

Terminology Related to the Issue of Reduction of Tax Burden Used in the Polish Tax Doctrine

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ABSTRACT : Behaviours leading to tax reduction are generally divided up into: tax planning - tax avoidance - tax evasion. However, in Polish literature, the term "tax optimization" is most often used to describe the phenomenon. The undetermined meaning and often intuitive use of the above-mentioned concepts result in the fact that they are used interchangeably, despite the fact that there are relations of exclusion, inclusion or superiority between them. The article aims to synthesize the views of Polish doctrine and practice and to clarify the content of concepts related to tax reduction in the Polish legal system. Establishing the terminology is fundamental to any discourse, therefore an important postulate is the unification of the language of science and law in the national dimension and the determination of the meaning of the concepts related to tax reduction.

KEYWORDS: terminology, tax planning, tax avoidance, tax evasion, tax optimization

I. INTRODUCTION

In literature on fiscal matters, the activities aimed at reducing tax burden can be divided into: tax planning, tax avoidance and tax evasion. Most representatives of Polish doctrine and practice, however, commonly use the term 'tax optimization'. The introduction of the General Anti-Avoidance Rule (GAAR) into the Polish tax law constitutes a turning point in the meaning of the term 'tax avoidance'. At present not taking GAAR into account in the conceptual framework of tax law results in a fallacy. Definitions of tax planning, tax optimization, tax avoidance and tax evasion are being constantly mixed up in Polish literature, despite the fact that there are relations of exclusion, conclusion or supremacy between them. Sometimes, the terms of tax planning, tax optimization and tax avoidance are used interchangeably, and the concept of 'tax avoidance' is extended by adding the adjective 'illegal' and thus it starts to embrace tax evasion. The imprudent concept of 'legal' tax avoidance can also be encountered. It should be emphasized that it is generally accepted that actions taken in the process of tax avoidance are always legal (at least under private law) and legality is one of the criteria for the distinction of tax avoidance from tax evasion (which is penalized not only by the Polish Tax Penal Code) - thus it is a tautology, and the term 'legal tax avoidance' is an oxymoron.

II. TAX OPTIMIZATION

Tax optimization is commonly referred to as activities of entrepreneurs that involve application of legal arrangements of applicable regulations to reduce tax burdens. Tax optimization consists of all activities in accordance with applicable law and related to the conducted business that result in tax benefits [Melezini, 2010, p. 445]. In tax optimization process, a taxpayer uses all the possibilities and powers offered by legal provisions in order to reduce the amount of the tax burden to the lowest possible level without stepping outside the letter of law [Ladziński et al., 2008, p. 17]. The essence of tax optimization is striving towards non-appearance of state of affairs which would trigger taxation [Selera, 2010]. The taxpayer tries to escape from the tax burden or to significantly limit this burden in relation to the level considered adequate to a given situation considered from an economical rather than a formal and legal standpoint [Olesińska 2013, p. 17].

The term 'tax optimization' has the widest range of meanings among the above-mentioned forms of limiting the tax burden as it covers all legal activities leading to the minimization of tax burden by such a choice of legal actions and such a selection of tax policy instruments that ensures a reduction of total tax burden and thus maximization of net profit [Dymek 2006, p.11]. Tax optimization is primarily the choice of a lawful way of achieving a specific economic result, while minimizing the associated tax burden [Kudert, Jamroży, 2013, p. 24]. Tax burden optimization can be defined as the concept and the set of specific activities of the entity which are consistent with the requirements of tax law, coherent and permanent, and take into account the risk arising from such activities. These activities are aimed at fulfilling the entity's tax obligations in the correct amount, and are based on actions optimizing the tax burden or reducing financial costs associated with the implementation of tax obligations, using the knowledge of constructors of those strategies. These activities are undertaken to increase the entity's profits but also to improve the competitive position of the enterprise by

reducing the tax burden affecting the price or cost of the manufactured product [Wyrzykowski 2015, p. 37]. Tax optimization Understood in this way consists of two concepts i.e. tax planning and tax avoidance. A common goal for tax planning and tax avoidance is to reduce the tax burden by means of legal actions undertaken by business entities.

III. TAX PLANNING

Tax planning has a number of definitions. According to the definition adopted in international tax terminology, tax planning means conducting a business or one's personal life in such a way to pay as little tax as possible. This term is commonly understood as doing one's business activities while meeting all tax obligations under the applicable law, regardless of the legal area in which they arise, while reducing tax liability to the minimum [Wyciśłok 2013, p. 5]. Tax planning involves maximum use of exemptions and tax breaks provided in tax legislation, as well as procedures which are approved by tax authorities. Tax planning is conducting property interests by enabling the use of legally permitted ways of minimizing the tax burden [Brzeziński 1996, p. 10] and consists of the application of the most favorable tax provisions for the tax payer in order to minimize the tax burden [Koreń, 2014, p. 14]. As part of tax planning, taxpayers have the right to an 'active' approach to tax law provisions and to follow this approach while arranging their civil law relations [Radzikowski 2005, p. 19]. The goal of tax planning is to create optimal tax structures and decisions related to specific economic (operational or investment) activities of taxpayers [Wyciśłok 2013, pp. 29-40]. The taxpayer analyzes the available options for the implementation of a specific project and selects one option that translates into the lowest level of tax burden [Jankowski 2019, p. 15]. Tax planning also means the use of interpretative doubts which are ultimately resolved in favor of the taxpayer [Klonowska 2017, p. 23].

In case of tax planning, the taxpayer uses the possibilities of tax savings which result directly from legal provisions [Jankowski 2019, p. 17]. Tax planning is the right of choice that the legislator gives to the taxpayers. This right is in no way controversial [Jankowski 2019, p. 19] and does not lead to any intervention from the part of tax authorities. Tax planning is a tax optimization as an economic category, aimed at creating optimal structures in terms of tax burdens and solutions related to specific economic activities undertaken by taxpayers e.g. operational or investment [Wyciśłok 2013, p. 38].

IV. TAX AVOIDANCE

Tax avoidance consists of shaping civil law relations whose main objective is not to realize a particular economic goal but to produce a tax advantage [Jakubowski 2019, p. 8]. The doctrine often mentions 'apparent legality' of tax avoidance because it is a procedure that is formally in accordance with the provisions of tax law and involves disclosure by the taxpayer of relevant circumstances to determine the amount of tax liability [Zalasiński 2007, p. 4]. It is emphasized that this is a *praeter legem* action which is not contradictory to applicable law but is also not foreseen by it [Selera 2010, p. 115]. Such behavior of taxpayers is negatively assessed by the legislator due to the incompatibility of the legal form and economic content of the relationship which leads to more favorable taxation in relation to other entities in a similar legal and economic situation [Litwińczuk 1999, p. 5]. Tax avoidance is an active form of tax resistance and opposition to the tax burden [Lipowski 2004, p. 64]. Tax avoidance can be called an active (aggressive) contestation of tax authority. In the tax avoidance process, the tax obligation is being maneuvered and in consequence a lower tax burden is achieved than this expected by the legislator [Radzikowski 2010, p. 10]. The taxpayer, as a result of shaping the factual state of affairs in a particular way, avoids paying tax despite achieving economic effects that would be achieved in a taxable situation [Rozmaryn 1938, p. 67]. The phenomenon of tax avoidance usually consists of taxpayers' use of known and approved legal forms of business operations. Taxpayers do not hide these operations or their results from the tax administration. They demand that what they do openly becomes the basis for determination of their tax obligation (the judgement of the Supreme Administrative Court of 25 June 1998, I SA/Po 1883/97, non-published).

In article 119a of the Act of 29 August 1997 Tax Ordinance (Journal of Laws 2019.900 i.e. of 14 May 2019 - hereinafter referred to as T.O.), the General Anti Avoidance Rule (GAAR) is set out. The Rule determines the actions that are recognized by the legislator as tax avoidance. Paragraph 1 of Art. 119a states that tax avoidance is *an act that results in a tax advantage, if achieving such advantage, which is contrary to the subject or purpose of the T.O.'s provisions, was the main or one of the main purposes of its performance and the manner of operation was artificial*. The occurrence of tax avoidance is associated with the reaction of tax authorities, re-characterization or neutralization of acts that result in obtaining an undue tax advantage. It can be argued that tax avoidance is an act whose consequences are defined by an effect in the form of an undue advantage because the activities in the process of obtaining it are lawful. Only the occurrence of a tax advantage

that is contrary to the subject or purpose of provisions of T.O., when achieving such advantage is the main or one of the main goals and the manner of operation is artificial, triggers application of GAAR regulations. Tax avoidance is a process which may involve a number of activities as long as the activities are valid under private law and the GAAR will be applied to the end result of these activities in which the taxpayer attempts to achieve an undue tax advantage by means of self-calculation. Tax avoidance is a process that consists of lawful behavior but this does not imply the legality of end result of these actions. Due to the exhaustion of the meaning of the term 'tax avoidance' in article 119a of the T.O, the use of this term is only permitted if the behavior meets the statutory criteria and can be subject to GAAR.

V. TAX EVASION

Tax evasion means reduction or elimination of the tax burden by violation of applicable law. This scam consists of not meeting one's tax obligation through concealing from tax authorities the actual state of affairs subject to taxation [Brzeziński 2001, p. 91]. Tax evasion is a 'direct' violation of the T.O. and a *contra legem* action [Pietrasz 2007, p. 48] because the taxpayer fails to take action when the law imposes so. Evasion is aimed at completely eliminating the tax burden by not disclosing the actions which, according to the T.O., are subject to taxation [Bernal 2008; Sowiński 2006, p. 129]. Tax evasion is a deliberate failure to pay tax which is due by the letter of law [Pietrasz 2007, p. 48] and involves taking actions prohibited by tax law which lead to partial reduction or total elimination of tax burdens by not disclosing or providing false legal state of affairs [Kudert, Jamróży 2013, p. 21]. In principle, the acts classified as tax evasion lead to violation of both criminal and tax law. The acts that are penalized in Poland by penal fiscal law include among others: tax evasion through not disclosing the entity or object of taxation (article 54 of the Act of 10 September 1999, Penal Fiscal Code, Journal of Laws 2020.19 i.e. of 8 January 2020 hereinafter referred to as: PFC), unreliable keeping of accounting books (Article 61 of the PFC), failure to issue invoices and bills, as well as issuing and circulating bills and invoices which are faulty (Article 76 of the PFC).

VI. CONCLUSION

The currently observed intensification of tax risk can lead to the conclusion that different possibilities of reducing the tax burden are, in this respect, transitive along with its increase; from tax planning through tax avoidance to tax evasion [Zeitlin 1982, p. 91]. It is therefore vital to establish relevant terminology of the fiscal discourse and to unify and standardize the fiscal scientific and legal jargon on the national level but in accordance with international practice.

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