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Best practices concerning private tax rulings according to Base Erosion and Profit Shifting (BEPS) Action 5 and Polish Tax Law[1]

Dobre praktyki w zakresie indywidualnych interpretacji podatkowych zgodnie z Base Erosion and Profit Shifting (BEPS) Action 5 a polskie prawo podatkowe

Abstract

The aim of this article is to assess the degree of the implementation of the best practices concerning tax rulings developed under Action 5 of the BEPS Project in Polish tax law. The authors present the current situation of Poland's tax ruling system. Then, the authors assess the degree of implementation of each best practice. The authors also formulate critical comments on the OECD's best practices. In the opinion of the authors, the Polish tax ruling regulation generally meets most of the OECD's requirements, primarily because it is a fully transparent system.

Keywords: Poland, OECD, Base Erosion and Profit Shifting (BEPS), tax law, private tax ruling

Streszczenie

Celem niniejszego artykułu jest ocena stopnia implementacji do polskiego prawa podatkowego najlepszych praktyk dotyczących interpretacji podatkowych opracowanych w ramach Działania 5 projektu BEPS. Autorzy przedstawiają polski system interpretacji podatkowych. Następnie dokonują oceny stopnia implementacji każdej z najlepszych praktyk. Autorzy formułują również krytyczne uwagi do najlepszych praktyk OECD. W ocenie autorów polska regulacja dotycząca interpretacji podatkowych generalnie spełnia większość wymogów OECD, przede wszystkim dlatego, że jest systemem w pełni transparentnym.

Słowa kluczowe: Polska, OECD, BEPS, prawo podatkowe, indywidualna interpretacja podatkowa

JEL: K34

Tax rulings system in Poland — introduction

The Polish tax rulings system is characterized by increasing diversity. Therefore, it is worth making a preliminary presentation of their catalogue, establishing the terminology that will allow us to clearly present the shape of this system. The common English term "tax ruling" will be used as the broadest phrase, encompassing all the institutions under analysis. Particular institutions will be referred to in ways that reflect their Polish names as accurately as possible.

Of course, the most important tax rulings are the "classic"[2] private (individual) tax rulings (governed by the provisions of Art. 14b–14r the Tax Ordinance Act of 29 August 1997, Journal of Laws 2020, item 1325, as amended, hereinafter cited as the o.p.) referred to in Poland as tax interpretations, which may apply-with some exceptions-to all provisions of tax law. These may take the form of either individual tax interpretations (in Polish: *indywidualne interpretacje podatkowe*), which may generally be used only by the requesting entity (although there are exceptions to this rule, as discussed below), or general tax interpretations, which will be omitted from this publication.

In addition to the classic individual interpretations indicated above, there are also specialized tax rulings that may only be applicable in specific cases, as follows:

- Protective opinions (in Polish: *opinie zabezpieczające* — Art. 119w–119zt o.p.),
- Binding excise information (in Polish: *wiążące informacje akcyzowe* — WIA; governed by art. 7d–7k 7k Excise Duty Act of 6 December 2008, Journal of Laws 2020, item 722, as amended, cited hereafter as the u.p.a.), and
- Binding rate information (in Polish: *wiążące informacje stawkowe* — WIS; art. 42a–42i Act of 11 March 2004 on Value Added Tax, Journal of Laws, 2020, item 106, as amended, hereinafter referred to as the u.p.t.u.),
- Advance pricing arrangements (APA, in Polish: *uprzednie porozumienia cenowe;* art. 81–107 of Act of 16 October 2019 on the settlement of double taxation disputes and the conclusion of advance pricing agreements, Journal of Laws 2019, item 2200, hereinafter cited as the "APA Act").

Tax rulings in BEPS — the purpose of regulation

Tax rulings are mainly addressed under Action 5 of BEPS. This action was defined as: "harmful tax practices-countering harmful tax practices more effectively, taking into account transparency and substance".[3]

This action continues the OECD's fight against harmful tax competition (Madies, 2020, 105–107). Countries try to offer favourable tax regimes to selected taxpayers while also facilitating artificial shifting of income so that this income is not taxed in the country where the real economic activity is carried out. According to the OCED, to combat harmful tax practices, member states should clearly define the conditions to be met by entrepreneurs doing business in a given jurisdiction so that they can benefit from tax preferences (by ensuring adequate business substance). Much more relevant to the topic of the current paper is another aspect of Action 5, that is, the issue of the transparency of taxation rules for international entrepreneurs. In the context of, *inter alia*, the Luxleaks affair (Huesecken, Overesch, 2019, 380–412), steps have been taken to increase the transparency of national tax interpretation systems. Among other things, the Luxleaks affair shows that it is precisely by means of the tax rulings system that it is possible to create a system of incentives for foreign investors, which, from the point of view of other countries, will have the character of harmful tax competition. Tax rulings have become an excellent instrument for protecting the interests of entities that take part in this procedure. After all, such taxpayers can invoke the protection of tax rulings in the face of possible claims from the state should the state's policy change and it wants to withdraw from previous "commitments."

There is no doubt that the creation of preferential tax regimes by means of tax rulings cannot be accepted in the BEPS era. The problem is the level of determination of OECD members to fight this practice. The final report on Action 5 obviously had to be consensus among all its authors. In the course of the OECD's work, the level of acceptance for the various actions in the project was expressed in three "levels." The maximum level of acceptance is the so-called "minimum standards," that is, a situation where all countries explicitly agreed to adopt the proposed solutions.

A recommendation is a higher level of acceptance, where countries have agreed on the principles and that this should lead to convergence at a regulatory level in the future. This includes certain aspects of Actions 2, 5, 6, 7, and 8–10.

As far as best practices are concerned, the aim is only to encourage participating countries to comply with them, and if they so choose, the OECD will provide appropriate assistance (Christians, Shay, 2017, p. 32–34). It is a best practice in the field of issuing tax rulings that will be analyzed in the current paper. Therefore, the exchange of information on tax rulings, which is the minimum standard, will be omitted. However, it is impossible to analyse the best practices in the field of tax rulings in complete isolation from the issue of the exchange of information. To some extent, best practices can enhance the effectiveness of information exchange.[4]

In the final report on Action 5, three groups of these practices were distinguished and linked to the stages of the functioning of tax rulings. The first group relates to the ruling stage. The second group is entitled, "Term of the ruling and subsequent audit/checking procedure," while the third is called, "Publication and exchange of information." Last group of best practices will be omitted as one of them concerns only general tax interpretations and the other has no practical application in Poland.

In principle, they only concern rulings of a cross-border nature. This is because of the fact that BEPS Action 5 aims at combating harmful tax competition between states. In

practice, however, because of the lack of differentiation between strictly domestic and cross-border rulings, their scope of influence may be wider.

The analysis of this problem will be carried out in such a way that the individual best practices will be discussed within the groups identified in the 2015 final report and in the order adopted there. The initial part of the analysis will be a citation of the best practices in question.

Transparency of tax ruling rules

"Official rules and administrative procedures for rulings should be identified in advance and published, and they should include:

(i) The conditions for the applicability of the ruling process;

(ii) The grounds for denying a ruling;

(iii) The fee structure, if applicable;

(iv) The legal consequences of obtaining a ruling;

(v) Possible sanctions for incomplete or false information provided by a taxpayer;

(vi) The conditions for revoking, cancelling, or revising a ruling; and

(vii) Any other guidance that is deemed necessary to make the rules sufficiently comprehensive and clear to taxpayers and their advisors"[5].

This best practice, in fact, refers to the transparency of the legal basis for issuing tax rulings. From the perspective of Polish law, this may be quite surprising because it is obvious to Polish lawyers. In Poland, all tax rulings are issued based on legal regulations, which define the procedure for their issuance. Polish lawyers are currently accustomed to this legal state.

Of the contents indicated by the best practice quoted above, only the regulation concerning "(v) possible sanctions for incomplete or false information provided by a taxpayer" is not implemented in Poland. This does not mean that Poland has not implemented best practices in this respect. In fact, such a sanction exists — if the taxpayer provides incomplete or false information, the interpretation will not protect him or her. Protection is granted only when the occurrence of an event corresponds to that described in the request for a tax interpretation.

The Polish legal regulation is in line with the trends that are quite visible in other countries. The case of Luxembourg is significant here. Until the Luxleaks scandal broke, the system of tax rulings in Luxembourg functioned very efficiently (perhaps even too efficiently) without any clear legal basis. The tax ruling system was based on general principles of law and a high legal culture of the tax administration. In the literature, the general principles of law were sometimes treated as a specific source of law (Steichen, 2006, p. 548 et seq.; this author has placed the general principles of law in the chapter devoted to "other sources" such as custom, and not in the chapter dealing with, for example, laws or regulations). Of fundamental importance was the principle of good faith, which is closely linked to the principle of legal certainty. As a result, the tax authorities in Luxembourg issued both general and individual tax rulings that were respected in practice (Guilloteau, Linz, 1997–2003). Moreover, this was in the well-understood interest of Luxembourg, whose tax policy at the time was based on a — not always entirely fair — incentive for investors to relocate their business operations to Luxembourg.

As a result, it has been widely alleged that Luxembourg has developed a *de facto* discretionary system of tax "creation" for the benefit of large multinationals, which have been able to significantly reduce their tax burdens by shifting income to Luxembourg and taking advantage of its preferential tax treatment. The tax practices of the Luxembourg administration have been exposed by the International Consortium of Investigative Journalists (ICIJ).[6]

The aforementioned Luxleaks affair resulted in changes in the regulation of the procedure for issuing tax rulings in Luxembourg. Now, the issuance of rulings in Luxembourg has been subject to a precise procedural regulation (Mischo, Kerger, 2015, pp. 1197–1201) which additionally involves the introduction of fees for their issuance. This does not mean that the general principles of law (especially the principle of legitimate expectation) have lost their significance in the practice of tax law application in Luxembourg (this takes an in-depth look at this issue: Chouche, 2019). In French law, there has also been a similar trend toward more detailed statutory regulation of the issue of various tax rulings Gibert, Daluzeau, 2009, pp. 456–463).

Issuing a tax ruling is only an interpretation of the law, not a creation of law

"Tax rulings should be issued, and any administrative discretion in granting a ruling should be exercised, only within the limits of, and in accordance with, the country's relevant domestic tax law and administrative procedures, and should be limited to determining how that law and/or any administrative procedures apply to one or more specific operations or transactions intended, planned, or undertaken by the taxpayer."[7]

This best practice relates to the key issue of the creation of preferential tax regimes precisely by means of rulings and not openly, that is, by issuing the relevant normative act. In fact, the exchange of tax information, which also covers cross-border tax rulings, is intended, among other things, to combat this type of state action. The European Commission's crusade against the rulings issued by countries such as Ireland, Luxembourg,[8] Belgium,[9] and the Netherlands in favour of international corporations was based largely on the belief that tax rulings constitute a form of creating exceptions to tax regulations in a given country. They were alleged to constitute state aid because they were selective in nature. Commissioner Margrethe Vestager even openly stated that tax rulings "are by nature selective"

(Lovdahl-Gormsen, 2019, p. 4). It turns out, however, that the General Court of the EU does not share such a negative assessment of tax rulings, as evidenced, in particular by the Apple judgment.[10] This verdict is yet another defeat for Commissioner Vestager, who wanted to combat tax avoidance by global corporations by means of regulations on unlawful state aid. Meanwhile, European courts are not inclined to treat every favourable tax provision as prohibited aid, even if the provisions are aimed at attracting foreign investment; they only must be applied consistently to everyone. So if the tax ruling does not create an exceptional situation for one entity but is consistent with the law, the taxpayer can feel safe.

In Poland, all tax rulings must comply with the law. They are only supposed to be an instrument for interpreting the law, not for creating it. This is indirectly evidenced by the fact that all individual tax rulings are subject to judicial review. The criterion for judicial review is the compatibility of the tax rulings with the law. Of course, a tax ruling will not always actually be lawful. If it violated the law and was favourable to the taxpayer, it would be difficult to expect the taxpayer to challenge it on his or her own. Another matter is that in such a case, the interpretation authority may always change the tax ruling. The basis for the change will be a statement that the interpretative act is contrary to the law.[11] Similarly, tax rulings in the form of tax decisions must be consistent with the law. There is no tradition in Poland of using private tax rulings to create laws.

Compliance of tax rulings with international law

"Tax rulings should respect applicable international obligations that are incorporated into domestic tax law, for instance, obligations under relevant bilateral treaties."[12]

From the point of view of the principles of Polish law, this best practice is a logical consequence of the previously described principle that the issuance of a tax ruling is only an interpretation of the law and not a creation of law. In the Polish legal order, international agreements on tax matters have a value even higher than laws.[13]

Written form of tax rulings

"Tax rulings should be issued in writing."[14]

Undoubtedly, the written nature of tax rulings is important in terms of their transparency. It also strengthens the position of the holder, who can easily "prove" that the tax authority expressed a certain view, thus possibly obtaining protection. In a situation where a given legal system grants protection to an entity that only obtained an oral interpretation, this protection is illusory because of evidentiary difficulties.[15] Therefore, the doubts about oral interpretations are not surprising (Lamarque, 1998, p. 504).

When one looks at the system of tax rulings in Poland, however, it seems that the OECD's position is too rigorous. There is, in fact, the institution of "silent tax interpretation" in Poland. The body issuing tax interpretations has three months to issue them. If this body fails to meet this deadline, then "it is deemed that on the day following the day on which the deadline for issuing the interpretation expired, an interpretation stating the correctness of the applicant's position in full has been issued."[16]

Therefore, it is an institution that protects the interests of the taxpayer. Thanks to this, the taxpayer's right to obtain an interpretation (and, thus, in essence, assistance from the state in understanding tax regulations) is not illusory. Interestingly, in the case of other tax rulings, such as binding rate information or binding excise information, an analogous solution is not applicable, which means that a taxpayer has no effective instrument to force a tax authority to issue such an interpretation quickly.

Issuance of ruling by competent authorities

"Tax rulings should only be issued by the competent government office or authority in charge of this task. Where a ruling is granted by another government office, it should be subject to approval by the competent office."[17]

In Poland, this requirement is undoubtedly fulfilled. What is more, a specialized office (*Krajowa Informacja Skarbowa*) has been created to issue interpretations. Only in the case of local taxes are they issued by local tax authorities (heads of villages, mayors, and town/city presidents). These are bodies that specialize in interpreting tax law. It is not possible for an "accidental" authority to issue interpretations.

Requirement for at least two persons to act when issuing tax rulings

"It is recommended that at least two officials are involved in the decision to grant a ruling or there is at least a two-level review process for the decision, in particular in cases where the applicable rules and administrative procedures explicitly refer to discretion or the exercise of judgment by one of the relevant officials."[18]

For Polish lawyers and tax officials, this is rather surprising advice. On the one hand, it is obvious to them, but on the other, it seems rather bizarre. In Poland, tax rulings are issued by a specialized tax authority (usually the head of the KIS or-sometimes in the case of specific tax rulings-the head of the KAS), which acts based on its regulations. It is obvious that the ruling, before it is sent to the taxpayer, is subject to approval by the superiors of the employee who prepared it. However, this is not explicitly provided for in the act but results from internal regulations regarding the functioning of a given interpretation authority.[19] Additionally, each tax

ruling may be amended either by the head of the National Fiscal Administration or the director of National Fiscal Information. This ensures control over the correctness of the issuance of tax rulings.

Binding nature of tax rulings

"Tax rulings should be binding on the tax authority (to the extent permitted by domestic law), provided that the applicable legislation and administrative procedures and the factual information on which the ruling is based do not change after the ruling has been granted."[20]

This best practice is, despite its appearances, not clear. On the one hand, the OECD indicates that tax rulings should be binding on tax authorities, but on the other hand, it adds a reference to the national regulation to define the scope of this binding.

Meanwhile, the issue of the binding nature of tax rulings has always raised serious doubts. The definition of tax rulings in the *International Tax Glossary*[21] does not mention this issue at all, pointing to the different conditions for obtaining tax *rulings* and their different legal value in various countries.[22] The literature contains definitions of tax rulings referring to their binding character (Rivier, 1994, p. 3). When reports from the International Fiscal Association (IFA) Congress in Eilat were published in 1999, the definition was formulated in a slightly different way: more or less binding (Ellis, 1999, p. 22). This "softened" perhaps the most debatable element of the definition relating to the question of the binding character of *a tax ruling*.

Polish individual interpretations are not binding on the taxpayer. The taxpayer may consider the interpretation to be contrary to the law and act against it. Similarly, an administrative court is not bound by an interpretation because judges are subject only to the constitution and statutes.[23]

Individual interpretations are also not binding on the tax authority. If, over the course of examining the taxpayer's case, it determines that the interpretation is erroneous, the tax authority is obliged to issue a tax decision that is consistent with the law, not an interpretation.

A taxpayer has the right to apply for a tax exemption so that he or she can in fact pay the taxes in the amount that results from the interpretation, as long as this is considered as a future event.[24] If the taxpayer asks a question concerning the past, he or she is exempt only from the obligation to pay the interest for late payment, but he or she must pay the amount of tax resulting from the regulations itself. Compliance by a taxpayer with an interpretation also releases him or her from criminal liability.

However, the binding rate information and binding excise information, which were later introduced into Polish law, have the legal form of administrative decisions and are as binding as decisions on the assessment and collection of taxes. Of course, these are atypical decisions because they relate to future events that will occur only after they are issued.

Obligation to state the facts to which the tax ruling relates in writing

"Taxpayers should apply for a ruling in writing and provide a full description of the underlying operations or transactions for which a ruling is requested. The information should be included in a file supporting the ruling application (the »ruling file«). The ruling file should also include information on the methods and facts for determining the key elements of the tax authority's view (e.g. transfer prices, mark-ups, interest rates, profit margins). There will often be very specific documentation requirements for APAs or other rulings related to transfer pricing. Any additional information or relevant facts which are brought to the attention of the tax authority (i.e., in meetings or oral presentations) should be recorded in writing and also be included in the ruling file."[25]

To some extent, the above-quoted best practice refers to the principle of issuing tax rulings in writing. The obligation to provide a complete description of the facts is quite obvious. Tax rulings should protect the taxpayer only to the extent to which the taxpayer discloses the facts.

The Polish regulation meets these requirements. Taxpayers submit applications for tax rulings on official forms. The mere submission of an application that does not contain a complete description of the planned economic operations does not mean automatic refusal to issue a ruling. Before refusing to issue an interpretation, the interpretation authority must demand that the application be supplemented. In practice, the actions of the interpretation bodies in Poland (*Krajowa Informacja Skarbowa*) too often consist of demanding that the application be supplemented with detailed information that is not material to the issuance of the interpretation; this action is perceived by taxpayers as making it excessively difficult to obtain a tax ruling.

From the taxpayer's point of view, an accurate description of the planned operation is crucial for the protective value of the interpretation. Only when the description included in the application corresponds exactly to the course of the subsequent economic operation may the taxpayer obtain protection stemming from that interpretation. In practice, the actions taken by tax authorities during tax proceedings when a taxpayer invokes a tax interpretation held will relatively often consist of searching for even minor and insignificant-from the point of view of application of the law — differences between the contents of the request and factual situation that occurred later. This has recently resulted in a reaction from the administrative courts, which have opposed this type of practice. The Supreme Administrative Court, in its judgment of 28 January 2019 (I FSK 293/17), stated the following: "Only significant discrepancies between the factual state presented in the application and the actual state established during tax proceedings may justify disregarding this interpretation (...). The authorities' actions after issuing an interpretation cannot be aimed at undermining it."

Obligation to indicate in the interpretation the data of the taxpayer and of the taxpayer's proxy

"Information concerning the applicant (including taxpayer's name, tax residency, tax identification number, commercial register number for corporations and companies) and tax advisor/tax consultant involved should be included in the ruling file and/or the ruling itself."[26]

In Poland, of course, taxpayer data are included in each individual tax bill. This is one of the pieces of "advice" given by the OECD, which is so obvious that it is difficult to understand the point of its formulation. It should be noted, however, that in Poland, all tax rulings are published, with data allowing for the identification of the taxpayer removed.

Obligation to check the completeness of the materials on which the tax rulings are based and obligation to check the consistency of the ruling with other rulings issued previously

"Before taking a decision, the person/s providing the ruling should check that the description of the facts and circumstances is sufficient and justifies the envisaged outcome of the ruling. They should also check that the ruling outcome is consistent with any previous rulings concerning similar legal issues and factual circumstances."[27]

This best practice is a postulate that is difficult to enshrine in law. To a large extent, its fulfilment depends on the diligence of a tax administration official. Efforts to maintain consistency in the tax rulings in Poland are particularly difficult to achieve because of the number of interpretations issued. Over the course of issuing tax rulings, previously issued rulings are usually taken into account. Tax rulings are available to everyone, not just the officials issuing the subsequent ruling. In addition, a special Department of Tax Rulings was established at the Ministry of Finance to maintain uniformity in the practice of tax law interpretation.

Issuance of APA for a limited period

"APAs should only be for a fixed period of time and should be subject to review before being extended."[28]

This is the first best practice included in the second group, namely: "Term of the ruling and subsequent audit/checking procedure".

The Polish regulations regarding APAs provide for their issuance for the period indicated in the application but for no longer than five years[29]. At the request of a domestic related party, an APA may be renewed for successive periods of no more than five tax years if the circumstances have not materially changed[30]. The extension (in Polish law, it is called "renewal") takes place by way of a tax decision[31] and, therefore, is subject to all the rigors of a tax proceeding, which means that the tax authority must make a determination based on the facts of the case.

Obligation of the taxpayer to notify changes in facts related to the tax ruling and to periodically verify the correctness of tax rulings

"Taxpayers should notify the tax authority about any material changes in the facts or circumstances on which a taxpayer-specific ruling (including an APA) was based, as soon as possible so that the tax administration can assess whether to exchange this information with another country. As part of this notification process, taxpayers should notify tax administrations of any material changes to the related parties with which they transact (for transactions covered by the ruling) and any other changes which would impact on who information should be exchanged with."[32]

"Effective administrative procedures should be in place to periodically verify that the factual information relied upon and assumptions made when granting taxpayer-specific rulings remain relevant throughout the period of validity of the ruling. This may be particularly necessary in the case of APAs, where any underlying assumptions and decisions could be affected by changes in economic circumstances."[33]

These two practices are worth discussing together. The imposition on taxpayers of an obligation to provide information on changes in the facts makes it possible to verify the correctness of tax rulings. Similarly, it should be stated that this is a best practice, the advisability of which raises large doubts. We believe that it is a good thing that Poland has not implemented it. The Polish solution, whereby it is the taxpayer who must keep his or her tax rulings up to date, is more rational and, above all, cheaper for both the tax authorities and taxpayer.

This is also a difficult postulate to implement. The Polish regulation boils down to the simple solution that a change in conditions and circumstances causes the tax rulings to stop protecting the taxpayer. A tax ruling applies only to the specific factual circumstances described in the application. It is the taxpayer him- or herself who assesses whether the ruling is applicable in the case or whether it can give him or her protection. This approach is connected with the fact that under Polish law, the interpretation authority that receives an application for an interpretation does not examine the truthfulness of the taxpayer's statements (moreover, they often concern the future, so there is nothing to examine). It is the taxpayer who bears the risk of an incorrect description of the factual state.

The OECD recommendation is unrealistic, especially when in some years, the Polish tax administration has issued almost 40,000 rulings a year. Implementing this procedure would mean gigantic costs, not only for the tax authorities, which would have to somehow respond somehow to the taxpayers' information, but also for taxpayers.

The situation is different in the case of APAs. The head of the National Fiscal Administration conducts verification activities aimed at verifying the application of the previous price agreement by related parties.[34] In the case of the nonapplication of a prior agreement in the period of its

validity, the head of the National Fiscal Administration *ex officio* declares the expiry of the agreement.[35]

A party to an agreement may have it amended in the event of a change in factual circumstances. In the case of a change of economic relations causing a significant change in the scope of the elements of the previous price agreement, the previous price agreement can be amended or repealed by the head of the National Fiscal Administration before the lapse of its determined term. The change and repeal of the previous price agreement takes place on the application of a party or ex officio.[36] However, the number of APAs issued in Poland is much smaller: less than 100 per year.

Expiry of the tax ruling

"Rulings should be subject to revision, revocation, or cancellation, as the case may be, in the following circumstances:

1) if the taxpayer makes a misrepresentation or omission in applying for the ruling that calls into question the validity of the ruling;

2) if the relevant laws change;

3) if there is a relevant and significant change

(i) in the facts or circumstances upon which the ruling was based or

(ii) in the validity of the assumptions made"[37] .

Regarding the situation when a taxpayer has misled the tax authority by providing false data in the application for a tax ruling, Polish law solves this problem in a simple manner: such a tax ruling simply does not protect the taxpayer because in the application, he or she has described an event that will not occur. There is no justification for warning the taxpayer that the tax authority has already figured out his or her machinations.

A change in the law, on the other hand, obviously renders a tax ruling useless. Demanding that in such a case the authority take action by issuing another document stating the change or expiry of the tax ruling should be assessed as a complete misunderstanding. This act can only have informative value. From the point of view of the constitutional principle of legalism, failure to amend or revoke a tax ruling cannot result in a taxpayer being able to base his or her activity on a tax ruling that is out of date because he or she has already been informed (through the promulgation of a legal act) of a change in the law. The potential protection afforded to a taxpayer who has not received notice that a tax ruling has become obsolete as a result of a change in the law is in fact an "invitation" to tax avoidance by making it more difficult to receive notice of the "obsolescence" of the ruling, thereby continuing to benefit from the old, more favourable provisions. Nor does the OECD seem to take into account that any action by a tax authority costs money.

In Poland, a change of circumstances makes it impossible to use the tax rulings. This is because the ruling is strictly connected to the factual situation described in the application. Why change the interpretation when the taxpayer can later change his or her way of acting and again act in accordance with the interpretation?

The implementation of this best practice (together with the previously described best practices) would mean that the tax authorities would have to constantly watch over the validity of interpretations. This is an unnecessary overgrowth of paternalism and the creation of complicated procedures in a situation where the matter can be resolved by requiring the taxpayer to exercise a minimum of diligence.

This best practice has not been implemented in Poland, which should be viewed positively. In principle, tax rulings can be amended if they prove to be defective, that is, contrary to the law in force at the time they were issued.

Conclusions

Poland largely implements the best practices developed by the OECD. In addition, it does not do so under the influence of the OECD because Polish legal solutions emerged much earlier than the Final report of 2015. A feature of the Polish regulation of tax rulings is their transparency, so this regulation has reached the state desired by the OECD.

Unfortunately, some best practices developed by the OECD do not take into account the specific situation in some countries. First and foremost, according to the OECD, the tax administration would be required to constantly "supervise" tax rulings. This is not possible when, in a given country, as in Poland, between 20,000, and 40,000 different tax rulings are issued annually. In such a situation, it is the taxpayer him- or herself who must assess whether he or she can rely on a tax ruling — that is, whether the tax ruling is appropriate to his or her legal and factual situation.

The lack of the implementation of certain best practices is not a situation that would be in any way alarming. The very fact that the OECD's position in this area is in the form of best practices shows that there are differences in the approach to the problem of tax rulings among the OECD countries. Simply put, the solutions in force in different countries are different, and it is difficult to find a solution that is acceptable to all.

Przypisy/Notes

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[2] It should be noted that such terms ("classical tax interpretation" or "classical tax ruling") are not commonly used in Poland. To designate this type of tax ruling, simply the phrase "tax interpretation" is used.

[3] *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 — 2015 Final report, OECD/G20 Base Erosion and Profit Shifting Project,* Paris, OECD Publishing, http://dx.doi.org/10.1787/9789264241190-en; http://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report-9789264241190-en.htm; hereinafter cited as: "Report."

[4] Report, p. 56.

[5] Report, p. 56.

[6] See https://www.icij.org/project/luxembourg-leaks/your-head-spinning-5-tips-understand-lux-leaks-files.

[7] Report, p. 56.

[8] ECJ Cases T-755/15 and T-759/15, *Grand Duchy of Luxembourg* (T-755/15), *Fiat Chrysler Finance Europe* (T-759/15) v *European Commission*, ECLI:EU:T:2019:670.

[9] ECJ Cases T-131/16 and T-263/16 *Kingdom of Belgium* (T-131/16), *Magnetrol International* (T-263/16) v *European Commission*, ECLI:EU:T:2019:91.

[10] ECJ Cases T-778/16 and T-892/16, *Ireland* (T-778/16), *Apple Sales International, Apple Operations Europe*, (T-892/16) v *European Commission*, ECLI:EU:T:2020:338.

[11] This can be evidenced by contradiction with the case law of the courts, the Constitutional Court or the Court of Justice of the EU (Article 14e § 1 point 1 o.p.).

[12] Report, p. 56.

[13] Art. 7 of the Polish Constitution.

[14] Report, p. 56.

[15] See under EU customs law: ECJ case C-499/03P, *Peter Biegi Nahrungsmittel GmbH, Commonfood Handelsgesellschaft für Agrar-Produkte mbH v Commission of the European Communities*, ECLI:EU:C:2005:136.

[16] Art. 14o § 1 o.p.

[17] Report, p. 56.

[18] Report, p. 56.

[19] For National Tax Information, please see the following link: https://www.kis.gov.pl/documents/6609173/10401485/Regulamin_organizacyjny_KIS.pdf

[20] Report, p. 57.

[21] *International Tax Glossary*, 3rd edition IBFD 1996.

[22] *Ibidem*, pp. 6 and 260.

[23] Art. 178(1) of the Constitution of the Republic of Poland.

[24] Art. 14m o.p.

[25] Report, p. 57.

[26] Report, p. 57.

[27] Report, p. 57.

[28] Report, p. 57.

[29] Art. 95(2) of APA Act.

[30] Art. 95(4) of APA Act.

[31] Art. 95(7) of APA Act.

[32] Report, p. 57.

[33] Report, p. 57.

[34] Art. 103 of APA Act.

[35] Art. 105(1) of APA Act.

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[37] Report, p. 58.

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