the interpretation presented by tax

¹³⁰ For example: Has the taxpayer made efforts to obtain the right of a permanent residence, or obtained a permanent registration on the territory of Poland.

¹³¹ Supreme Administrative Court judgment of April 26, 2013, ref. No I FSK 811/12.

¹³² Eighth Council Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value-added tax to taxable persons not established in the territory of the country.

¹³³ Supreme Administrative Court judgment of April 27, 2012, ref. No I FSK 1041/11.

¹³⁴ Dz.U. of 2017, item 1221, hereinafter: “VAT Act”.

¹³⁵ The Regulation of the Minister for Finance of 23 April 2004 regarding refund of tax on good and services to a certain entities.

authority undermines the principle of equality before the law expressed in Art. 32 of the Constitution of RP as well as prohibition of discrimination on grounds of nationality resulting from Art. 18 of TFEU. The situations of both groups of entities are comparable. In both cases, we are dealing with taxpayers of VAT tax. Such status is held by all economic entities, regardless of their place of business. Both groups are characterized by the same common feature – they make taxed purchases of goods and services on the territory of Poland. Once the time of return has been exceeded by tax authority, both groups become – towards the state budget – creditors in the field of VAT, simultaneously obtaining the right to deduct input tax. The Supreme Administrative Court came to similar conclusions in its judgement of 16 June 2011¹³⁶.

4. NON-DISCRIMINATION RULES UNDER BILATERAL DOUBLE TAX CONVENTIONS

Almost every DTC concluded by Poland contains provisions on non-discrimination rules¹³⁷. The agreements which does not contain those provisions are DTC with Australia¹³⁸ and Saudi Arabia¹³⁹. Most of DTCs are based on OECD MTC; individual DTCs contains insignificant distinctnesses from OECD MTC, as an example: the OECD MTC in art. 24(3) uses the expression “carrying on the same activities” – most of DTC concluded by Poland are provided with this wording, however for example DTC with India¹⁴⁰ uses the expression “carrying on the same activities in the same circumstances or under the same conditions” while DTC with United Arab Emirates¹⁴¹ “carrying on the same activities in the same circumstances and under the same methods”. Nonetheless in rare DTCs differences having different effect on the scope of protection by DTC’s non-discrimination rules than those contained in OECD MTC occurs. Some dissimilarities appear in

¹³⁶ Supreme Administrative Court judgment of June 16, 2012, ref. No I FSK 952/10.

¹³⁷ A. Zalasiński, *Umowy o UPO – polska praktyka traktatowa*, (in:) B. Brzeziński (ed.), *Model Konwencji OECD. Komentarz*, Warszawa 2010, p. 1181.

¹³⁸ Agreement between the Republic of Poland and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income dated 7 May, 1991 (Dz.U. of 1992, No 41, Item 177).

¹³⁹ Convention between the Republic of Poland and the Kingdom of Saudi Arabia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital dated 22 February, 2011 (Dz.U. of 2012, Item 505).

¹⁴⁰ Agreement between the Government of the Polish People’s Republic and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Dz.U. of 1990, No 8, Item 46).

¹⁴¹ Agreement between the Government of the Republic of Poland and the Government of United Arab Emirates for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income dated 31 January, 1993 (Dz.U. of 1994, No 81, Item 373).

art. 24(3) of DTC with Russia, United States of America¹⁴² and Pakistan which provides *most favoured nation clause*¹⁴³.

There is a modest case law of Polish administrative courts referring to the non-discrimination rule provided in DTCs. Most of those cases concerned personal income tax, as an example: in this case concerning taxation of pension from Spain in Poland the court found that the provision of Art. 24 of DTC with Spain means that both Polish and Spanish citizens should be subject to the same taxation and tax obligations in Poland. It cannot be inferred from those provision that the tax exemption provided in Spanish tax law concerning a Polish citizen holding a tax residence there, moves together with the change of tax residence to Poland and in Poland this income should also benefit from tax exemption. One cannot agree with the statement that the pension from Spain, due to the tax exemption in Spain, should be exempt from taxation also in Poland. A similar case was the subject of judgement of Voivodship Administrative Court in Gdańsk of 22 September 2015 (on the basis of the DTC with Romania)¹⁴⁴.

5. NON-DISCRIMINATION RULES UNDER EHRC AND BIT – BRIEF OVERVIEW

Poland ratified EHRC on January 19, 1993. The European Court of Human Rights considered 2827 actions concerning Polish law since then until today¹⁴⁵. Most of them concerned infringement of Art. 6 of EHRC¹⁴⁶. However cases concerning the discriminatory character of Polish tax law provisions wasn't a subject of judgments of EHRC. Generally there is an occasional amount of cases concerning taxation. The reason for this may be the fact that Poland is relatively

¹⁴² Convention between the Government of the Polish People's Republic and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income dated 8 October, 1974 (Dz.U. of 1976, No 31, Item 178).

¹⁴³ Convention between the Polish People's Republic and the Islamic Republic of Pakistan for the Avoidance of Double Taxation of Income dated 25 October, 1974 (Dz.U. of 1976, No 9, Item 47).

¹⁴⁴ Voivodship Administrative Court in Gdańsk judgment of September 22, 2015, ref. No I SA/Gd 861/15.

¹⁴⁵ [https://hudoc.echr.coe.int/eng#{"respondent":\["POL"\],"documentcollection-id2":\["GRANDCHAMBER","CHAMBER"\]}](https://hudoc.echr.coe.int/eng#{), (accessed: 19.03.2018).

¹⁴⁶ In this regard it is worth mentioning the case *Alojzy Formela v. Poland* (Application No 31651/08); <http://www.hfhrpol.waw.pl/precedens/images/stories/file/31651-08%20%20Statement%20of%20Facts%20and%20Questions%20to%20the%20Parties.pdf> (accessed: 20.03.2018). The complaint concerned the proceedings conducted by the tax authorities against the entrepreneur – Alojzy Formela. He accused Poland of violating his right to property and the right to a fair trial. First of all, he meant that although he fulfilled all his duties, he was punished for the tax negligence of his contractors. However in the end this case was not a subject of a court decision. However it shows that it is possible to use Art. 6 of ECHR in cases concerning the incorrect behavior of tax authorities.

short-term party to the EHRC. Another point is that many persons may not realize that taxation matters may violate the provisions of EHRC. In addition, the waiting time for the sentence is long and in effect it can act discouragingly to take action in the European Court of Human Rights.

Poland concluded the majority of BITs in the 80's and 90's. Recently, under the impact of the European Union, Poland begins to terminate its BITs with another Member States. Lately Poland has terminated the BIT with Portugal¹⁴⁷ and Denmark¹⁴⁸.

In the context of non-discrimination rules concerning taxation on the basis of BITs it is important to note that investor can sue state for abuse of power, including incorrect behavior of tax authorities which was of a discriminatory character.

An interesting case was the subject of a judgment of the arbitration court. The case concerned an American investor demanded compensation from Poland for the fact that the proceedings of tax authorities led to the bankruptcy of his margarine factory¹⁴⁹. The investor claimed that his company went bankrupt because of the devastating struggle with tax authorities. The tax authorities found that the company illegally included expenditure on consulting services as tax deductible costs, which reduced the taxes paid. As a result, the company had to pay over PLN 50 million to the treasury with interest (for CIT and VAT taxes). The investor in proceedings before arbitration court claimed that the conduct of the tax authorities was biased, prejudiced and discriminatory and that the company was denied due process. For instance, he claimed that tax authorities applied the transfer pricing rules through non-binding guidelines when those rules had yet to be incorporated in the statute. Further the investor argued that the guidelines set unreasonable standards for providing documentation rather than seeking the objective truth – the tax authorities were motivated by a bonus system, which rewarded them for issuing decisions against taxpayers. In this regard the investor referred to Art. II(6) of the BIT with the United States¹⁵⁰ expressing the right to fair and equitable treatment and to Art. VII expressing protection against expropriation.

However arbitration court found that the lost of tax proceedings was not a result of conduct of the tax authorities but because of K insufficient record keeping. Court stated also that there has been no expropriation. The example of this case shows how the rules of non-discrimination on the basis of BITs can be used in building arguments during court's proceedings.

¹⁴⁷ orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-644-2017/.../8-020-644-2017.pdf (accessed: 25.03.2018).

¹⁴⁸ bip.kprm.gov.pl/download/75/24617/RM-10-174-17.pdf (accessed: 25.03.2018).

¹⁴⁹ International Centre for Settlement of Investment Disputes (additional facility), ICSID Case No ARB(AF)/11/3 of 24 November, 2015.

¹⁵⁰ Bilateral Investment Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations signed on 21 March 1990 (Dz.U. of 1994, No 97, Item 467).

Important feature regarding both, non-discrimination rules on the basis of ECHR and BIT is that they enable taxpayer to protect against actual discrimination manifested in the behavior of the tax authorities.

6. LAW PROVISIONS WHICH COULD BE CONSIDERED AS DISCRIMINATORY

6.1. THE ISSUE OF DISCRIMINATORY CHARACTER OF TAX CAPITAL GROUPS

This issue was not a subject to Polish case-law, however it interested researchers¹⁵¹ and practitioners.

The reason why the discriminatory character of Tax Capital Group¹⁵² may be considered are the regulations of Polish Corporate Income Tax Statute according to which TCG may only consist of limited liability companies or joint-stock companies having their seat within the territory of Poland¹⁵³.

Creating a TCG brings the following tax benefits:

– The object of imposition of income tax in TCG shall be the income earned in a tax year which is a surplus of total incomes earned by all companies constituting a tax capital group in excess of their total losses – this enables consolidation of incomes and losses in TCG¹⁵⁴;

– Exclusion of transfer pricing regulations in relation to TCG¹⁵⁵;

– Tax neutrality of donations made between entities belonging to the Tax Capital Group¹⁵⁶.

B. Kuźniacki indicates that dissimilar treatment of TCG results only from the place of their registered office¹⁵⁷ and according to judicature of CJEU the difference in tax treatment resulting exclusively from the place of the company's registered office should be seen as a covered discrimination¹⁵⁸. Also the establishment of a TCG offers certain benefits, and therefore the fact that it cannot be established by entities that do not have their seat in Poland may be discriminatory against them.

¹⁵¹ B. Kuźniacki, *Niezgodność przepisów o podatkowych grupach kapitałowych z zasadą zakazu dyskryminacji w świetle prawa unijnego i umów o unikaniu podwójnego opodatkowania*, "Przegląd Podatkowy" 2015, No 9, and B. Kuźniacki, *Niezgodność polskich przepisów o podatkowych grupach kapitałowych z zasadą zakazu dyskryminacji w świetle orzecznictwa Trybunału Sprawiedliwości*, "Europejski Przegląd Sądowy" 2015, No 2.

¹⁵² Hereinafter: "TCG".

¹⁵³ Art. 1a(2) item 1 of Corporate Income Tax Statute.

¹⁵⁴ Art. 7a(1) of Corporate Income Tax Statute.

¹⁵⁵ Art. 11(8) item 1 of Corporate Income Tax Statute.

¹⁵⁶ Art. 16(1) item 14 of Corporate Income Tax Statute.

¹⁵⁷ B. Kuźniacki, *Niezgodność przepisów o podatkowych grupach kapitałowych...*, p. 39.

¹⁵⁸ C-397/98, C-410/98, EU:C:2001:134, pkt 42.

This regulation could be regarded as discriminatory also on the basis of DTC¹⁵⁹. According to Art. 24(3) of OECD MTC “the taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favorably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities”. In connection with the fact that the permanent establishment cannot be part of a TCG, it can be considered that it is discriminated in relation to companies established in Poland, which may take advantage of tax benefits resulting from being a part of TCG.

C. Brown indicates that the requirement of equal treatment does not take into consideration relationships the enterprise and others enterprises in the context of rules allowing consolidation, transfer of losses or transfers of property between companies under common ownership (tax-free)¹⁶⁰. Such situation could be seen contrary to non-discrimination rules.

Consideration could be given why until today no one has appealed to court on this matter. It seems that this may be due to the low popularity of TCG in practice. In addition, recently Poland is actively working to combat tax optimization. The Ministry of Finance issued a special warning against tax optimization in TCG¹⁶¹. Therefore, conducting business activities in a form of TCG can start enjoying even less popularity.

6.2. DISCRIMINATORY CHARACTER OF CREDIT METHOD?

Using the credit method, the similar treatment – from the point of view of the state of residence – is guaranteed only in the case of income coming from states with low tax rates (such income is subject to taxation taking into account the higher level of taxation in the state of residence), while in the case of income obtained in states using higher tax rates the differentiation of tax burdens is tolerated (the tax surplus is not refunded). In the opinion of the CJEU, such differentiation of tax rates and, consequently, differentiated income taxation is justified and does not violate EU freedoms¹⁶².

In past the credit method was established in DTC with United Kingdom. In 2006 new DTC with United Kingdom was introduced. In the explanatory memorandum to new DTC with United Kingdom it was clarified that: “credit method is a significant impediment to Poles taking up employment in the United King-

¹⁵⁹ B. Kuźniacki, *Niezgodność przepisów o podatkowych grupach kapitałowych...*, p. 46.

¹⁶⁰ C. Brown, J. Mintz, *On the Relationship between International Tax Neutrality and Non-Discrimination Clauses under Tax-Treaties for Source-Based Taxes*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties...*, p. 597.

¹⁶¹ The Ministry of Finance, *Ostrzeżenie Ministerstwa Finansów przed optymalizacją podatkową w ramach podatkowych grup kapitałowych*, June 26, 2017, ref. No 004/17.

¹⁶² Court of Justice of the European Union, 12 May 1998, ref. No C-336/96, *Mr and Mrs Robert Gilly v. Directeur des services fiscaux du Bas-Rhin*.

dom. According to this method, income from hired labor in the United Kingdom obtained by a resident for tax purposes in Poland is taxed in both the United Kingdom and Poland, with the tax paid in the United Kingdom deductible from tax to be paid in Poland. It should be noted that in the United Kingdom there is a significantly lower tax burden for a certain amount of income from hired labor, which makes it necessary to pay tax in Poland. As a result, the tax situation of Polish residents working in the United Kingdom is unfavorable compared to the situation of Polish employees in other countries (eg. neighboring Ireland) applying the exclusion method with progression, according to which their income is exempt from taxation in Poland”.

There has been also some judgments concerning the issue of discriminatory character of credit method. For example in the case on the basis of DTC with United States of America¹⁶³ Taxpayer argued, recalling the provision of art. 21 of DTC with United States of America which stated that a national of a Contracting State who is resident in the other Contracting State cannot be subject to taxation or related obligations that are different or more burdensome than the taxation or duties that the citizens of the other Contracting State may undergo under the same circumstances, that the credit method is of a discriminatory character. The Court disagreed with an Applicant founding that the prohibition of discrimination means that the citizens of a Contracting State shall not be subject to taxation in the other Contracting State on special terms, different from the rules governing all citizens of that state. The income obtained by the taxpayer, including the income from the foreign pensions, was taxed in Poland on general principles, the same as that which income of those kind obtained by Polish citizens is subjected to.

7. CONCLUSIONS

Non-discrimination rules that applies in tax matters are a part of Polish legal landscape. They exist both in Constitution of RP, at the level of EU law, in DTCs, EHRC, BITs and at the level of WTO. Constitution of RP provides general principle of equity before the law. It is very important that this principle applies to “all persons” not only to nationals. However in practice this provision does not have strong impact in the process of applying tax law. The overview of judicature shows that although courts refer to constitutional principle of equity before the law, they do not apply it more widely in the process of the interpretation of tax law. Courts often just indicates it together with different non-discrimination provisions. The reason why constitutional principle of non-discrimination does not have strong impact in the process of interpreting and applying tax law is the existing hierarchy of laws in Poland which provides that provisions of EU law and

¹⁶³ Voivodship Administrative Court in Kielce judgment of April 12, 2006, ref. No I SA/Ke 21/06.

ratified agreements with prior consent expressed in statute have priority over the provisions of statute, if the statute cannot be reconciled with provisions of those agreements. In this regard, when statute – which is the main legal act establishing tax matters in Poland, violates the non-discrimination rules provided in ratified agreements with prior consent expressed in statute, courts refer more widely to provisions of ratified agreements with prior consent expressed in statute.

The overview of case law allows the conclusion that DTC does not have strong impact on Polish law in the aspect of non-discrimination rules. There are very few cases regarding non-discrimination rules on the basis of DTC. Most of them relates to issues concerning personal income tax and in most of this cases courts disagreed with taxpayer in regard that provisions indicated by taxpayer are of a discriminatory nature. There is even less cases concerning corporate income tax indicating that non-discrimination rules contained in DTCs are of negligible significance for world's business. Another point is that strict interpretation of non-discrimination rules on the basis of DTC could be understandable since DTC is a result of the waiving of the part of the sovereignty of contracting states¹⁶⁴.

The overview of case law regarding EU non-discrimination rules leads to different conclusions from those expressed in relation to DTC. There is a lot of case law concerning issue of discriminatory character of provisions of Polish tax statutes or discriminatory interpretation of these statutes by tax authorities, contrary to EU law and EU fundamental freedoms. Many cases concern corporate income tax what shows that EU non-discrimination rules are used by taxpayers conducting economic activities in Poland. Tax authorities are not willing to respect non-discrimination rules; tax ruling issued by them shows that domestic law of statute is often the most important for them and they do not try to interpret it in a spirit of EU non-discrimination rules¹⁶⁵. However Polish courts usually recognize the significance of EU non-discrimination rules and skillfully interpret provisions of Polish tax statutes in the light of their spirit. The reason why EU non-discrimination rules are used more often than DTC non-discrimination rules is probably because Polish courts are more familiar with EU law, there is a lot of judgments of CJEU which help courts in building line of argumentation; also some courts emphasized the supremacy of EU law over DTC. Another point is that EU non-discrimination rules have a wider scope than those expressed in DTC, so it is easier to indicate violation of non-discrimination rules of EU law than those resulting from DTC. Moreover it should be noted that there is an important difference regarding application of non-discrimination rules on the basis of DTC and

¹⁶⁴ K. Vogel, *Klaus Vogel on Double Taxation Conventions. A Commentary to the OECD, UN and UN Model Conventions for the Avoidance of Double Taxation on Income and Capital With Particular Reference to German Treaty Practice*, London 1997, p. 19.

¹⁶⁵ However it should be also indicated that tax authorities generally represent *in dubio pro fisco* attitude and often are interpreting the provisions of tax law in a way to burden taxpayer with the highest possible tax obligations, both to resident and non-resident taxpayers.

EU law: cases based on DTC law are settled by domestic courts which could be more willing to apply narrow scope of non-discrimination rules recognizing its own country objectives. Instead EU non-discrimination rule is subject to wide interpretation of CJEU which takes into account the aspect of integration of the economies of contracting states¹⁶⁶ and is not limited by state's particularism.

Furthermore the overview of judicature shows that in process of designing and implementing the law non-discrimination rules not always are respected by Polish legislator. In this regard the activity of courts is crucial in order to remove effects of provisions incomparable with non-discrimination rules expressed in EU law and DTCs.

In conclusion it should be stated that in Polish legal order various non-discrimination rules concerning tax matters are provided: constitutional, those included in EU law, DTCs, HCHR and BIT. In practice the most substantial significance regarding cross-borders situations have non-discrimination rules provided in EU law. Moreover it should be remembered that there are also other possibilities to impede the tax situation of foreigners. In this regard the most important are State aid rules. According to those rules states cannot unduly favour certain companies over others¹⁶⁷. State aid rules concerning tax matters could be a form of discrimination of foreigners¹⁶⁸.

That it is very important taxpayers being aware of protection which non-discrimination rules are able to provide them especially in a situation where courts are willing to interpret provisions of law in the light of EU (mainly) and DTC non-discrimination rules. On the other hand Polish legislator and Polish tax authorities has to remember about significance of non-discrimination rules and that violation of them is a violation of Polish law.

OVERALL CONCLUSION OF THE RESEARCH WORK

Traditionally states was fully sovereign in shaping their tax systems. Their tax autonomy was unlimited by other states. However over time the economic relations between states intensified and the need to remove barriers to the economic

¹⁶⁶ W. Haslehner, *Nationality, Non-Discrimination and Article 24 OECD Model: Perennial Issues, Recent Trends and New Approaches*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016, p. 6.

¹⁶⁷ Poland has violated state aid rules concerning tax matters. For example recently European Commission found Poland's tax on the retail sector in breach of EU rules, https://ec.europa.eu/taxation_customs/node/963_en (accessed: 25.03.2018).

¹⁶⁸ Author just wanted to indicate this issue in conclusions, because state aid rules was not a subject of this paper. However violation of state aid rules can also severely harm foreigners on tax matters.

exchange has occurred. In current globalized world we observe many initiatives at international level aimed at combating aggressive tax competition between states. Those initiatives at the same time when implementing unified measures, bring together tax systems of states. Nowadays tax autonomy has changed its traditional meaning: it gains international dimension as matter of taxes are becoming more and more a part of international relations between states and are not only internal state matter anymore.

It is important that international initiatives concerning international tax law are build on principles of fairness and justice. In this regard non-discrimination rules are very important. Moreover non-discrimination rules guarantee equal treatment of foreign taxpayers creating beneficial ground for conducting cross-border businesses and intensifying economic relations between states.

Non-discrimination rules limit tax autonomy of state. However on the other hand the states may experience loss of sovereignty because of harmful tax competition. That's why there is a need to develop solutions at the international level that would allow states more effectively manage their tax systems and in fact retain their tax autonomy understood in up-to-date way.

Non-discrimination rules are provided in provisions of many international agreements: in EU law, in DTCs, in ECHR, those of WTO and in the end, in BITs. The overview of Polish case law regarding tax non-discrimination rules indicates that tax authorities still not always recognize the meaning of non-discrimination rules. Another point is that it shows how important appropriate and case-by-case interpretation of those rules is. Never two situations are entirely similar or entirely different¹⁶⁹ so strictly defined criteria regarding discriminatory treatment will not enable true protection to foreign taxpayers; non-discrimination rules should be drafted in a way to enable case-by-case adjudication.

The overview of case law indicates that in practice the most significant non-discrimination rules are those provided in EU law. In context of tax autonomy concept it indicates that the way of interpretation has a significant impact on implementation of non-discrimination rules to a particular situations. CJEU as an EU institution is able to interpret those rules in a spirit detached of state's will to maintain full sovereignty over its tax matters. Moreover CJEU has to make sure that EU law is applied in the same way in all EU Member States. However it should be remembered that non-discrimination rules provided in international agreements are a part of a law and their violation is a violation of law. It is important legislator and tax authorities to comply with non-discrimination rules. Also it is important that at the level of international organizations the significance of those rules is emphasized. However, most importantly taxpayers has to realize the protection which non-discrimination rules guarantee them. As overview of Polish

¹⁶⁹ P. Western, *The empty idea of equality*, "Harvard Law Review" 1982, Vol. 95, No 3, p. 537.

case law indicates, the change of incompatible with non-discrimination rules tax law provided in statute is possible through court's interpretation.

BIBLIOGRAFIA

- Attard R., *Discriminatory Taxation and the European Convention on Human Rights*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016
- Bącal M., *Zasady ogólne prawa unijnego. Charakterystyka i zastosowanie wybranych zasad prawa unijnego – zasada równości (zakaz dyskryminacji)*, (in:) E. Fronkiewicz (ed.), *Zasady prawa unijnego w VAT*, Warszawa 2013
- Bammens N., *The Non-Discrimination Analysis under the OECD Model as Compared to the EU Fundamental Freedoms*, (in:) J. Englisch (ed.), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism*, Amsterdam 2016
- Bammens N., *The Principle of Non-Discrimination in International and European Tax Law*, Amsterdam 2012
- Banaszak B., *Zasada równości w orzecznictwie Trybunału Konstytucyjnego*, (in:) L. Garlicki, A. Szmyt (eds.), *Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje*, Warszawa 2003
- Benett M., *The David R. Tillinghast Lecture – Nondiscrimination in International Tax Law: A concept in Search of a Principle*, "Tax Law Review" 2006, Vol. 59
- Blonigen B., Oldenski L., Sly N., *The differential effects of bilateral tax treaties*, "American Economic Journal: Economic Policy" 2014, Vol. 6, issue 2
- Brown C., Mintz J., *On the Relationship between International Tax Neutrality and Non-Discrimination Clauses under Tax-Treaties for Source-Based Taxes*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties: Building Bridges between Law and Economics*, Amsterdam 2010
- Buttenham K., Maikawa M., *State sovereignty and multilateral instrument*, "Canadian Tax Journal, Revue fiscale Canadienne" 2016, Vol. 64, No 2
- Działocha K., *Uwaga 7 do art. 84*, (in:) L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. III, Warszawa 2003
- Dziurdź K., Marchgraber C., *Non-discrimination in European and Tax Treaty Law, Open Issues and Recent Challenges*, Wien 2015
- Dziurdź K., *Non-Discrimination and Harmful Tax Competition under WTO Law and Article of the OECD Model*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016
- Garrido B., *Interaction between the Interpretation of the Non-discrimination Provisions in Tax Treaties and in the EC Treaty: An Apparent Rather than Real Conflict*, "EC Tax Review" 2009, Vol. 18, No 4
- Gilpin R., *Global political economy: Understanding the international economic order*, Princeton and Oxford: Princeton University Press, 2001
- Gomułowicz A., *Podatki i prawo podatkowe*, Warszawa 2016
- Green A., *The trouble rule of nondiscrimination in taxing foreign direct investment*, *Law & Policy in International Business* (1994–1995), No 26

- Griffith R., Hines J., Sorensen P., *International Capital Taxation*, (in:) J. Mirrlees (ed.), *Dimensions of Tax Design*, New York 2010
- Haslehner W., *Nationality, Non-Discrimination and Article 24 OECD Model: Perennial Issues, Recent Trends and New Approaches*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016
- Isenbaert M., *The Contemporary Meaning of “Sovereignty” in the Supranational Context of the EC as Applied to the Income Tax Case Law of the ECJ*, “EC Tax Review” 2009, Vol. 18, issue 6
- Kaul I., *Blending external and domestic policy demands – The rise of intermediary state*, (in:) I. Kaul, P. Condeicao (eds.), *The new public finance: Responding to global challenges*, Oxford 2006
- Krzywoń A., *Podatki i inne daniny publiczne w Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2011
- Kuźniacki B., *Niezgodność polskich przepisów o podatkowych grupach kapitałowych z zasadą zakazu dyskryminacji w świetle orzecznictwa Trybunału Sprawiedliwości*, “Europejski Przegląd Sądowy” 2015, No 2
- Kuźniacki B., *Niezgodność przepisów o podatkowych grupach kapitałowych z zasadą zakazu dyskryminacji w świetle prawa unijnego i umów o unikaniu podwójnego opodatkowania*, “Przegląd Podatkowy” 2015, No 9
- Kwiecień R., *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, Warszawa 2000
- Lehner M., *Limitation of the national power of taxation by the fundamental freedoms and non-discrimination clauses of the EC Treaty*, “EC Tax Review” 2000, Vol. 9, issue 1
- Mączyński D., *Międzynarodowe prawo podatkowe*, Warszawa 2015
- Matias S., *Globalisation, international level and the state*, Keynote Speech On October 17, 2008 at the Georgetown University Law Center’s event on Globalization
- McLure C., *Globalisation, Tax Rules and National Sovereignty*, “Bulletin for International Fiscal Documentation” 2001, Vol. 55, issue 8
- Michie J., *The Handbook of Globalisation*, Cheltenham 2011
- OECD, *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, 2013, <http://dx.doi.org/10.1787/9789264202719-en> (accessed: 25.08.2018)
- OECD, *Model Tax Convention on Income and Capital. Version of 2014*, https://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en#.Wq27QLyJyIs (accessed: 25.08.2018)
- Pak I., *International Finance and state sovereignty: global governance in the international tax regime*, “Annual Survey of International and Comparative Law” 2004, No 10
- Peters C., *International Tax Neutrality Plea for a More Explicit Dialogue between the State and the Market*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties: Building Bridges between Law and Economics*, Amsterdam 2010
- Peters C., *On the Legitimacy of International Tax Law*, Amsterdam 2014
- Rust A., *International Tax Neutrality and Non-Discrimination – A Legal Perspective*, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer, A. Storck, M. Zagler (eds.), *Tax Treaties: Building Bridges between Law and Economics*, Amsterdam 2010

- Teixeira G., *Tax Systems and Non-Discrimination in the European Union*, "INTERTAX" 2006, Vol. 34, issue 2
- United Nations, *Committee of Experts on International Cooperation in Tax Matters Report on the seventh session*, New York 2012
- van Arendonk V., *The European Cooperation Project, Tax & Sovereignty*, "EC Tax Review" 2016, Vol. 25, No 5–6
- van Raad K., *Nondiscrimination in International Tax Law*, Deventer 1986
- van Thiel S., *General Report*, (in:) M. Lang, J. Herdin, I. Hofbauer (eds.), *WTO and Direct Taxation*, Wien 2005
- Vanistendael F., *Non-Discrimination: Can the EU Learn from the OECD Model Convention and Vice Versa?*, (in:) P. Pistone, D. Weber (eds.), *Non-Discrimination in Tax Treaties: Selected Issues from a Global Perspective – Review*, Amsterdam 2016
- Vogel K., *Klaus Vogel on Double Taxation Conventions. A Commentary to the OECD, UN and UN Model Conventions for the Avoidance of Double Taxation on Income and Capital With Particular Reference to German Treaty Practice*, London 1997
- Wälde T., Kolo A., *Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty*, "INTERTAX" 2007, Vol. 35, issue 8–9
- Wang G., *Radiating Impact of WTO on Its Members' Legal System: The Chinese Perspective*, Hague 2011
- Western P., *The empty idea of equality*, "Harvard Law Review" 1982, Vol. 95, No 3
- Zalasiński A., *Umowy o UPO – polska praktyka traktatowa*, (in:) B. Brzeziński (ed.), *Model Konwencji OECD. Komentarz*, Warszawa 2010

TAX AUTONOMY AND NON-DISCRIMINATION RULES IN THE ERA OF CONFLICTING POLITICAL GOALS: INTERNATIONAL AND POLISH PERSPECTIVE

Summary

The aim of this paper is to discuss non-discrimination rules concerning tax matters on the example of Polish case analysis. Author wishes to conduct research work in broader context. In this regard it is necessary to outline the current globalized world in which tax systems of states operate, discuss the concept of state's tax autonomy and examine how the role of a state on tax matters has recently changed. Subsequently the non-discrimination rules from an international perspective shall be presented. It is also important to answer the question about the impact of those rules on state's tax autonomy and about the role which they could play in reconciling political goals in the current globalized world. All of this contexts enables to examine non-discrimination rules from Polish perspective. Author introduces all of non-discrimination rules concerning taxation in Polish legal order, accordingly presents and studies Polish case law regarding those rules. Finally,

overall conclusions of the research work are introduced which are intended to discuss the role, significance and the future of non-discrimination rules in contemporary globalized world, both from international and Polish perspective.

KEYWORDS

non-discrimination rules, tax autonomy, globalization, tax system, tax discrimination, tax fairness

SŁOWA KLUCZOWE

zasady niedyskryminacji, autonomia podatkowa, system podatkowy, dyskryminacja podatkowa, sprawiedliwość podatkowa