

Separation of Powers

-- Questionnaire --

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

Does your Government have legislative competence on tax matters?

1.1. Does your Government draft tax bills proposals and present them to Parliament?

Polish government is entitled to draft tax bills and present them to the Parliament on the basis of Article 118 of the Constitution of 2 April 1997. It does draft tax bills and present them to the Parliament.

1.2. In case your answer to 1.1. and 1.2. is positive:

1.2.1 Does your Government usually exercise that competence?

Polish government drafts tax bills and presents them to the Parliament. Current Government (elected in Autumn 2007) has presented to the Parliament seven tax bills so far (by 8 August 2008). None of these bills is aimed at introducing significant changes to any tax but changes proposed in the field of value added tax are rather complex. Previous governments have also exercised this competence extensively.

1.2.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

Tax authorities as such cannot present tax bills to the Parliament. The Minister of Finance is a tax authority (although rather specific one) within the meaning of Polish General Tax Law of 29 August 1997. However, he is not competent to present tax bills to the Parliament either. He usually prepares such bills but officially they are prepared and presented by the Government as a whole. Therefore, any ideas from the Ministry of Finance must seek approval of the Government as a whole before they are presented to the Parliament.

The commissions working in the lower house of Polish Parliament (*Sejm*) and the Senate undertake attempts in order to introduce changes to bills presented. It shall also be underlined that the Members of Parliament, the commissions working in the *Sejm* and the Senate often present tax bills – frequently dealing with the same taxes as governmental tax bills. Thus, bills presented by the government and other bodies are frequently discussed together. Members of Parliament happen to prepare their own proposals of amendments within the field of tax law. These proposals are usually minor ones.

1.3. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.2. ?

According to the annual report of the Supreme Administrative Court 2007 (www.nsa.gov.pl), although the Government is the main initiator of legislative process, impulses to commence legislative work come from a variety of entities. At the stage of

parliamentary work one may notice easiness of presenting legislative initiatives with regard to any amendments to tax bills. Such amendments are presented by the Members of Parliament at different stages of parliamentary works. Thus, individual interests are represented. Easiness of initiating legislative works and significant particularism of legislative initiatives lead to the disintegration of legislative process, which affects the quality of tax law. The view presented in the above-mentioned report corresponds with views presented by practicing lawyers and academics. It should, however, be underlined that tax bills presented by the government are not highly assessed as regards their legislative quality.

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

Although it is rather difficult to assess a whole string of different tax acts, domestic tax legislation could probably be assessed rather as detailed – casuistic. This does not mean, however, that all indeterminate concepts are avoided. Leaving too significant margin of discretion for tax authorities might lead to declaring tax provisions to be contrary to the Constitution.

In the course of legislative works, the issue of too significant discretion of legal provisions arises. It is often emphasized that tax law should be briefly formulated. Yet, one may observe constant increase in the volume of tax laws. Regulation of value added tax and excise duties may serve as an example. At the moment of Polish accession to the EU one rather brief act – Law of 8 January 1993 on Goods and Services Tax and Excise Duty was replaced by two significantly longer acts – one of them regulating Goods and Services Tax and the other Excise Duties. Both acts are accompanied by a number of – significant in volume – ministerial regulations. In effect, the volume of tax laws regulating value added tax and excise duties has doubled.

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

Due to the lack of uniform legislative technique, one may encounter critical remarks towards too casuistic provisions and too vague provisions (see response to 2.1.).

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

Constitutionality of tax legislation is subject to review by the Constitutional Tribunal (*Trybunał Konstytucyjny*). Its review proceedings can be initiated *inter alia* by individual complaint of a taxable person or upon a request from an administrative court dealing with an individual case.

Local tax law (created by local self-government units) is subject to control of administrative courts.

2.3. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

The Constitutional Tribunal indicates that tax law provisions shall be clear and precise. Lack of clarity and precision might be perceived as a violation of the rule of law principle expressed in Article 2 of the Constitution. However, the cases where the Constitutional Tribunal held that tax law provisions were so indeterminate that they must have been perceived as unconstitutional have been rare (The Tribunal believes that stating that a provision is unconstitutional is a final solution. It is only acceptable when the provision cannot be constructed in any manner that would be in line with the Constitution. Therefore, vagueness of the legal provision is not sufficient to state that the provision is unconstitutional, unless it is so vague that it cannot be understood.). This does not mean, however, that they are not existent. For instance, in its judgement of 29 October 2003 (K 53/02), the Constitutional Tribunal held that legal provisions subject to its control were unconstitutional due to the lack of clarity. A provision considered to be unconstitutional amended other provision, which had earlier been deleted.

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

Administrative courts control decisions of tax authorities. The courts' judgements are binding upon tax authorities in particular cases. Therefore, in case of legal indeterminacy, it is the administrative court, which has the final word regarding the interpretation of the rule.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

Under Article 184 of the Constitution the Supreme Administrative Court and other administrative courts control the activities of public administration. This seems to be the constitutional basis for administrative courts to have the final word on the interpretation of any legal rules applied by public administration, including indeterminate ones.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

Legal indeterminacy is usually fulfilled by administrative rulings and case law. Recently, administrative rulings issued by the Minister of Finance (or self-governmental tax authorities in the case of local taxes) in individual cases upon request of a taxable person seem to play the major role (Art. 14 et seq. of the General Tax Law of 29 August 1997). These rulings are subject to the control of administrative courts. They are published on web sites (without particulars of those asking for rulings).

The Minister of Finance also presents his position with regard to some tax interpretation problems of general interests. The position of the Minister is presented in a written form and it is usually available in the internet.

The role of case law of administrative courts is also significant but one should bear in mind that their judgements are binding in individual cases only.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

Administrative rulings are not binding on a taxable person. They are not binding on courts either. Administrative rulings offer certain range of protection towards taxable persons. In this sense, the administrative courts may be bound by the rulings as they cannot issue a judgement, which would deprive a taxable person of a protection derived from the ruling, even if the ruling (and the decision based thereon) is, according to the court, *contra legem*. Formally, it may happen that an administrative ruling will not be taken into account or will be subject to change after the duty to pay tax has arisen. As a matter of principle, a taxable person may be exempt from a duty to pay tax in such cases.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

Application of tax law by tax administration is subject to control of administrative courts – regional administrative courts acting in the first instance and the Supreme Administrative Court acting in the second (the last) instance.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

Provisions regulating the issuance of administrative rulings have been subject to a number of changes in recent years but in none of the cases the courts were legally bound by the rulings. Binding the courts with administrative rulings would mean that courts are not independent.

Even at the time, when there were no legal provisions regulating consequences of taxable person's following an official, published opinion of tax authorities, courts and academics tended to think that following official, published opinion of tax authorities cannot be detrimental for a taxable person. It was not clear, however, how this "detriment" should be understood.

Currently, in the case when administrative ruling (individual or general interpretation) is not advantageous for a taxable person, a court is not limited in any manner when issuing a judgement. In the case when an advantageous (for a taxable person) ruling is not taken into account by tax authorities (impossible under the provisions in force until 30 June 2007), taxable may be exempt from obligation to pay tax. Therefore, the problem of following administrative rulings by courts is rather deprived of any practical significance.

The important legal problem concerns the significance of individual rulings issued by tax authorities for a taxable person other than the one being party to court proceedings. Such rulings are sometimes invoked by courts. This does not mean, however, that the courts follow views expressed in the rulings. This may be the result of an enormous number of published – often contradictory – rulings. Until 30 June 2007 each head of tax office, head of customs office and local tax authority could issue rulings on the interpretation of tax law (with regards to taxes falling within its

competences). As a result, one legal problem (or one legal provision) was often interpreted in numerous ways by different tax authorities and a taxable person might nearly always find an advantageous interpretation. Since 1 July 2007 only the Minister of Finance (in fact four tax chambers prepare such rulings) and local tax authorities with regard to local taxes have been competent to issue rulings. This may lead to certain level of uniformity and increase in the role of rulings in court's practice.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

Tax administration sometimes refers to the case law of both domestic courts and the ECJ when presenting grounds of its decisions.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

Tax administration adheres in its practice to the judgements of administrative courts, once the judgements on a particular matter are numerous and uniform. There are legal instruments supporting such process. The Minister of Finance issues administrative rulings (both general and individual interpretations of tax law). In the course of doing so, he is required to take into account judgements of courts, the Constitutional Tribunal and the European Court of Justice. On the other hand, the Minister is not legally bound by the above-mentioned judgements.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

Tax administration is legally bound by the judgements of administrative courts in individual cases.

4.6. Does your Tax Administration circumvent your domestic courts' case law?

It is plausible that tax administration undertakes measures not to follow a court's judgement, which it considers to be disadvantageous for the administration.

II

Please answer the following questionnaire, which aims at confirming your answers in I

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way?

yes – no

1.2. Do tax authorities influence tax legislation to a major degree?

yes – no

1.3. Does your Parliament

a) usually accept the bills provided by tax authorities?

yes – no

b) refuse the bills provided by tax authorities?

never – **sometimes** – often

c) improve the bills provided by tax authorities?

never – sometimes – **often**

(answers in 1.3. apply to the government understood as tax authorities)

1.4. Is your Parliament able to discuss the bills thoroughly?

yes – no

1.5. Is there sufficient knowledge of tax law in Parliament?

yes – **no**

Please note, however, that the Parliament may use external experts in the course of legislative works.

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations?

never – **sometimes** – often

Problem seems to be far too intricate to respond this type of question precisely. Certain gaps can certainly be filled by tax authorities through its rulings.

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament?

never – sometimes – often

2. Relationship between the Parliament and the Domestic Tax Courts

2.1. Are there independent (Tax) Courts in your country entitled to control legislation?

yes – **no**

Administrative courts are not entitled to control tax legislation. However, they can refer questions to the Constitutional Tribunal whenever they have doubts concerning compatibility of a legal provisions with the Constitution in the course of dealing with a particular case. Administrative courts are competent to control tax acts of local self-government units. Some administrative courts adopt the view, according to

which they are entitled to refuse applying a provision of an executive regulation contrary to the Constitution or to an act of Parliament. Such a judgement is binding exclusively in a particular case as opposed to the judgement of the Constitutional Tribunal, which is binding *erga omnes*.

2.2. If “yes”, do they control tax legislation:

ex ante or ex post?

2.3 Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards?

yes – **no**

Administrative courts are not entitled to control constitutionality of tax legislation. However, they can refer questions to the Constitutional Tribunal whenever they have doubts concerning compatibility of a legal provisions with the Constitution in the course of a particular case (see also 2.1.).

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law?

yes – **no**

Views on this matter differ. The majority view seems to be that administrative courts should ignore an unconstitutional rule having previously obtained the position of the Constitutional Tribunal on the matter in question. Minority view is that administrative courts can (and should) ignore provisions they believe to be unconstitutional even if they have not referred any questions to the Constitutional Tribunal. The minority view applies to executive regulations only, it does not apply to acts of parliament even they are believed to be unconstitutional.

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration?

Decisions (both substantive and procedural) of tax authorities are subject to review by administrative courts, which deal *inter alia* with tax matters. A taxable person can complain to one of regional administrative courts (*wojewódzki sąd administracyjny*). The judgement of such a court can be complained against by both a taxable person and tax authority to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*).

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities?

yes – **no**

If "no", do the courts follow them in fact?

never – **sometimes** – often – very often

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)?

never – sometimes – **often** – very often

Please report statistics if available!

The analysis of the judgements of the Supreme Administrative Court available in CBOSA database (i.e. database of judgements of administrative courts) show that complaints against the judgements of regional administrative courts are lodged by taxable persons more frequently than by tax authorities. For instance, 75% of complaints, with which the Supreme Administrative Court dealt with in March 2007 were lodged by taxable persons, while as only 25% by tax authorities (only taxes falling within the competences of heads of tax offices and directors of tax chambers were taken into account, thus, the statistics does not apply to excise duties, local taxies and, to certain extent value added taxation). In 2007 regional administrative courts dealt with 11 815 complaints against the decisions of the directors of tax chambers. Around 28 % of the complaints were (3 382) were judged in favour of taxable persons. Thus, one may notice that tax authorities and taxable persons lodge similar proportion of complaints against unfavourable judgements.

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases?

never – sometimes – **often** – very often

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision?

never – **sometimes** – often – very often

b) Does it try in another similar case to convince the Court to decide in a different way?

never – sometimes – **often** – very often

c) Does it try to influence the Parliament to change the law?

never – **sometimes** – often – very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?

never – **sometimes** – often – very often

Under General Tax Law of 29 August 1997 the Minister of Finance is obliged issue interpretations with regard to crucial problems tax law. In the course of preparing such interpretations, the minister is obliged to take into consideration judgements of administrative courts, the Constitutional Tribunal and the European Court of Justice.

e) Does it try “to hide” such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision?

never – sometimes – often – very often

Hiding a court judgement seems to be hardly possible as all judgements are (or at least should be) published on the website of the Supreme Administrative Court.

If possible, please add statistics to the answers!