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COUNTERACTING INTERNATIONAL TAX AVOIDANCE PRACTICES

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Abstract

The aim of this work is to present legal regulations and system solutions undertaken by individual States, including EU institutions to counteract international tax avoidance practices. The work discusses the axiology of legal regulations aimed at counteracting international tax avoidance practices and attempts to present the notion of harmful tax competition. Moreover, the article aims at introducing the essence of tax avoidance and juxtaposing it with the notion of tax evasion.

What needs to be emphasized is that the phenomenon of tax avoidance is often identified with tax evasion. It should be remembered and stressed that tax avoidance is not a, it is a phenomenon that can be described as a "breach within the limits of the law". In contrast to tax evasion, which is penalized by law, tax avoidance is a lawful phenomenon but standing in contrast with its axiology.

Key words: international tax avoidance, tax avoidance, harmful tax competition, tax evasion.

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1. Introduction

International tax avoidance is one of the most controversial issues of tax law. The evolution of this phenomenon proceeded in direct proportion to the economic development of individual countries. It should be noted that the provisions of tax law on the level of national regulations may differ in the details of the adopted solutions, but always their purpose is to invalidate the effects of tax reduction resulting from operations that are legal, but are not motivated by any overriding economic objective except tax avoidance. Using legal mechanisms, tax legislators aim at an alternative determination of the effects of a given activity based on tax law. As a result of the application of a given regulation, we are dealing with a kind of reclassification of the effects of this activity in accordance with the tax law.

2. Avoiding a tax evasion and harmful tax competition. Clarifying the concept

By starting to discuss legal regulations counteracting international tax avoidance, I will present an understanding of the very concept of tax avoidance and an opposing phenomenon - tax evasion. I will also describe the concept of harmful competition. In international terms, tax avoidance boils down to the use of "free spaces between the scope of tax jurisdictions" (Wyciśłok, 2013: 55). Tax avoidance is also defined as "minimizing taxation" and "tax resistance". The mechanism of tax evasion is described in the literature by using such terms as: legal and illegal tax avoidance, legal and illegal tax evasion, legitimate or unauthorized tax evasion, abuse of the right to evade tax, free choice of the least taxed way, bypassing the tax law - at the same time without specifying their meaning (Kalinowski, 2001: 23).

The legal definition is the legal basis for all regulations counteracting the practices of international tax avoidance, including in particular, the phenomenon of harmful tax competition occurring in the legal systems of other countries or tax-autonomous territories. In the context of Polish statutory regulations regarding income taxes, one should critically refer to the lack of a proper definition of this concept. Identification of specific states or tax autonomous territories as applying, from the perspective of the Polish state, harmful tax competition takes place in the Polish tax law based on unspecified criteria whose scope is only a kind of presumption. There are no known normative provisions of Polish legislation that allow such identification of a given country (territory). The only, though not very successful, attempt to define "by calculating" legal regimes deemed harmful to tax purposes are the provisions of two identical regulations of the Minister of Finance of 2017. These

regulations contain the same list of nearly thirty countries and territories applying harmful competition for personal and corporate income tax purposes.

3. Counteracting tax avoidance at international level

The introduction of legal regulations counteracting international tax avoidance practices is part of the common trend of fiscal policy and legislative actions. Economic development as well as the process of integration of national economies contributed on the one hand to increasing the optimistic activities of taxpayers and, on the other, to intensifying the reactions of the legislator. The initiative of the Organization for Economic Co-operation and Development (OECD) to counteract the erosion of the tax base and the transfer of profits (BEPS) (Guzek et al, 2018: 9) can be regarded as the most key international action, which largely initiated the coordination of taxation responses to tax avoidance.

Legislative activities undertaken at the international level are also the result of the recognition that the tax legislators of individual countries do not keep up with the processes of globalization, the development of cross-border trade. The consequence of the lack or delayed reaction of the tax legislator is to leave "breaches" in the law, which are then used by international economic entities.

The manifestation of these activities was the commissioning of the so-called OECD's Action Plan by the G20 to prevent tax base erosion and transfer of profits. The plan was presented at a ministers of finance meeting during the G20 summit in Moscow, which took place in February 2013. Fifteen detailed solutions were presented, which were mainly intended to provide both domestic and international instruments to prevent the phenomenon of paying low taxes or not paying taxes. The essence of the plan was based on three pillars which are:

- strengthening the consistency of income tax regulations at the international level
- connection of taxation with the economic content of activities and
- improvement of transparency.

Institutions of the European Union, as one of the first treatment documents, have published the recommendations of the European Commission on the issue of tax avoidance in the Resolution of the European Parliament of 8 July 2015 on tax avoidance and evasion as challenges for management, protection and development in developing countries. It was emphasized that tax havens and jurisdictions that ensure secrecy about transactions, bank and financial information in combination with minimum taxation systems create harmful tax competition. On 28 January 2016, the European Commission presented a package of measures in which it called on Member States to adopt a more robust and coherent approach

for entrepreneurs who try to evade taxation and to implement international standards to reduce tax base erosion and profit shifting. In the content of the above-mentioned communication, the main elements of the proposed solutions were indicated, among others:

- legally binding measures to block the methods most commonly used by entrepreneurs to avoid paying taxes
- activities for good tax governance at international level
- a new European Union procedure for listing third countries that do not comply with the rules

The result of the European Commission's communication was the drafting of Directive 2016/1164/EU, which was adopted on 12 July 2016. The preamble of the directive indicated the need to establish provisions that would raise the average level of protection preventing aggressive tax planning in the internal market of the European Union. It was considered necessary to establish provisions preventing the erosion of tax bases and transferring profits outside the internal EU market. It should be emphasized that the scope of the definition of tax avoidance resulting from the regulation of the Directive 2016/1164/EU is broader (potentially includes more phenomena) than the regulations of the Polish anti-avoidance clause.

The above is a consequence of the Directive 2016/1164/EU using the phrase "the main purpose or the only main goal of their introduction was to obtain a tax advantage", while the provisions of the Polish clause contain the phrase "primarily for the purpose of obtaining a tax advantage", clarified by stating which action is considered to be taken primarily to obtain a tax advantage whereas other economic objectives of the activities indicated by the taxpayer should be considered insignificant. Thus, in the light of the provisions of the Polish clause, the existence of even one significant (main) purpose of the taxpayer's activities, other than a tax advantage, should exclude the classification of these activities as tax avoidance. At the same time, bearing in mind the content of Art. 6/1 of Directive 2016/1164/EU, tax avoidance may also be an activity which, among other significant (main) business goals, is also aimed at a tax advantage. Following the above, under the provisions of Directive 2016/1164/EU, a commercially reasonable or economically justified operation that simultaneously contributed to a significant tax advantage can be identified as tax avoidance (assuming that the other tax avoidance conditions are met), while under the provisions of the Polish clause such an action should not be considered as tax avoidance.

The primary purpose of Directive 2016/1164/EU was to ensure that taxes are paid in the state where profits are generated and value added is produced. The above statement should be referred to the principles of the functioning of the EU's internal market, by preventing the situation where profits are generated in one Member State, taxed in another, and the profits

transferred outside the area of the EU internal market. The phenomenon described from the perspective of the Member States is particularly dangerous, as it results in an irretrievable loss of tax revenues from profits that have been generated in the territory of the Community. What needs to be emphasized is that the Directive 2016/1164/ EU covers only taxpayers who are subject to corporate income tax in at least one Member State, including permanent establishments of resident entities in one or more Member States for tax purposes in a third country. Thus, the provisions of Directive 2016/1164/EU do not apply to cases of tax avoidance by natural persons, which from the perspective of the complete erosion system of tax bases in individual Member States should be assessed critically. It should be noted that the marginalization of the use of tax avoidance mechanisms by natural persons conducting economic activity puts into question the implementation of the objectives underlying the Directive.

The principal part of Directive 2016/1164/EU introducing mechanisms to prevent international tax avoidance can be divided into four parts:

- restrictions on the possibility of including interest in tax deductible costs;
- regulations preventing the change of tax residence of legal persons, including permanent establishment and transfer of assets;
- General Anti-Avoidance Rules clause;
- CFC regulations - regarding taxation of controlled foreign companies.

The first regulation group of Directive 2016/1164/EU deals with the problem of thin capitalization, i.e. financing the activities of legal persons through a system of loans whose repayment with interest will reduce their tax base. The provision of Art. 4/1 of Directive 2016/1164/EU stipulates that the surplus of borrowing costs is deductible (i.e. included in tax deductible expenses) in the settlement period (Directive 2016/1164/EU, Art. 2/3) in which these costs were incurred, only up to 30% of the taxpayer's financial result before interest, taxation, depreciation and amortization. The above principle, however, is not absolute, because subsequent regulations of Art. 4 of Directive 2016/1164/EU provide for the possibility of a number of exemptions from its scope (Directive 2016/1164/EU, Art. 4/3). In accordance with the provisions of Art. 4/3 of Directive 2016/1164/ EU by way of derogation from 1 the taxpayer may be entitled (by the decision of the State of his residence) to:

- a) deduct the surplus of borrowing costs up to a maximum of EUR 3,000,000;
- b) full deduction of the surplus of borrowing costs if the taxpayer is an independent entity.

The above limitation of the tax deductibility of interest and the cost of external financing compared to it, in the part in which these costs exceed the taxable interest income and other taxable revenues, up to 30% of EBIDTA, is a response to the mechanisms of insufficient capitalization. However, this is a very narrow regulation, referring to one of many methods of international tax avoidance.

Another group of regulations of Directive 2016/1164/EU concerns one of the most significant problems concerning the issue of international tax avoidance practices. It is a change in tax residency and two related categories of activities, identified as the transfer of a permanent establishment and the transfer of assets to another country. The change of a tax residence is an escape from the of the original tax residence state's power, usually the state of the establishment of the company. This is a very effective operation from the perspective of reducing fiscal burdens, especially when the transfer of the registered office and the management board of the company to another state (and consequently also a tax residence) may take place without establishing a permanent establishment of the company in the country of its original tax residence. Such actions are easily justified and they find a legal basis in the European law. Regulations of Art. 5 of Directive 2016/1164/EU provide for taxation of unrealized capital gains in the event of a change in tax residence, transfer of assets or a permanent establishment to another country. In accordance with the provisions of Art. 5/1 of Directive 2016/1164/EU, the taxpayer is subject to tax in the amount equal to market value (Directive 2016/1164/EU, Art. 5/6) transferred assets (at the time they are transferred), less their value for tax purposes, in each of the following situations:

- a taxpayer transfers assets from its head office to a permanent establishment in another Member State or in a third country, provided that the Member State of the head office no longer has the right to tax the transferred assets due to the transfer;
- a taxpayer transfers assets from its permanent establishment in a Member State to its head office or other permanent establishment in another Member State or in a third country, provided that the Member State of the permanent establishment no longer has the right to tax assets transferred due to the transfer;
- the taxpayer transfers his tax residence to another Member State or a third country excluding assets that are actually related to a permanent establishment in the first Member State;
- a taxpayer transfers an economic activity carried out by its permanent establishment from one Member State to another Member State or to a third country in so far as the Member State of the permanent establishment no longer has the right to tax the transferred assets due to the transfer.

The above regulation is therefore the basis for European tax law for the so-called exit tax, charged with certain forms of exit (non-investment) from the tax authority of the state of the original tax residence of capital companies. The regulation of exit tax in individual Member States was left to these countries. In accordance with the provisions of Art. 11/5 of Directive 2016/1164/EU, Member States are obliged to adopt and publish the laws, regulations and administrative provisions necessary to comply with Art. 5 of the Directive and their application from 1 January 2020. Clearly, the general provisions of Directive 2016/1164/EU should be considered as general provisions against tax avoidance, as applicable in the largest spectrum of cases. Regulations regarding the taxation of controlled foreign companies at the European level concern the problem of harmful tax competition on the European Union's internal market. What needs to be emphasized is that this issue, despite the great interest of the EU legislator, has not been regulated in any way that would be a normative approach to this issue.

As a result, the limit of tax harm to the Member States' systems in relation to each other was not known. The current European regulations set this limit at the level of the lower income tax actually paid than that which would have been levied by the controlled foreign company or permanent establishment of the taxpayer under the corporate tax system applicable in the taxpayer's home Member State. It is extremely important to emphasize that the regulation of Art. 7 of Directive 2016/1164/EU stipulating conditions governing the treatment of an entity or permanent establishment whose profits are not taxable or exempt from tax in a given Member State, as a controlled company was regulated in a typically continental sense. It should be noted that the condition based on reference to voting rights, the capital (i.e. shares or stocks in a company) and participation in profits, which results from the shares held in the company, allows to identify existing links only on the basis of formal and legal ownership. Most mechanisms of aggressive tax planning assume the use of trust units, owned by entities unrelated to the taxpayer. Material and legal ownership is a concept that goes beyond the commercial law regime, having a typically civilian character in the Anglo-Saxon spirit. It is therefore a concept that is fundamentally detached from the participation in a given unit (Nawrot, 2018: 339).

In the case of a capital company with a full fiduciary structure (and therefore concern, inter alia, its ownership structure), the material-law owner controlling the company in terms of civil law (including economic power over the company) is deprived of the right to participate in its profits. As a result, the connections referred to in Art. 7/1 letter a and Directive 2016/1164/EU does not cover the scope of trustees whose material owner is a taxpayer from a Member State of the European Union, while their formal-legal owner is another entity (trustee). The above dissonance should be evaluated critically, although trust mechanisms are used primarily at the level of natural persons and not entrepreneurs. In turn, reference to the effectively paid income tax in Art. 7/1 letter b of Directive 2016/1164/EU should be

assessed positively, mainly due to the tax competition mechanisms applied in the national legislation of many European Union Member States.

4. General Anti-Avoidance Rules Clause

In Polish tax law (of 15 July 2016) there is also a GAAR clause. The purpose of the Polish GAAR clause is to deprive taxpayers of the possibility of obtaining tax benefits from avoidance practices. Such regulations are currently in force in dozens of countries. The very fact of introducing the anti-avoidance clause into the Polish tax law is particularly important in the context of the constitutional principle of the exclusivity of the Act in tax matters. As a consequence, the concept of bypassing the law began to function in a normative sense in Polish tax law and can be assessed on this level, and not only on the basis of axiology attributed to the legislator. Analysis in terms of the operation of the anti-avoidance clause against tax avoidance together with the analysis of the concept of counteracting tax avoidance has evolved over recent years. The essence of the introduced regulation is expressed in the provisions of Art. 119a of the Tax Ordinance Act, according to which an action performed primarily in order to achieve a tax advantage, contrary to the circumstances of the object and purpose of the tax act, does not result in a tax advantage if the taxpayer's way of acting was artificial. This means that the activities disputed under the tax law remain valid and effective in the field of civil law, but their tax consequences are determined differently than would result from the content of the legal relationship, which was assessed by the tax authorities as artificial.

As a result, the legal and tax efficiency of such a solution is challenged, as the model of the clause proposed in Section IIIa of the Tax Ordinance assumes combating activities and facts that, from a rational point of view, have no other economic justification than a reduction in taxation (Kubista, 2016: 93-96). For the application of the clause, it is necessary to meet the following conditions cumulatively:

- element of "artificiality" of the taxpayer's actions;
- the taxpayer's intention manifested primarily in striving to achieve a tax advantage;
- the tax advantage in the given circumstances is contrary to the subject and purpose of the Tax Act.

It is artificial to consider a taxpayer's way of acting, which based on the existing circumstances allows (requires) to assume that it would not be used by a person acting reasonably and pursuing legitimate goals other than gaining benefits. The legislator has decided to adopt a model of anti-avoidance clause based on "assessing the artificiality of transactions" combined with the criterion of a rational third party. The solution adopted by

the legislator should be critically assessed. In the course of its activities, the tax authority may apply the GAAR clause from the necessity to make factual findings contrary to those declared by the taxpayer. On the contrary - for the clause the authority is not obliged at all to establish the facts, assessing this state according to the model of conduct of a reasonable taxpayer guided by economic goals other than tax (Filipczyk, 2016; 13). Such a solution may lead to arbitrariness of decisions and excessive discretion regarding the application of the institution of the clause.

The legislator in Art. 119c/2 of Tax Ordinance Act additionally points to an open catalogue of circumstances indicating the artificiality of the transaction, assuming that in assessing whether the mode of operation was artificial, in particular the occurrence of the following should be taken into account:

- unjustified splitting of operations or
- engaging intermediary entities in the absence of business or economic justification, or
- elements leading to obtaining a state identical or close to the state existing before the act or
- elements that are mutually bearing or compensating, or
- business or economic risk exceeding the expected non-taxable benefits to the extent that it must be assumed that a reasonably acting entity would not choose this method of action.

5. Absence of business or economic justification

The analysis of the existing regulations and published documents allows for the formulation of several proposals regarding counteracting tax avoidance practices at the international level, primarily within the European Union. One of the conditions for the application of the Polish anti-avoidance clause is the contradiction of the obtained tax advantage with the object and subject of tax regulations. At the same time, determining the purpose and subject of a given provision can be particularly difficult in practice. Often it may be necessary to analyse the context in which a given provision is located, or the assumptions that the entire legal act has to implemented. The content of EU regulations and the BEPS report may be helpful in this respect. The documents explicitly indicate what kind of anti-avoidance regulations should be prevented. Thus, the analysis of EU legislation and the work of the OECD allows us to identify a spectrum of facts that are considered harmful and undesirable from the perspective of protecting the tax base. The implementation of such state of affairs

by performing activities covered by the disposition of specific tax regulations will therefore be an act contrary to the object and subject of these provisions.

The legitimacy of introducing GAAR into the Polish legal order was justified, among others, by the Resolution of the European Parliament of 25 November 2015 on the interpretation of tax law and other measures of similar nature or effect, as well as the content of the post-audit statement of the President of the Supreme Chamber of Control after the control of the Ministry of Finance, in which the Supreme Audit Office brings, inter alia, implementing solutions aimed at counteracting lowering the income tax base, consistent with the EU and OECD recommendations.

The above points to the fact that the EU and OECD objectives and objectives of the Polish legislator in the field of tax avoidance are convergent, and the Polish legislator shares the assessment of the European Union and OECD authorities in the identification of undesirable phenomena, and therefore in accordance with the above comments to achieve benefits contrary to the purpose and subject of tax regulations.

An analysis of European Union legislation and OECD studies indicates that measures to prevent international tax avoidance are aimed primarily at such actions as:

- using hybrid instruments and differences in national tax systems,
- using technical aspects of tax systems or discrepancies between two or more tax systems to reduce tax liability,
- acquisition of contractual benefits and abuse of the provisions of agreements on the avoidance of double taxation,
- transferring taxation of profits to other places than where economic activity is carried out and added value is generated.

The analysis of the above actions, negatively assessed from the perspective of protection of the tax base, leads to the conclusion that counteracting tax avoidance practices should be directed primarily to international schemes that use more than one tax system, including revenue to jurisdiction with preferential taxation. Therefore, it seems reasonable to conclude that a cautious and restrained approach should be applied to the use of the clause in relation to those taxpayers' activities which cannot be attributed to the abovementioned characteristics. In the case of activities that do not go beyond the limits of Polish tax jurisdiction, and at the same time can be attributed to the economic context, convincing demonstration of their contradiction with the purpose and subject of tax regulations will be extremely difficult for the tax authorities.

6. A multilateral convention on the implementation of treaty regulations preventing the erosion of the tax base and the transfer of profits

The Paris Convention on the implementation of treaty regulations preventing the erosion of the tax base and the transfer of profits is undoubtedly one of the most important international tax agreements. Currently, the assessment of the importance of convention mechanisms is difficult to overestimate. This is because the provisions of the Convention will change, after the ratification procedures have been concluded, the provisions of all double taxation agreements by States that have acceded to this convention, without the need for their separate renegotiation. The basic objective of the convention is to counter international tax avoidance based on the regulations of double taxation agreements, whose existing provisions at the interface with the national law of contracting States may sometimes lead to double non-taxation of certain categories of income. The minimum standard for the implementation of the Paris Convention which must be applied by the signatory States in their mutual relations, upon ratification of the Convention and which is not subject to exclusion in any scope, includes:

- the obligation to include in the preambles to the double taxation agreements that the purpose of their provisions, apart from avoiding double taxation, is also prevention of tax avoidance,
- a general anti-avoidance clause to ensure that double tax conventions are not used in aggressive tax planning,
- a mutual communication procedure to improve existing dispute resolution mechanisms.

The Paris Convention also modifies the principle that the contracting State, according to the provisions of double taxation agreements, has the right to tax the tax resident of a given country in accordance with its internal law, whereas the majority of the provisions of double taxation treaties regulate the tax limitation of resident contractors States.

Subsequent regulations of the Paris Convention are devoted to counteracting the abuse of regulations on double taxation agreements that may occur with regard to enterprises owned by enterprises of individual countries in the territories of other contracting States or territories of third countries.

7. Conclusion

The European Union and many countries outside the Union in recent years have strongly tightened actions to prevent practices of international tax avoidance. The international tax

avoidance itself is one of the most controversial legal problems of most developed economies. The regulations introduced will certainly make it difficult to apply tax avoidance mechanisms but do not eliminate them. In order to optimize tax burdens, entities with an international reach use various hybrid structures combining features of at least two categories of financial instruments. This means that the income from these sources is differently identified by the tax laws of individual countries. The aspect of international tax avoidance cannot, in my opinion, be reduced only to the desire to avoid fiscal burdens. Such depreciation of the problem seems to be completely detached from the legal economic background of the use by Polish taxpayers of the so-called international tax planning. Namely, taxpayers using mechanisms of international tax avoidance, often spend the funds left as a result of optimization measures on investments and not on personal consumption.

Due to the lack of regulations in Polish tax law providing for the exemption from taxation of income assigned to investment or partially exempt from taxation at the corporate level of passive profits, in particular income from securities and royalties, the use of mechanisms of international tax avoidance becomes a necessity, often fully justified.

It should be remembered, and it must be clearly emphasized that using the mechanisms of international tax avoidance of income is an element of not only harmful tax competition operating on the international arena in interstate relations but also competition between individual market participants.

Entities using international tax avoidance practices are in a better competitive position vis-à-vis market participants who do not take advantage of the opportunities offered by international tax avoidance. This in turn means that the tax system of a given country ceases to be neutral for competition.

Apart from the fiscal consequences of the taxpayers' use of international tax avoidance mechanisms, the greatest damage done by the practical application of the international tax avoidance mechanism is the distortion of free market competition rules that should be the same for all market participants. From this perspective, the practical use of the opportunities offered by harmful tax competition is subject to a decidedly negative assessment.

The controversy over the practices of international tax avoidance means that they cannot be perceived as a homogeneous phenomenon and cannot be unequivocally assessed from the perspective of economic consequences. The distortion of the rules of free market competition set and protected by the States undoubtedly should be assessed negatively, although a peculiar paradox, which is increasing the investment expenditures of enterprises using international income tax avoidance mechanisms, is a positive activity from the purely economic perspective, indirectly causing employment growth, and thus consumption and consequences leading to an increase in budgetary revenues in the area of tax to goods and services.

Counteracting practices of international tax avoidance based on domestic tax legislation should be assessed quite critically. Although the Polish legislator introduced a number of important legislative changes that are consistent with the international methodology of combating the phenomenon of tax avoidance, the adopted legislative solutions only in their foundations constitute the implementation of the provisions of Directive 2016/1164/EU to the Polish tax law.

Notwithstanding the criticism of the current state of Polish legislation counteracting international tax avoidance, the fact that the automatic exchange of banking information for fiscal purposes and the Paris Convention on the implementation of treaty regulations preventing tax base erosion and profit transfer in an unprecedented way will limit the possibilities of international tax avoidance, closing many of its previous mechanisms. This statement should refer in particular to the possibility of obtaining information about the actual beneficiaries of foreign companies used in the structures of aggressive tax avoidance, usually based on the transfer of profits. This information in the possession of banks should be automatically transferred to the appropriate authorities of the country of residence of these people.

The direction of changes in the international legal environment of the phenomenon of international tax avoidance of income is unquestionably assessed positively.

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