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The Polish Tax Ordinance Bill as an Instrument Supplementing the Constitutional Tax Law Making Principles

Keywords: general taxation law, General Taxation Law Codification Committee, bill of the new Tax Ordinance, making tax law, tax law-making principles, Constitution of Republic of Poland

Słowa kluczowe: ogólne prawo podatkowe, Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego, projekt nowej Ordynacji podatkowej, stanowienie prawa podatkowego, zasady stanowienia prawa podatkowego, Konstytucja RP

Abstract

The article presents the process of preparing the Polish Tax Ordinance Bill and its fundamental assumptions as the codification of the general part of taxation law in the light of constitutional rules provided for the tax law-making process. First, it focuses on the importance and the tasks of the General Taxation Law Codification Committee. Then it presents the drawbacks of the Ordinance currently in force, which justify its replacement with a new act. The next part of the article discusses the assumptions and objectives of the bill adopted by the Committee. The last part presents the substantive layout of the new act. The concluding part argues for the urgent need to introduce the new Tax Ordinance into the domestic legal system as this act would supplement the principles of tax law resulting from the Constitution of the Republic of Poland.

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Streszczenie**Projekt nowej Ordynacji podatkowej jako instrument uzupełniający konstytucyjne zasady tworzenia prawa podatkowego**

W artykule przedstawiono proces przygotowania projektu nowej Ordynacji podatkowej oraz jej podstawowe założenia jako kodyfikację części ogólnej prawa podatkowego w świetle konstytucyjnych zasad tworzenia prawa podatkowego. Po pierwsze, w opracowaniu tym przedstawiono znaczenie i zadania Komisji Kodyfikacyjnej Ogólnego Prawa Podatkowego. Następnie przedstawiono wady aktualnie obowiązującej Ordynacji podatkowej, które uzasadniają zastąpienie jej nową ustawą. W dalszej części artykułu omówiono założenia i cele projektu przyjętego przez Komisję. W ostatniej części przedstawiono układ merytoryczny nowej ustawy. W końcowej części wskazano na pilną potrzebę wprowadzenia nowej Ordynacji podatkowej do krajowego porządku prawnego, przy czym podkreślono, że akt ten uzupełniłaby zasady stanowienia prawa podatkowego wynikające z przepisów Konstytucji RP.

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I. Introduction

In October 2014, the General Taxation Law Codification Committee (GTLCC) was established in Poland³. Its principal task was to order the general part of taxation law in the form of a new act. First, it was important to resolve the question of whether the Committee's work was a tax code embracing the whole taxation law or partial codification covering general taxation law. The codes of general taxation law, as a rule, do not cover the provisions regulating particular taxes making the taxation system. This model is also implemented in Poland. The task of the Committee was to prepare the Tax Ordinance as a codification of general taxation law. Therefore, it aimed at consisting of provisions regulating tax obligations (e.g., tax overpayment, statutes of limitation, the liability of heirs and third parties), tax procedures.

³ Council of Ministers' decree of October 16, 2014 on establishing, organizing and operating of GTLCC (Dz.U. item 1471).

The government decided to vest the preparation of the bill in a committee of the representatives of taxpayers, tax authority employees, judges, and academicians dealing with taxation law. That was an innovative solution in Poland, diverging from the earlier preparing tax laws by the Ministry of Finance. The first stage of the Committee's works was preparing directional assumptions of the future Tax Ordinance, adopted by the Council of the Ministers in October 2015. Based on the accepted directional assumptions, GTLCC prepared a Tax Ordinance bill and extensive justification, which was brought to the Sejm in June 2019. However, the bill has not been passed due to the end of the Parliament's term.

The article's objective is to present the process of preparing the draft and its fundamental assumptions and prove the research hypothesis according to which the bill of the new Tax Ordinance supplements the mechanisms and tax law-making principles resulting from the provisions of the Polish Constitution⁴.

II. The Idea Behind the Codification Committee

The initiator of creating GTLCC was the Minister of Finance, who decided to begin reforming the Polish taxation law in this form. It was the Ministry's response to proposals, reported for quite a long time, to extend the participation of the circles interested in reforming the taxation system. The appointment of a committee aimed at replacing the previous model of preparing drafts of tax laws by internal teams of employees of the Ministry of Finance. This way of reforming taxation law in the public feeling was treated as sham operations, aiming to increase the effectiveness of tax collecting solely, without properly considering the taxpayer's rights. It was justified that the fiscal system is not interested in creating tax regulations that would hinder the implementation of its fundamental task, which is gaining the assumed tax incomes.

The mentioned drawbacks are not in the concept of vesting the preparation of the reform draft of general taxation law in a codification com-

⁴ The Constitution of the Republic of Poland of April 2, 1997 (Dz.U.No. 78, item 483 as amended).

mittee understood as a team of “experts” recruited not only from the Ministry of Finance and with a clearly defined task: to prepare the bill of the new Tax Ordinance. The Committee included: five representatives of the science of taxation law, three judges of the administrative court, three representatives of tax authorities, three representatives of tax advisor firms, and a representative of the President of the Republic of Poland. This Committee composition was supposed to guarantee considering in the works on the reform of general taxation law all essential problems connected with the functioning of the regulations identified by science, judicature, and practice.

It is important to underscore that GTLCC did not develop the draft in a hurry. First, directional assumptions of the new act were prepared (January 2015), then they were consulted with the department and by the public, which lasted from February to September 2015. After the directional consultations, they were accepted by the government (October 2015)⁵. On this basis, GTLCC prepared a draft of the law and passed it to the Minister of Finance (October 2017). The new Ordinance draft was referred to the so-called intradepartmental consultations (completed in June 2018). Once they had been completed, interdepartmental and public consultations began (completed in January 2019). The Committee cooperated with the Ministry of Finance at the analysis of observations reported in the framework of the consultations. The bill was referred to the Sejm in June 2019⁶.

The composition of the Committee, as well as the procedure of preparing the draft and its extensive consultation, resulted in the preparation of the bill of the modern Tax Ordinance within the assumed deadline. In this context, the appointment of GTLCC turned out to be a good initiative of the Minister of Finance.

⁵ L. Etel et al., *Ordynacja podatkowa. Kierunkowe założenia*, Białystok 2015, p. 15 et seq., <https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/3358/1/L.%20Etel%20i%20in.%20C%20Ordynacja%20podatkowa.%20Kierunkowe%20założenia%20nowej%20regulacji.pdf> (2.10.2020).

⁶ Print No. 3517 – Government bill – Tax Ordinance, <https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=3517> (2.10.2020).

III. Reasons for the Replacement of the 1998 Tax Ordinance

The presently binding Tax Ordinance entered into force on January 1, 1998, and so far, has been amended 160 times. Analyzing the frequency and the scope of the changes introduced into the act over recent years allows us to state that it is one of the most frequently amended tax laws⁷. The act has become outdated, and its upgrades are of little help.

The currently binding Tax Ordinance lacks institutions typical of the codified general parts of taxation law, especially the general rules of taxation law. Outside the Ordinance remain, for example, the rule of pragmatism, the rule of cooperation, the rule of proportionality, the rule of weighing a legitimate interest of the obliged and public interest, the rule of amicable settlement of cases, the rule of resolving doubts referring to the actual state on behalf of the taxpayer⁸. A complete catalog of the rules of taxation law can be introduced into the taxation law system only in the new Tax Ordinance.

Another reason for preparing the new act is the necessity of introducing several instruments of sealing the tax system into the legal system. They aim to limit the possibilities of escaping tax paying.

An important argument for the amendments in Tax Ordinance is the proposed need for defining the taxpayer's rights in an open catalog included in one document⁹. According to GTLCC, it is best done in a Tax Ordinance. Their formulation in the act would also impact the practice of applied law, especially its interpretation.

A good example of institutions missing in the current Ordinance are the so-called conciliatory methods of settling tax cases. At present, it is commonly recognized that mediations and agreements in the relations of taxpayer-tax

⁷ *Barometr Prawa*, Grant Thornton 2020, pp. 11–12, <https://barometrprawa.pl/wp-content/uploads/2020/03/Barometr-prawa-RAPORT-2020-03-05-2020.pdf> (2.10.2020).

⁸ L. Etel et.al., op.cit., pp. 73–100.

⁹ B. Brzeziński, *Koncepcja praw podatnika i ich ochrony jako przedmiot badań naukowych*, "Kwartalnik Prawa Podatkowego" 2005, No. 1, pp. 9–34; *Study into the Role of Tax Intermediaries*, "Forum on Tax Administration", OECD 2008, <http://www.oecd.org/tax/administration/39882938.pdf> (3.10.2020); *Co-operative Compliance: A Framework. From Enhanced Relationship to Co-operative Compliance*, OECD 2013, <http://www.oecd.org/tax/administration/co-operative-compliance.htm> (3.10.2020).

authority are useful, and their role is emphasized both in Polish¹⁰ and foreign¹¹ literature and various other sources¹².

Changes in the Tax Ordinance are also forced by the development of technology, particularly electronic forms of communication between the authority and the taxpayer. The Tax Ordinance must be restructured due to the vast legacy of judicial decisions of courts resolving tax cases. In their judgments, the courts very often signaled severe problems connected with the defectiveness of the provisions of the Tax Ordinance. Most of them may be solved by fundamentally changing the current regulations. In this context, it is important to note the judgments of the Constitutional Tribunal. The Tribunal issued over 20 decisions concerning the compliance of the provisions of the Ordinance with the Constitution. Also, the Court of Justice of the European Union (CJEU) has decided on many cases which directly¹³ or indirectly¹⁴ referred to the Polish regulations in the Ordinance.

¹⁰ B. Brzeziński, *Kierunki zmian przepisów ogólnych ordynacji podatkowej*, "Kwartalnik Prawa Podatkowego" 2001, No. 3–4, pp. 33–44; A. Gomułowicz, *Zasada sprawiedliwości podatkowej w orzecznictwie Trybunału Konstytucyjnego*, Warsaw 2003.

¹¹ *Procedural Rules in Tax Law in the Context of European Union and Domestic Law*, eds. M. Lang, P. Pistone, J. Schuch, C. Staringer, Warsaw 2010; A. Barak, *Proportionality. Constitutional rights and their limitations*, Cambridge 2013; H. Elffers, P. Verboon, W. Huisman, *Managing and Maintaining Compliance*, Boom Legal Publishers 2006.

¹² For details, see *Code of Good Administration* containing the minimum standards applicable to member states of the Council of Europe and constituting an appendix to the recommendation of June 20, 2007, 7 CM/Rec. Committee of Ministers of the Council of Europe to member states on good administration, Taxpayer card model developed by Confédération Fiscale Européenne, Asia-Oceania Tax Consultants' Association or Society of Trust and Estate Practitioners, <http://www.cfe-eutax.org/node/3134> (3.10.2020), European Union Taxpayers' Code, European Commission, Directorate General for Taxation and Customs Union (European Union 2016), https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_pl.pdf (3.10.2020).

¹³ For details, see: judgment of the Court (Third Chamber) of February 12, 2009, C-475/07, which concerned an infringement of a Member State's obligations regarding excise duty on electricity.

¹⁴ For details, see: Court of Justice of the European Union of March 8, 2001, C-397 and 410/98 *Metallgesellschaft*, from which it follows the principle that Member States are, in principle, obliged to refund taxes which have been collected in breach of Community law. In other judgments of the CJEU, this also applies, inter alia, to the issue of interest rates on taxes collected contrary to EU law, e.g., Court of Justice of the European Union of September 7,

Including those decisions is not possible as a result of introducing cosmetic changes. Comprehensive regulation is necessary for the new law. It cannot be changed by the fact that many judgments of the CJEU have a direct impact on Polish tax law¹⁵.

An additional reason for undertaking works on the new act is that as a result of subsequent amendments, certain solutions introduced in 1998 have been spoiled or have become difficult to apply and should be generally restructured. The best example makes the regulations concerning expiry dates of tax obligations, which are easily broken or extended by tax authorities, or individual interpretations of taxation law issued in an extensive number (ca. 26 thousand per year). Also, overpayment and refund rules should be entirely restructured because of too complicated a system of provisions regulating them.

IV. Fundamental Assumptions of the Tax Ordinance Bill

Beginning the preparations of the new Tax Ordinance, GTLCC adopted certain fundamental assumptions concerning its form. First and foremost, it was decided to introduce new institutions, which are missing in the current act (e.g., general rules of taxation law, the catalog of the taxpayer's rights, the means of combating the excessive length of proceedings). It was also decided to generally restructure the malfunctioning regulations (e.g., limitation, overpayment, penalties for breaking the order, issuing interpretations of the provisions of taxation law, reliefs in paying off tax obligations).

Another assumption adopted by GTLCC was leaving intact the provisions of the current ordination, which function correctly in the last two decades. Designing the new law, GTLCC used the legal solutions developed over the years of being in force and perfecting the Tax Ordinance of 1997, which proved effective.

2006, C-470/04 *Inspecteur van de Belastingdienst Oost/kantoor Almelo*, of July 19, 2012, C-591/10 *Littlewoods Retail Ltd*, of April 18, 2013, C-565/11 *Mariana Irimie*, of October 15, 2014, C-331/13 *Nicula*, of December 12, 2006, C-374/04 and of March 13, 2007, C-524/04 *Test Claimants*.

¹⁵ D. Mączyński, *Bezpośredni wpływ orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej na stanowienie prawa podatkowego w Polsce. Wstęp do badań*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2019, vol. 81, No. 3, p. 31 et seq.

The Committee also decided that the designed provisions cannot trigger a “revolution” in general taxation law. They should be amended wherever it is possible in the form of the modification of the existing regulations. Revolutionary concepts, before they are learned and accepted by tax authorities and taxpayers, may disorganize the functioning of the tax system. General taxation law should be amended through evolution, not rapid and radical reforms.

V. The Aims of the Tax Ordinance Bill

Simultaneously with adopting the mentioned assumptions of the bill, GTLCC presented two fundamental aims to be implemented:

1. protection of the taxpayer’s rights in their relations with fiscal authorities and improvement of the atmosphere thereof,
2. increasing the efficiency and the effectiveness of the calculation and collecting taxes (securing budget incomes).

The fundamental reason for formulating the first aim is, in public feeling, unsatisfactory relations between tax authorities and taxpayers. It is natural that the taxpayer, the weaker party of this relationship, should be protected by the Ordinance. Instruments serving the protection of their rights were recorded in many provisions of the new Ordinance. The regulations should be based on the presumption that the taxpayer is honest and consciously does not commit infringements of taxation law.

Another fundamental aim of the new Tax Ordinance is increasing the efficiency and effectiveness of calculating and collecting taxes. The aim requires expanding the capabilities of tax authorities in performing the responsibilities resulting from tax laws. However, this cannot result in the infringement of the taxpayer’s rights. In the opinion of GTLCC, the implementation of this objective involves increasing tax incomes (sealing the system and liquidating the tax gap) and a need for increasing budget incomes acquired from the tax system.

VI. Institutions and Structure of the New Tax Ordinance

The draft tax ordinance introduces many new institutions and includes institutions that have been significantly modified to adapt them to the changing reality and to implement the assumptions of the new Tax Ordinance.

The first group encompasses general principles of tax law, an open catalog of taxpayers' rights and duties, representation in tax law, restitution of a substantive time limit, information and support for a taxpayer, tax remission, correction of a declaration during tax proceedings, mediations, tax agreement, measures counteracting protracting proceedings, summary procedure, and proceedings on trivial amounts of tax, discontinuation of proceedings due to a "representative case", a possibility of withdrawal from an appeal against a decision, a ban on adjudicating against a taxpayer by the first instance body, consultation procedure, cooperation agreement, official general information about vital changes of tax law provisions, determination of the value of assets, and the procedure of files' reproduction¹⁶.

The second group consists of institutions included in the currently binding Tax Ordinance, but they have been restructured in the draft. This group encompasses basic terms and definitions, solidarity in tax law, application of e-communication, partial decisions, the extended possibility of paying tax by the entities other than the obligor, limitation of tax obligations' assessment and collection, excess tax, tax declarations, disciplinary penalties, and official interpretations of tax law provisions¹⁷.

The structure of the binding Polish Tax Ordinance is a tax law codified only partially. For instance, it does not contain the procedure of executing tax obligations, which is characteristic of other tax codes¹⁸. In Poland, these problems are regulated by the Act on the executive procedure in administration. It contains provisions regulating the execution of all public-legal liabilities, including taxes. In this situation, there is no sense in dividing the administrative procedure into two parts, namely the execution of tax liabilities

¹⁶ L. Etel et al., *op.cit.*, pp. 819–832.

¹⁷ *Ibidem*.

¹⁸ *Tax Codes Concepts in the Countries of Central and Eastern Europe. supra n. 5*, p. 16 et seq.

(Ordinance) and the provisions regulating the execution of other monetary and immaterial liabilities.

The Tax Ordinance Bill does not regulate (with certain exceptions in Part V) the problems of liability for committed misdemeanors and offenses connected with the infringement of the provisions of taxation law, which is usually a subject of tax codes¹⁹. The issue is comprehensively regulated in the Tax Penal Code. There are no justified reasons for transferring it to the Tax Ordinance and, in this way, decodifying the fiscal penal liability.

VII. The Tax Ordinance Bill and the Basic Constitutional Tax Law Making Principles

The Tax Ordinance Bill supplements the mechanisms and principles resulting from the provisions of the Polish Constitution. This draft introduces, among others principles of tax law, the principle of balancing the legitimate interests of the taxpayer and the interest of tax authority²⁰, the principle of determining the content of tax law provisions where one should take into account the structure of the tax to which these provisions apply and the principle of resolving doubts in favor of the obligated party²¹. These principles mainly concern the application and interpretation of tax law in Poland. This bill, however, does not contain rules concerning the making of tax law. When preparing this bill, it was concluded correctly that in making tax law, one should not enter into the sphere of principles that were developed based on the Polish Constitution's provisions. The principles of making tax law have been described in the lit-

¹⁹ Ibidem.

²⁰ L. Etel, M. Popławski, *Weighing the interest of the obliged and the public interest in the polish tax law*, [in]: *Optimization of organization and legal solutions concerning public revenues and expenditures in public interest: conference proceedings (conference proceedings)*, eds. E. Lotko, U.K. Zawadzka-Pąk, M. Radvan, Białystok 2018.

²¹ M. Popławski, *The Impact of General Tax Law Principles Contained in the New Tax Ordinance Act on the Interpretation of Tax Law*, "Zeszyty Naukowe Uniwersytetu. Seria Prawnicza. Prawo" 2019, 27 (108), pp. 140–149, <https://repozytorium.ur.edu.pl/bitstream/handle/item/5421/12%20pop%c5%82awskithe%20impact.pdf?sequence=1&isAllowed=y> (4.10.2020).

erature, but the jurisprudence of the Constitutional Tribunal is of particular importance in this regard²².

In the doctrine, it is pointed out the following principles of making tax law: the principle of trust of a citizen to the state, the principle of law reliability, the principle of the provision of a suitable adjustment period, the principle saying that law may not be applied retroactively, the ban on changing tax law during a year, the principle of the protection of rights that were justly acquired, the principle of due protection of pending business, the principle of the inadmissibility of the accumulation of tax responsibility²³.

Among the mentioned principles, the principle of the suitable adjustment time plays an important role. It may be perceived as the obligation to observe a suitable period of *vacatio legis*, that is, the period between publishing an act in an official journal and its coming into force²⁴. A taxpayer must be able to familiarize himself in advance with new tax law regulations²⁵. It is emphasized that it is about the possibility of making decisions in the scope of life interests, which means that a taxpayer must have time to adjust to changed tax regulations and make a decision concerning further proceedings safely²⁶. As it is outlined, this principle should be obeyed when new regulations impose duties on a taxpayer or limit his or her rights, and this rule should be applied to all taxes, even though it plays a unique role in the scope of annual considerations, i.e., calculated annually (income taxes and taxes connected with property possession)²⁷. Attempting to determine a minimum period of *vacatio legis* therein, attention is paid to the fact that it should be at least one month, which means that changes in such taxes should be announced at least 30 days before the beginning of a tax year when they will come into force²⁸.

²² M. Popławski, *Introduction to Polish Tax Law*, Białystok 2011, p. 44 et seq.

²³ C. Kosikowski, *Finanse publiczne w świetle Konstytucji RP oraz orzecznictwa Trybunału Konstytucyjnego (na tle porównawczym)*, Warsaw 2004, p. 197.

²⁴ M. Popławski, *Introduction...*, p. 45 et seq.

²⁵ *Ibidem*.

²⁶ A. Gomułowicz, [in:] *Podatki i prawo podatkowe*, eds. A. Gomułowicz, J. Małecki, Warsaw 2010, p. 102.

²⁷ M. Popławski, *Introduction...*, p. 45 et seq.

²⁸ Constitutional Tribunal Judgment K. 28/95.

Another fundamental principle also referring to taxes calculated annually concerns the ban on changing tax law during a year²⁹. The increase of tax rates during a year, or the elimination of tax preferences, are examples of breaching the mentioned principle³⁰. Such situations should be deemed as actions harming the taxpayer, which also contradict the protection of acquired rights³¹. We should also highlight a principle concerning the ban on the introduction of tax law with retroactive force. According to it, the tax law should not amend taxation rules concerning the events before a particular regulation came into force³². It means that the law should not introduce any new taxation concerning the events before a given provision came into force if there was no tax burden or higher taxation in a given situation when lower taxation was earlier in force.

VIII. Conclusion

The GTLCC accomplished the task vested therein of preparing a new draft of the Tax Ordinance.

The bill was not passed because of the end of the Parliament's term. Given the instability of the general taxation law, works on the new law adoption should be taken at the earliest convenience because permanent amending the current Tax Ordinance does not bring good results – preparation of the draft five years. There are no real possibilities to prepare another bill and adopt it within this parliamentary term. Thus, the GTLCC's final work should proceed further. The draft is not free from flaws, which was demonstrated during the consultations, but they can be easily eliminated in the legislative process.

The Tax Ordinance Bill supplements tax law-making principles resulting from the provisions of the Polish Constitution. It provides new principles of tax law, which concern the application and interpretation of tax law in Poland. However, it does not interfere with making tax law since it should be the sphere of principles developed based on the Polish constitutional provisions.

²⁹ Constitutional Tribunal Judgments K. 13/93, K. 1/94, K. 12/94, K. 1/95, K.27/98.

³⁰ Ibidem.

³¹ M. Popławski, *Introduction...*, p. 46 et seq.

³² Ibidem.

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