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The Tax Avoidance Clause: Do We Want it, Do We Need it?

Introduction

As of 25 July 2016, a tax avoidance clause¹ has been implemented once again in the Polish legal system, with the aim of helping the tax authorities to prevent tax evasion, which leads to reduced tax revenues. By referring to this clause, the tax authorities will have a chance to question and challenge such optimising activities and other activities which, although legal, allow certain taxpayers to avoid paying taxes. This instrument is certainly a strong tool owing to which the tax administration authorities may have recourse to the past activities of taxpayers. This may also be the reason why the clause provokes so much controversy. The first attempt to incorporate the clause in the Polish tax system was made over ten years ago and it failed then, as it was challenged by the Constitutional Court. Since then a number of other optimising structures have developed and their growth has been accompanied by increasing financial needs of the State. Hence discussion concerning the possibility of actually implementing tax avoidance clause structures has recently returned, and is currently taking place among legal theoreticians and practitioners. The many questions asked include: (i) Is it really necessary to adopt a tax avoidance clause?; (ii) Are there any legal grounds which would justify its adoption?; and, if the answer to the latter is in the affirmative, (iii) Should the solutions adopted in it be regarded as the right ones? These three questions, and some others frequently asked, have been the inspiration behind the writing of this paper.

Taxpayer's attitudes as a premise for the adoption of the tax avoidance clause

The general tax avoidance clause has been known under several other names, of which the most commonly used are the general anti-avoidance rule and the general anti-abuse

¹ Act of 13 May 2016 on the amendment to the Act on Tax Ordinance and certain other legislative acts (Dz. U. 2016 item 846).

rule. The idea of tax avoidance is not new and the anti-abuse rule is present in the legal orders of many States, while many others are considering its adoption. Examples of the latter are Germany and France in Europe, or India and Australia.² The concept's global relevance arises from the fact that in each tax system taxpayers will tend to try to reduce their tax dues. Hence the various actions undertaken by interested parties (taxpayers), which range from those which generate a tax liability to those which amount to tax fraud. Some of these activities lead to aggressive tax planning, which is a negative phenomenon currently under the scrutiny of various authorities, including the European Commission. On 6 December 2010, the Commission published Recommendation 2012/772/UE (OJ L 338/41),³ in which it expressed support for the initiatives of EU Member States aimed at combatting aggressive tax planning. At the same time, the Commission emphasised that although in principle tax planning is an acceptable practice, the instruments used have evolved in the direction of more refined structures, now extending to a greater number of States and covering different national jurisdictions, which allow taxable income to be moved to States or jurisdictions that are more favourable to entities seeking to optimise taxation. Thus for the purpose of further deliberations presented in this paper, the content of point 1 of the Preamble to the Recommendation is crucial, as it states that a key feature of the tax optimisation practice is a reduction of the tax liability, which is legal but contrary to the intention of the legislator. Here we arrive at the main element that constitutes the circumvention of a law clause, and subsequent justification of its application by tax authorities. It is, after all, the tax authority which is vested by law with the task of assessing the intentions of a taxpayer who has resorted to tax optimisation strategies.

In doing so, tax authorities will first and foremost rely on procedures available in law. However, it is also vital to identify the moment at which the optimisation starts securing a taxpayer excessive gains at the cost of the State tax revenue base. In other words, it becomes important to capture the moment when the result of optimisation turns out to be contrary to the legislator's intention and the principle underlying taxation. The Commission refers to such a situation aggressive tax planning when, in order to reduce tax liability, a taxpayer uses the technical aspects of a given tax system or the differences between two or more tax systems, and for instance makes deductions for the purpose of reducing. Such planning may take the form of, say, double tax exemptions or making tax deductions allowable in the case of a loss in two tax systems.

2 Described in detail in the publication authored by A. Olesińska, *Klauzula ogólna przeciwko unikaniu opodatkowania*, Toruń 2013, *passim*.

3 Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU), OJ L 338/41.

However, it must be repeated once again that not all optimising activities undertaken by taxpayers are negative in character.⁴ As pointed out in the literature, each situation requires individual examination before it is classified as a given form of a taxpayer's behaviour, of which he most common ones are:⁵

- tax saving – a legally indifferent behaviour which nevertheless influences the taxpayer's situation, when for example taxpayers limit their professional activity and control income in order to reduce the taxable base.
- tax planning – defined by some as tax optimisation achieved through the exercise of all tax reductions and tax exemptions available by law.
- tax avoidance – the subject of this paper, which may be interpreted in a number of ways, all sharing some common features, such as the active involvement of a taxpayer aimed at reducing the tax liability within allowable limits or (at times) where not regulated by law. The issue of the legality of such an activity has not been unambiguously solved, but the problem may be best illustrated by the fact that tax avoidance is often referred to as an “indirect violation of tax law.”
- tax evasion – a phenomenon of the most negative nature. The term is used to describe a situation involving a direct breach of the applicable law and the subsequent punishment administered for an act sometimes referred to as “tax fraud.”

These different types of tax behaviours illustrate different taxpayers' attitudes to taxation, which range from those that are completely legal (positive) to the negative ones, which are not accepted by the State (or society). These attitudes result from many inter-relating and overlapping factors, and are subsequently analysed in different scientific areas of research, including economics, psychology, sociology, or law, with an aim of identifying and subsequently separating factors that influence the tax decisions made by taxpayers.⁶ This behavioural aspect of the research cannot be underestimated and should be used in the process of creating and enforcing law.⁷ It is, after all, the behavioural elements shaping taxpayer's attitudes that form behavioural facts. Following Andrzej Gomułowicz, it is tax mentality, tax morality or tax ethics⁸ that have a role in the shap-

4 K. Wójtowicz-Janicka, *Optymalizacja podatkowa w doktrynie i orzecznictwie*, in *Optymalizacja podatkowa*, ed. Ł. Mazur, Warszawa 2012, pp. 15-19.

5 P. Karwat, *Obejście prawa podatkowego*, Warszawa 2002, pp. 13-28.

6 R. Sowiński, *Uchylanie się od opodatkowania. Przyczyny, skutki i sposoby zapobiegania zjawisku*, Poznań 2009, p. 21.

7 T. Nieborak, *Creation and enforcement of financial market law in the light of the economisation of law*, Poznań 2016, pp. 158-172.

8 A. Gomułowicz, *Podatki a etyka*, Warszawa 2013, *passim*.

ing of individual taxpayers' attitudes.⁹ All this happens in a situation in which, from the point of view of the taxpayer, "tax is seen as a form of the State authorities" intervention in the rights in property of a given payer and is directed against one of the strongest and most protected pursuits i.e. the desire to make and multiply income and increase the wealth."¹⁰ Excessive tax liabilities are therefore perceived as fiscalism and are bound to bring about a defensive reaction on the part of the taxpayer. This tax resistance characterising a taxpayer is believed to be the intrinsic feature of any tax liability.¹¹ As Aleksandra Wrzeńska-Nowacka noted, "the obligation to share one's own financial success with the State often results in taxpayers getting involved in activities aimed reducing their tax burdens."¹²

A legislator's action (taken by a tax authority) triggers off a reaction which may take different forms: from tax saving to tax evasion. It is right to believe that the tax law relationship constitutes a natural axis of the conflict between the parties, which in this case are the State (the active party) and the taxpayer (the passive party). In this context, tax avoidance is in between the two extreme forms: an autonomous form of activity undertaken by taxpayers. Tax planning (and tax saving) is a legal method of lowering or reducing one's tax liabilities that is accepted by fiscal authorities. It may, for instance, be the running of business in which tax exemptions and reliefs are used to the maximal legally allowed extent. It is worth noting here that the common view presented in the literature is that basically tax planning is very close to the avoidance of tax paying and the border between the two is hard to identify. While they are both always regarded as legal, they are not equally acceptable to tax authorities which, equipped with instruments available in general and specific tax law, undertake measures aimed at combatting tax evasion. This happens in consequence of the largely legitimate activities allowing taxpayers to reduce or eliminate tax dues (tax avoidance behaviour). State tax-based revenues are at stake as a result of unpaid taxes. With the general tax avoidance clause in place, fiscal authorities will have additional grounds upon which they will be able to challenge the reasons given by taxpayers seeking ways to avoid their tax liabilities, of which economic reasons are the most common.¹³

9 A. Gomulowicz, *Postawy wobec opodatkowania*, in A. Gomulowicz, D. Mączynski, *Podatki i prawo podatkowe*, Warszawa 2016, p. 360-380.

10 *Ibidem*; V. also H. Filipczyk, *Ingerencyjny charakter prawa podatkowego – jedna teza, dwie interpretacje*, in *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym*, ed. Z. Ofiarski, Szczecin 2014, pp. 399-409.

11 A. Olesińska, *op. cit.*, pp. 25-32.

12 A. Wrzeńska-Nowacka, *Granice między unikaniem opodatkowania a uchylaniem się od niego na tle wybranych orzeczeń sądów administracyjnych*, in *Stanowienie i stosowanie prawa podatkowego w Polsce. Optymalizacja podatkowa a obejście prawa podatkowego*, ed. M. Münnich, A. Zdunek, Lublin 2012, p. 173.

13 A. Olesińska, *op. cit.*, p. 17.

The tax avoidance clause in the Polish legal system – assessment

The analysis of Polish legal solutions underlying the introduction of the tax avoidance clause may begin with a statement that taxpayers exercising the ability to avoid paying taxes lies within the range of legal activities available to them. This fact is not without significance when it comes to the potential consequences under penal-fiscal law. More precisely, the enforcement of the clause may render the application of the provisions of this law impossible in a situation when the taxpayer attempts to avoid tax liabilities through illegal actions. The negative character of these activities can also be seen in other terms used to describe such illegal activity, such as “tax is fraud” or “tax crime.” Other examples of illegal activity include a failure to disclose all income sources or deducting from the taxable base costs that have not been incurred. Thus the opinion that there is a difference between an instance of tax planning when a taxpayer attempts to avoid a tax liability that may arise, and the situation of attempted tax evasion when a tax liability does arise but the taxpayers is not willing to satisfy the obligation¹⁴ seems to be correct. In the latter case the decision made is covert and *contra legem*, and it clearly differs from tax avoidance, which is an overt activity within the limits of the law, even if in the eyes of the legislator and tax authorities it is to the prejudice of the objective and rationale underlying the tax regime. This potential conflict between the taxpayer and the tax payee requires that in a tax avoidance situation it becomes necessary to determine the boundaries between what is a legal way of reducing or minimising one’s tax liability and what constitutes unacceptable actions aimed exclusively at lowering the payable tax liabilities.

The tax avoidance clause is an instrument with which tax authorities have been equipped and which serves to take actions aimed at the above. The characteristic feature of this instrument is its general character, which means that in deciding to resort to this instrument, the legislator indicates that certain activities undertaken by taxpayers in order to reduce the amounts of payable tax are ineffective. In this way, as it is often claimed, the legislator pays more attention to the spirit, not the letter of law.¹⁵ Equipped with such a clause, a tax authority may disregard the beneficial tax consequences enjoyed by a taxpayer and adopt a hypothesis of the *status quo*, which in the opinion of the tax authority will be the most adequate to the economic essence of the events that have occurred.¹⁶

This general and subjective element of assessment, which is part of the activity of tax authorities, is a source of numerous debates and controversies every time when a tax avoidance clause is adopted in a legal system (of any state). It was no different in Poland

14 T. Dębowska-Romanowska, *Uwarunkowania konstytucyjne dopuszczalności wprowadzania klauzul antyabuzyjnych, jako ogólnych instytucji materialnego prawa podatkowego*, in *Nauka prawa finansowego po I dekadzie XXI wieku*, ed. I. Czaja-Hliniak, Kraków 2012, pp. 91–94.

15 A. Olesińska, *op. cit.*, p. 27.

16 *Ibidem*, p. 17.

when, more than 10 years ago, the Tax Ordinance was amended and Articles 24a and 25b were added. However, all this was in vain since the Constitutional Court ruled in its judgment of 11 May 2004 (file K 4/03)¹⁷ that §1 of Article 24b was unconstitutional, being contrary to Article 2 in connection with Article 217 of the Constitution of the Republic of Poland. Without analysing the content of the judgment in any detail, and having regard to the opinions in the doctrine,¹⁸ it still is worth noting that the fundamental problem of the enforceability of the abusive clause included in the provision of the challenged Article, is the possibility it provided for the enforcement of the clause in making *ex post* assessments of a taxpayer's behaviour, which may result in negative consequences for the taxpayer in the event his/her behaviour has been found legal and not in breach of the applicable legal order. Thus, keeping in mind the ruling of the Constitutional Court and its rationale, the Polish legislator was obliged to make necessary amendments in line with the Court's reasoning which read as follows:

In the Constitutional Court's opinion, there should be no doubt as to the view that one of the elements of the constitutional principle of the rule of law (Article 2 of the Constitution) is a norm that prohibits sanctioning (here: in the meaning of ascribing negative consequences or refusing to respect the positive consequences) such behaviours of the addressees of the provisions, which are in compliance with the law (ordered or at least allowable). Therefore if an addressee performs an act in law which is lawful and the purpose of such an act is not prohibited by the law, it cannot be recognised as right and proper to qualify such an act in law in a manner (suggesting) that the goal achieved (including the taxation goal) is equivalent to and treated as prohibited acts. Therefore it must once again be emphasised that a legal norm is missing in the tax law system, which would prohibit a lower tax rate (of course when achieved by a taxpayer as a result of legal actions performed) [...]. The Constitutional Court thus stressed that threats to such predictability may be found in three factors. Firstly, when the premises for understanding (interpreting) a certain under-defined term are determined by subjective elements. The greater the scope for individualised interpretation of a given notion, the greater the threat of the unpredictability of solutions made on its basis. Secondly, the use of under-defined terms should be accompanied with the necessity of filling them with such contents which will guarantee the uniformity of the legal reasoning (or decisions underlying

17 Ruling of the Constitutional Court of 11 May 2004 (file K 4/03).

18 Including, primarily, an opinion assessing the possibility of applying general clauses, formulated separately to the Court's decision of 14 July 2004 (file SK 16/02) by Justice Teresa Dębowska-Romanowska who stated that "in the light of Polish constitutional regulations, general clauses referring to the enforcement of tax law have a very limited application and their implementation must be accompanied by particularly fair legislation".

the enforcement of law). Thirdly, it is of essence to ensure that the determination of unclear (blurred) concepts used in a given regulation will not be part of the task of authorities enforcing the said regulation, as this could potentially lead to illicit law-making by these authorities. Referring these reservations to the wording of para 1 of Article 24b of the Tax Ordinance it must be stated that from this point of view the regulation in question arouses fundamental doubts and reservations. Terms such as “it could not have been anticipated,” “other benefits of substance,” or “benefits arising from the lowering of the level of liability” decidedly disallow a conclusion that “their judicial interpretation will really be uniform and precise” and that “it will not be possible to derive from their wording the law-making capacity of law enforcing authorities.” It is also worth noting that the above reservation disallowing a provision with a wording containing under-defined terms to become subject of the law-making activity of law enforcing authorities was formulated by the Constitutional Court particularly with regard to regulations enforced by courts (as in the Constitutional Court’s ruling of 17 October 2000, SK 5/99, OTK ZU No. 7/2000, item 254).

These and other critical remarks formulated by the Constitutional Court were subsequently taken into account when a new wording of the general tax avoidance clause was being drafted. Still, however, the clause contains a number of under-defined terms, leaving much freedom and discretion of their interpretation to relevant tax authorities. This, however, again poses a risk of these organs assuming the law-maker’s role.

It should be nevertheless expected that this clause will be used reasonably and cautiously, to serve its main function, which is prevention, as indicated in the Preamble to the Act of 13 May 2016 on the amendment to the Act – Tax Ordinance and some other Acts (Dz.U. 2016 item 846). That Act re-introduced a tax avoidance clause to the Polish legal system. Its adoption was recommended by the Codification Committee of the General Tax Law in a document entitled: “Directions of the assumptions underlying the new tax law” of 24 September 2015.¹⁹ The Commission emphasized the fact that although the anti-abuse clause is known worldwide, there is no one normative model of this clause that could be commonly used. The Polish model is a pioneering solution in this respect, but has so far failed to attract wider attention or discussion which would help to define the concepts referred to Section IIIa “Counteracting tax avoidance”²⁰ added to the Tax Ordinance.²¹

19 Kierunkowe założenia nowej ordynacji podatkowej, http://www.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034, http://www.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034 [access: 20.05.2017].

20 Kierunkowe założenia..., *op. cit.*, p. 13.

21 Act of 29 August 1997 Tax Ordinance (consolidated text Dz.U. 2017 item 201).

The Section which covers the provisions of Articles 119a-119zf of the Tax Ordinance is extremely extensive and detailed, but not of all them require a thorough analysis.

The first issue requiring explanation is the definition of tax avoidance. As provided in Article 119a §1 of the Tax Ordinance, the goal of an action taken in the case of tax avoidance is a tax advantage, which under given circumstances is contrary to the subject and purpose of the tax law. Tax avoidance will not result in any tax advantage if the manner of the action taken to achieve it was artificial. In such a case, the tax effects resulting from a tax avoidance action are determined on the basis of such a state of affairs which could have possibly occurred, had a correct action been performed. An action shall be deemed correct if the entity could have performed it in given circumstances, had it acted reasonably and followed lawful objectives other than tax advantage, contrary to the subject and objective of the provisions of the tax law. If, in the course of the proceedings, a proper action can be identified, the tax effects will be determined on the basis of the state of affairs which would have occurred had the action been taken. An action is considered artificial if on the basis of the existing circumstances it must be regarded that such an action would not have been performed by an entity acting reasonably, abiding by the existing laws, and for lawful and legal purposes that were other than gaining a tax advantage that is contrary to the subject and purpose of the tax law. However, how should the artificiality and contradiction to the subject and purpose of the tax law be understood? The notion of “the subject and objective of tax law” has not been defined in any detail in the Tax Ordinance. To reconstruct its understanding, it may be useful to adopt the common belief that the purpose underlying tax law is fiscal in nature, which materialises when taxes are transferred to the State, local authorities etc. for the purpose of financing their public tasks.²² However, it is the legislator himself who creates possibilities for taxpayers to resort to and make use of tax reliefs, exemptions or reductions and other beneficial solutions. Thus a situation may be imagined in which although a taxpayer will pursue activities aimed at tax avoidance, in the long run this will improve his/her economic situation and have a positive effect on the State’s revenues, thus facilitating the realisation or implementation of various social or structural purposes. Whereas to assess whether the manner of the action performed was nothing but artificial, the following must at least be taken into account: 1. The presence of intermediating entities, despite the lack of economic justification for their involvement; 2. Elements leading to the achievement of the state of affairs identical to or close to the state existing before the action was performed; 3. The economic risk exceeding the expected benefits other than tax advantages, to the extent that it must be assumed that an entity acting reasonably would not have opted for this type of activity or action. An action is regarded as undertaken primarily for the purpose of a tax advantage if the remaining economic activities

22 R. Mastalski, *Prawo podatkowe*, Warszawa 2006, pp. 34-38.

indicated by the taxpayer as undertaken are of minor significance.²³ A tax advantage in the meaning of the relevant provisions of the Tax Ordinance includes, among other things: the non-occurrence of a tax liability, the postponement of the occurrence of a tax liability, a reduction in the amount of a tax liability, the overvaluation of a tax loss, the occurrence of a tax overpayment, the right to a tax refund right, or an increase in the tax overpayment or refund amount.

Thus, to prove that the taxpayer's action was artificial, a tax authority will primarily have to indicate the irrationality of the actions the taxpayer has performed. At the same time, non-artificial actions, being a *contrario* rational, will be these actions which even if seemingly intended to seek tax avoidance, will nevertheless belong to the elements of tax planning, which is economically justified. Despite the risk undertaken, such actions will generate measurable effects for the taxpayer, and thus, indirectly, for the State as well.

As can be seen from the above, determination of whether under actual circumstances we are dealing with actions indicating tax avoidance, requires a number of interpretative activities to be performed. If the tax avoidance clause can be enforced, then pursuant to § 1 Article 119a of the Tax Ordinance the tax authority will be in a position to cancel (recover, or refuse to grant) the tax advantage, and “deconstruct” at the same time the taxpayer's action by its reclassification (pursuant to Article 119a §§ 2-4 of the Tax Ordinance) or its neutralisation (pursuant to § 5 Article 119a).²⁴

What is also important is that when introducing the tax avoidance clause, the legislator determined the timescale of its enforcement, basing it on the concept of retrospectivity. Article 7 of the Act of 3 May on the amendments to the Tax Ordinance Act and some other legislative acts (Dz.U. 2016 item 846) provides that Articles 119a-119f apply to tax advantages gained after the coming into force of the said Act. In such a case, retrospectivity, although controversial from the point of view of the compliance of the adopted solution with the Constitution of the Republic of Poland, will mean that the legislator can make normative acts which will apply to circumstances that continue at the date of adoption and after the enforcement of these acts.²⁵

An allegation that a taxpayer attempted to avoid paying taxes may be defended. The defence should have a ‘cascade’ form and provide evidence of the correctness of the ac-

23 More on the delimiting clause referring to the economic optimisation reality and tax avoidance: S. Bogucki, M. Romanowicz, *Niedopuszczalność kwestionowania skutków podatkowych czynności prawnej w ramach instytucji art. 199a § 2 Ordynacji podatkowej w przypadku nadużycia prawa*, in *Międzynarodowe unikanie opodatkowania. Wybrane zagadnienia*, ed. D. Gajewski, Warszawa 2017, p. 3.

24 H. Filipczyk, *Stosowanie klauzuli ogólnej przeciwko unikaniu opodatkowania – zagadnienia wybrane*, “Monitor Podatkowy” 2016, no. 7, p. 13.

25 K. Turzyński, M. Kolibski, *Reguła intertemporalna klauzuli ogólnej przeciwko unikaniu opodatkowania w świetle standardów konstytucyjnych – polemika*, “Przegląd Podatkowy” 2016, no. 12, pp. 21-25. Cf. H. Filipczyk, *Stosowanie klauzuli...*, *op. cit.*, pp. 17-18.

tions performed, proving that they were based on reasonable grounds. This is so because the tax avoidance clause is of a legally fictitious character, allowing enforcement of legal provisions in a manner which in reality leads to imposing tax on a given action performed.²⁶ This action will, however, be placed in a certain actual state of affairs created on the basis of a model of a reasonable taxpayer's conduct, who in his/her actions aims at goals other than economic. Thus a tax authority will take steps to pursue and determine the legal effects of the actual state of affairs considered correct for a given economic goal. However, this pursuit will be based on a non-existent state of affairs, although from an objective point of view it is the most correct in the given circumstance of the taxpayer.

The consequence of the tax authority's activity may be a tax decision regarding tax avoidance. Thus the question arises whether persons responsible (and in particular, the financial officers in such a company) for a challenged tax avoidance situation in a company which is subject to Corporate Income Tax can be held liable and punishable under the Penal and Fiscal Code [the Code].²⁷ The amended Tax Ordinance introducing the tax avoidance clause failed to regulate this. Consequently, the provisions of the Code will apply. Their analysis leads to the conclusion that there is no way in which penal fiscal sanctions may be applied in respect of persons – officers of a company, liable for the occurrence of a situation of tax avoidance in nature. This may be justified or explained by constitutional provisions as well as the provisions of the penal fiscal nature. Article 42 clause 1 sentence 1 of the Constitution of the Republic of Poland provides that only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. A reflection of this principle is the provision of Article 1 § 1 of the Code stating that only a person who has committed a socially harmful act prohibited under the penalty clause of the binding law shall be criminally responsible for a tax crime or a fiscal offence. Neither the Tax Ordinance nor the Code provides that tax avoidance is an act amounting to a penal-fiscal liability and as such is not subject to it.²⁸ What is more, there is no mention in the Code of such a category of an offence as tax avoidance. Tax evasion (Article 54 of the Code) and tax fraud (Article 56 of the Code) are penalised if their source was illegal actions. The characteristic feature of tax avoidance is, as shown above, the legality of actions performed by a taxpayer, which may, however, under certain circumstances, be questioned by the tax authorities. As a result, it would not be permissible under the rule of law to penalise any person (and what is more, with the use of penal law instruments) for legal and lawful actions performed.

26 H. Filipczyk, *Stosowanie klauzuli...*, *op. cit.*, p. 14.

27 Act of 10 September 1999 Penal and Fiscal Code (Dz.U. 2016 item 2137 j.t.).

28 J. Olesiak, Ł. Pajor, *Komentarz do art. 119c Ordynacji Podatkowej*, in *Ordynacja podatkowa. Komentarz*, ed. H. Dzwonkowski, Warszawa 2016.

Conclusions

To sum up, it must be stated that since the development of the institution of taxation, a certain game has been going on between the State and the taxpayers, in which public and private interests collide. The notion of the common good should guide a State to enforce the opposing parties to seek a compromise. When it comes to taxes, however, a compromise is not easy to reach and often depends of the quality of the legislation and the activity of the tax authorities. The decisions or actions of the latter are generally not welcome. And yet, the tax authorities are vested with the task of protecting the State's finances and are therefore becoming increasingly better equipped with new instruments. This is partly due to the regulatory dialectics i.e. a situation in which the reaction of a tax legislator is triggered by the activity of taxpayers who sometimes take a too liberal approach to the interpretation of tax law provisions and create aggressive forms of tax planning. The answer to such actions will be the tax avoidance clause analysed in this paper. This clause has now returned to the Polish legal system, and is potentially a very powerful, but also – and this needs emphasising – dangerous weapon given to the tax authorities. It may only be expected that in the future the efficiency of the clause will flow from its preventive function rather than its actual application.²⁹

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²⁹ What is important here is the role of the tax avoidance clause and its application as an element of building citizens' trust in the State and the law created by the State. More on this: B. Brzeziński, *Zagadnienie konstytucyjności klauzuli normatywnej zapobiegającej unikaniu opodatkowania*, in *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, vol. I, Warszawa 2012, pp. 694-695.

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SUMMARY

The Tax Avoidance Clause: Do We Want it, Do We Need it?

The aim of this paper is to outline the institution of the tax avoidance clause which has recently been re-introduced to the Polish legal system. The clause is known in many legal systems worldwide, and always arouses numerous controversies, which arise primarily from the subjectivity as well as, partly, the retroactivity of its application, which is based on extremely general principles, leaving a vast interpretative margin to the tax authorities enforcing the clause. Selected problems arising from the implementation of the tax avoidance clause in the Polish legal system have been analysed. These theoretical problems will be real once the clause has been enforced.

Keywords: tax, tax evasion, tax avoidance clause, the Tax Ordinance

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