Financial Law Review

No. 25 (1)/2022

UNIVERSITY OF GDAŃSK • MASARYK UNIVERSITY • PAVEL JOZEF ŠAFÁRIK UNIVERSITY
http://www.ejournals.eu/FLR

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TRANSFER PRICING AS AN INSTITUTION SUPPORTING THE ANTI-OPTIMIZATION CLAUSE IN COUNTERACTING TAX AVOIDANCE

Abstract

The purpose of this study is to show the relationship between transfer pricing regulations and the anti-tax avoidance clause. The paper discusses the axiology of legal regulations aimed at counteracting tax avoidance practices and the use of non-market prices in relations between related entities. An attempt was made to present the concept of the phenomenon of harmful tax competition, also the essence of tax avoidance, and to contrast this concept with the phenomenon of tax evasion. The phenomenon of tax optimization was also indicated. The relationship between the provisions of the general anti-optimization clause and transfer prices that determine the appropriate state of prices between related entities within the meaning of tax law was also subjected to a detailed analysis.

Keywords: International tax avoidance, tax avoidance, harmful tax competition, tax evasion transfer pricing.

JEL Classification: K340

1. Introduction

The phenomenon of tax avoidance is identified in the doctrine of tax law as one of the controversial issues in this branch of law. It is worth emphasizing that the evolution of this phenomenon proceeded in direct proportion to the increase in tax burdens imposed by the

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provisions of tax law. The reaction of the tax legislator was manifested in the introduction of solutions which, although their structure differed in individual countries, but their common goal was to invalidate the effects of tax reduction resulting from operations that are legal, but are not motivated by any overriding economic goal, apart from tax avoidance. By using legal mechanisms, tax legislators aim at an alternative determination of the effects of a given activity under the 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 under the tax law.

2. The understanding the concept of tax avoidance and tax evasion

In the doctrine of tax law, there are voices that indicate that income tax is the most severe tax. Justifying this statement, it is indicated that income tax affects the gainful activity of an individual somewhat at the very basis. Avoiding or evading the payment of this levy is becoming a common practice used by both taxpayers - entrepreneurs and taxpayers – natural persons. Income tax burden demotivates people to work honestly. Montesquieu pointed out – "nature is fair to people, rewards them for their hardships, makes them diligent, because greater work comes with a greater reward. But if the arbitrary power takes away these innate rewards, man returns to disgust at work, and idleness seems his only good. At some point, taxpayers start to ask themselves why should they only work part of the year for themselves and their family and the rest for others? " This phenomenon prompts taxpayers to take actions aimed at reducing the tax burden, which are then classified as actions identifying tax avoidance or evasion. The concept of tax avoidance is widely recognized in the literature not only in legal and economic sciences but also in other fields of social sciences [Kichler 2013: 87-97]. The result of such a wide interest in the concept of tax avoidance are also its various terminological approaches, as well as different terminology regarding the phenomenon, which includes activities related to tax avoidance [Gajewski 2018].

It is undeniable that the obligation to pay taxes is an ailment and is also perceived by taxpayers. A natural consequence of this phenomenon are actions taken by taxpayers aimed at reducing or completely eliminating the tax burden. It should be remembered and it must be clearly emphasized that the activities implemented by taxpayers are both legal and illegal from the point of view of tax law. It should be emphasized that some activities fulfill the statutory features of offenses referred to as tax fraud. For the correct presentation of the discussed legal institution, it should be noted that the concept of tax fraud has not been exhaustively described, and the issue of penal fiscal liability was mainly touched upon, to a limited extent the forensic

issues of this phenomenon. Meanwhile, it should be emphasized that this phenomenon is one of the most common forms of tax escape.

It is not an easy task to formulate the criteria to distinguish between the concepts of tax avoidance and tax evasion. Both behaviors are aimed at reducing the tax burden. It should be remembered and it should be clearly emphasized that the concept of tax avoidance still arouses ambiguous associations, often equated in the practices practiced with the concept of tax evasion. The literature on the subject does not provide a consistent definition of the phenomenon of tax avoidance, and the tax legislator did not provide a legal definition of it. The concept of tax avoidance in the broad sense can be defined as an active form of tax resistance expressing opposition to the tax burden. Tax avoidance consists in actively contesting tax authority. It is not a passive objection to tax obligations. A characteristic feature of tax avoidance is an action aimed at eliminating or reducing the tax burden. Tax avoidance is not a behavior that is penalized by tax law. The use of institutions aimed at tax avoidance does not cause a reaction from the tax authorities in the form of criminal or tax sanctions. Tax avoidance is limited only by applying the anti-optimization clause.

Tax evasion is an illegal phenomenon, which should generally be defined as a phenomenon [behavior] aimed at illegal elimination of the tax burden. The conclusion of the above is the indication that the boundary between the concepts of tax avoidance and evasion corresponds to the reference to the assessment of the legality of the activities undertaken by the taxpayer. In both cases, it leads to the minimization of the tax burden or to the complete elimination of the tax burden [Kalinowski 2001: 3]. The use of differences in taxation of individual institutions of private law in order to reduce the tax burden within the limits of the applicable law is a feature that distinguishes tax avoidance from tax evasion [Brzeziński 2003: 87].

Activities undertaken as part of tax evasion are prohibited by law, and in the case of tax avoidance, these are activities that are legally permissible but contrary to the axiology of tax law. In the case of tax avoidance, the taxpayer reduces the tax burden legally, using the methods and means permitted by law tax [Gomułowicz 2011: 293]. The very process of tax avoidance or tax evasion is a complex process. The decision to take appropriate action is often implied by factors not only in order to achieve a tax benefit. The essence of the phenomenon of tax evasion consists in not disclosing the factual or legal status to the tax authority or in providing a false factual or legal status with which the tax obligation is related. Such an understanding of the essence of the phenomenon of undisclosed income requires the division of taxpayers' behavior into legal ones – i.e. those in which entrepreneurs and households, being in circumstances specified by law, fully comply with the tax obligations imposed by the legislator and illegal activities – i.e. those in which entrepreneurs and households, finding themselves in

certain legal circumstances, fail to fulfill their obligations imposed by the legislator in a reliable manner, thus eliminating or reducing the value of the tax liability. Tax evasion may consist in failure to disclose taxable income or disclosure of transactions. It can also consist in failure to complete a tax return or a fictitious transaction. Ultimately, tax evasion may take the form of a reduction in the amount payable by making false declarations. Various definitions of tax evasion can be found in the literature. For example, according to one of them [...] "tax evasion consists in taking actions prohibited by tax law, and leading to the minimization of tax liabilities or their complete elimination. Each case is an illegal, illegal activity (...)" [Gomułowicz 2004: 251]. Another definition indicates that "(...) Tax evasion is also defined as failure to disclose to the tax authority the factual or legal status with which the tax obligation is related, or by providing false facts (...)" [Bernal 2008; 46]. There is a distinction in European Union legislation between tax evasion and tax avoidance. Pursuant to Directive 2011/16/EU, the essence of tax evasion consists in deliberately not disclosing to the fiscal administration the actual state of affairs with which the tax obligation is related, or in deliberately disclosing untruths. Taking into account the above views on the definition of tax evasion, I agree that it is possible to distinguish between intentional and unintentional forms of tax evasion. The basis for the distinction between intentional and unintentional tax evasion there are different reasons for this. In the event of inadvertent action, the taxpayer has no intention of committing the prohibited act. Tax evasion in such a situation can occur where the taxpayer can be attributed recklessness or carelessness.

The concept of tax optimization is often equated with the phenomenon of tax avoidance.

Optimization is part of the tax planning process, because as a result of optimization activities based on economic assumptions and profitability assessment, the greatest profitability is achieved in planning with predetermined assumptions [Erdos 2010: 63]. The genesis of the term tax optimization is a product of the colloquial language used by tax advisors who offer their clients various methods of reducing the tax base [Ladziński 2008: 18]. It should be emphasized that this concept is used in economic turnover in an intuitive way, without an in-depth analysis of its essential subject-object elements. In a common sense, one can come across phrases in which the author of the statement points out that "optimization, in his opinion, is looking for legal loopholes in tax law that allow not paying taxes" or "tax optimization is using a company from tax havens to reduce taxation". Tax optimization, the aim of which is to minimize the amount of tax paid within the framework and limits of the applicable regulations, is a legal activity [Brzeziński 2003: 91].

On the other hand, tax optimization is an activity of the taxpayer aimed at reducing fiscal burdens within the framework and limits of the applicable regulations, which, although not met

with a favorable reaction from the tax administration, is accepted by it [Brzeziński 2003: 50]. In order to correctly illustrate the difference between tax optimization and tax evasion, based on the above example, it should be pointed out that tax evasion should not be equated with tax optimization, which is a legal activity of a taxpayer aimed at bearing the lowest possible tax burden. Tax optimization and tax avoidance are terms used interchangeably. It should be noted that tax optimization is primarily the selection of one of several possible transactions that will be the most tax-beneficial and will allow for the achievement of the intended economic goal. Tax avoidance, on the other hand, is shaping civil law relations, the main goal of which is to achieve a tax benefit, and not to achieve a specific economic goal. With regard to tax optimization, the tax advantages only determine the manner of carrying out a specific project, but do not in any way decide about its essence. Therefore, the concept of tax optimization should be clearly distinguished from tax avoidance. It is legitimate to consider tax avoidance as an aggressive form of tax optimization that fulfills the features of tax law circumvention.

It seems necessary at this point to indicate that it is not possible to indicate a single definition of tax avoidance, consistent with the communis *opinio doctorum*, or a generally accepted model of a general clause. There are two main trends in understanding it. The former should be defined as the power of the tax authority to 'replace' transactions made by the taxpayer with other hypothetical transactions and to apply the tax effects specific to those other transactions. The second thought relating to the concept of tax avoidance is the right for the tax authority to verify the economic substance of the transaction. Then a specific interpretation of it according to the criterion economic for the purposes of tax regulations [Krever 2016: 91-92].

3. Purpose of regulation a general anti-tax avoidance clause

A general anti-avoidance clause is intended to provide for the tax authority the basis for determining the tax and legal consequences of the actual state of affairs not on the basis of its formal and legal image, but on the basis of the economic content of the events. It allows to ignore the tax consequences of the taxpayer, which are beneficial for the taxpayer activities and determine the tax consequences based on a hypothetical state of affairs indicated by the tax authority, more adequate to the economic essence of the analyzed events [Olesińska 2013: 17].

The entry into force of the provisions on counteracting tax avoidance is therefore a significant breakthrough in the Polish tax law system. Previously, every valid and effective legal act had the effect assigned to it under tax law, regardless of whether the activity was performed for the purpose of obtaining a tax benefit and whether the type of activity chosen by the taxpayer

was adequate to the economic objective pursued. This meant that the limit of taxpayers' activities aimed at obtaining tax benefits, most often called tax optimization, was the effectiveness of these activities under civil law. If the authority tax administration was not able to challenge, pursuant to the provisions of Art. 199a of the Tax Ordinance Act, the legal effect of a legal transaction made by the taxpayer, was obliged to respect the tax consequences resulting from this activity. tax administration was not able to challenge, pursuant to the provisions of Art. 199a of the Tax Ordinance Act, the legal effect of a legal transaction made by the taxpayer, was obliged to respect the tax consequences resulting from this activity. In the current legal situation, taxpayers' actions taken to achieve a tax advantage will have the intended tax effect, unless the other definition criteria of tax avoidance are met, i.e. the method of action is not considered artificial and the tax benefit obtained will not be contradictory in the circumstances of a given case with the subject and purpose of the provision of the tax act. It is important that all the above-mentioned definition criteria must be met jointly so that a specific activity of a taxpayer goes beyond the limits of the permissible tax optimization and can be classified as tax avoidance.

The provisions on counteracting tax avoidance have moved the boundary of tax optimization, undoubtedly narrowing its scope. the legislator, formulating the definition criteria of tax avoidance, which are also the premises for the application of the general anti-tax avoidance clause, set points, the connecting line of which is the boundary between tax optimization and tax avoidance. As a result, the tax and legal effectiveness of such a solution is completely wasted, because the model of the clause proposed in section IIIa of the Tax Ordinance Act assumes combating actions and facts which, from a rational point of view, have no other economic justification than tax reduction. In order to apply the clause, the following conditions must be met cumulatively: the element of "artificiality" of the taxpayer's actions and the taxpayer's intention manifested primarily in order to obtain a tax advantage. Another premise is the tax advantage, which in the given circumstances is contrary to the object and purpose of a provision of the Tax Act. A method of operating a taxpayer which, on the basis of the existing circumstances, allows [orders] to assume that it would not be used by an entity acting reasonably and guided by lawful purposes other than achieving a tax advantage contrary to the subject and purpose of a provision of the tax act [Art 119c § 1 of the Tax Ordinance Act]. Generally speaking, the condition for the application of the general clause is the behavior of the taxpayer qualified as tax avoidance. Pursuant to art. 119a of the Tax Ordinance Act. Pursuant to the tax regulation tax avoidance is behavior aimed at obtaining a tax advantage for which the following criteria are met: was the sole or main purpose of the taxpayer's activities, or is the result of an artificial way of operating. Finally is contrary to the object and purpose of the

provision of the tax act. The tax benefit is understood by the legislator as such an effect of the performed activity that leads to the failure of a tax liability, postponement of its creation, reduction of its amount, creation or overestimation of a tax loss, as well as the creation or increase of the overpayment amount (and the amount of tax refund, respectively) - Art. 119e of the Tax Ordinance Act. Undoubtedly, the legislator wanted the concept of a tax advantage to cover all situations that could make the taxpayer's situation more favorable from the point of view of the tax burden than that assumed by the legislator. It should be noted that the provisions of the Tax Ordinance Act, i.e. Article 119e of the Tax Ordinance Act no however, it defines what a tax advantage is in fact. When looking for the essence of the tax benefit, it should be noted that one of the main objectives of the introduction of anti-tax avoidance provisions, which was expressed directly in the justification of the draft act of May 13, 2016, was the protection of such constitutional values as equality and universality of taxation. This means that the main goal of the discussed regulation is that taxpayers who are in different situations, but significantly similar from the point of view of a specific provision of the tax act, pay the tax in an equal amount, even if the provision of the tax act provided for taxation of only one of them. Therefore, it should be assumed that the tax benefit is failure a tax liability, its postponement or reduction, when the taxpayer is in a [economic] situation which, from the point of view of the applicable regulations, is significantly similar to the situation in which the taxpayer would be taxed, including taxation at a higher rate.

According to Art. 119a of the Tax Ordinance Act only an activity performed primarily or exclusively for the purpose of obtaining a tax advantage may be considered as tax avoidance. This Article 119d of the Tax Ordinance Act clarifies that: "An activity is considered to be undertaken primarily for the purpose of obtaining a tax advantage, when the other economic and economic purposes of the activities indicated by the taxpayer should be considered insufficient relevany". It follows from the above that the provisions on counteracting avoidance taxation may not be applied when there is a tax benefit other than a tax benefit indicated by the taxpayer purpose of the activity performed. Also when this objective, even if it were less significant than the tax benefit itself, cannot be considered insignificant. Obviously, the general anti-avoidance clause cannot be applied all the more when the purpose of the taxpayer's activity other than a tax advantage is equal or more significant than the tax advantage itself. Article 119d of the Tax Ordinance Act speaks of "economic and economic" goals without specifying the difference between an economic goal and an economic goal. The justification of the draft act amending the Act – Tax Ordinance and some other acts implicitly shows that "economic purpose" should refer to taxpayers conducting business activity, and "economic purpose" to taxpayers who do not conduct economic activity. It seems that we can assume that

the "economic goal" is primarily a goal resulting from directing a given activity to profit (increase of revenues/reduction of costs), and therefore a goal specified in the financial dimension. not the direct financial benefits of a given activity, but the benefits of a more general nature, relating to the organization of the business activity, the taxpayer's market position or the strategy of its operation. The existence of a purpose other than a tax advantage of an activity performed by a taxpayer excludes the application of the provisions on counteracting tax avoidance, provided that this purpose cannot be regarded as "insignificant". The legislator did not define how to understand the phrase "insignificant". The regulations on counteracting tax avoidance do not contain any indication as to the perspective from which the significance of the objective of the activity should be assessed. It is indicated that the level of significance of the objective of the activity may be assessed in relation to the size of the business activity or in comparison to the value of the tax benefit obtained. Understanding the significance of the objective of the activity by referring to the size of the conducted business activity or comparing it to the value of the realized tax benefit is not sufficiently grounded in the regulations on counteracting tax avoidance.

Moreover, against this understanding of the importance of the aim of the action is supported by a number of arguments in the realities of economic trading. First of all, it should be pointed out that, as a rule, economic activity is a series of numerous activities, rarely of which, separately, can be considered important from the point of view of the size of the conducted activity. A significant change in the economic situation of an entrepreneur is usually the result of the sum of many activities. According to Art. 119c of the Tax Ordinance Act the method of operation is considered artificial, "if, on the basis of the existing circumstances, it should be assumed that it would not have been used by an entity acting reasonably and pursuing lawful objectives other than obtaining a tax advantage contrary to with the subject and purpose of the provision of the tax act. Article 119a § 2, in turn, stipulates that in relation to an activity classified as tax avoidance, the tax consequences "are determined on the basis of the state of affairs which could have arisen if an appropriate transaction had been performed". Therefore, we can assume that an artificial mode of operation, in short, means an activity [or rather its type in legal terms], which is not adequate [appropriate] to the economic goal, which the taxpayer implements by making it. First of all, it should be noted that it is not a condition for the application of Art. 119a of the Tax Ordinance Act, which results directly from the wording of Art. 119c of the Tax Ordinance Act, the artificiality of action, but the artificiality of the mode of action. The method of counteracting tax avoidance is to omit the tax effect of the activity performed by the taxpayer. The legislator distinguishes two situations in this respect: when the taxpayer acts solely for the purpose of obtaining a tax benefit and when the tax benefit is the

taxpayer's main objective. Depending on which of the above-mentioned situations we are dealing with, or the tax effect on a hypothetical actual state is determined, which would have arisen if the activity had not been performed in the case of an activity performed solely for the purpose of obtaining tax benefits or for a hypothetical state of facts, which would have occurred if the taxpayer had performed an appropriate action in the case of an action performed primarily in order to obtain a tax advantage [Art. 119a § 2 of the Tax Ordinance Act]. It should be emphasized that it is not the essence of counteracting tax avoidance to question the activities performed by the taxpayer but questioning their tax effect. Therefore, we are talking about a hypothetical factual state, and the cited provisions of Art. 119a of the Tax Ordinance Act use conditional sentences.

Polish general clause against tax avoidance from the European perspective.

As mentioned above, pursuant to Art. 11 ATAD provisions of this directive, including as regards the general clause against tax avoidance, are to be implemented in the Member States on 01/01/2019. From today's perspective, the Directive is undoubtedly a key normative model to which the applicable provisions should be compared. The Polish clause is generally in line with the EU model. Defined in art. 119a of the Tax Ordinance Act the criteria defining tax avoidance coincide with the criteria set out in Art. 6 ATAD. It is true that the Polish clause does not apply if the value of the tax benefit does not exceed PLN 100,000, and the directive does not provide for any minimum amount threshold, it is possible to conclude that the limit amount in the Polish act has been set at such a low level that, and it should be considered that the goal set by the directive is being achieved by the Polish legislator. The introduction of a general anti-tax avoidance clause radically changed the perception of the effects of linguistic interpretation of tax law. The taxpayer can no longer automatically recognize that since the provision of the tax act gives him the opportunity to reduce his tax burden, he can certainly use this option. The introduction of the clause forced also to change other regulations, for example regarding tax interpretations, and also caused the problem of the relationship between the clause and other legal regulations aimed at combating tax avoidance, such as transfer pricing regulations. The clause implements the principle of equality in the field of taxation. The negative effect of tax avoidance is not only the reduction of budget revenues, but also the disturbance of market mechanisms, because taxpayers who effectively avoid taxation thanks to tax benefits achieve - without economic justification – better economic results than those taxpayers who do not undertake such activities.

It should be noted and it should be clearly emphasized that the general clause belongs to the general tax law. It is manifested in the statement that it cannot be included in the structure of any tax. For this reason, at first glance, there is no specific derogation relationship between the

general clause and the provisions on which individual taxes are based. The tax authority, when making the inspection dimension of the tax, first verifies the correctness of this dimension in the light of the construction regulations, further initially assesses whether in the examined facts there were artificial activities leading to a tax benefit, then, after positively determining the applicability of the Anti-Optimization Clause. The application of a standard usually takes place in such a way that an adequate [appropriate] legal act is established and ultimately applies the structural provisions of a given tax, but not to the actual facts, but to the state with the relevant activity. It can therefore be concluded that the anti-optimization clause, at least in the form in force in Polish law - despite its undoubtedly substantive nature [it determines the amount of the tax liability]. Importantly, it does not interfere with the content of construction standards, but only modifies the actual state, which is then subject to the application of the standards. construction.

In these considerations, it is important to indicate the possible types of relations that may occur between the regulations in the field of counteracting tax avoidance and the provisions on transfer pricing and determining the model prices applied between related entities.

Transfer pricing, like the anti-optimization clause, counteract tax avoidance. The application of transfer pricing institutions excludes the application of the mechanisms of the anti-optimization clause to the same factual state in accordance with the principle of *lex specialis derogat legi generali*. The second relation that can occur is the situation where transfer prices, similar to the anti-optimization clause, counter tax avoidance, but the opposite is the case. The anti-optimization clause excludes the application of transfer pricing regulations to the same factual state in accordance with the principle of *lex specialis derogat legi generali*. Ultimately, a third relationship can take place, the essence of which is as follows. Transfer prices are in a special relationship with the provisions on the anti-optimization clause, which may indicate the priority of application of the former, which, however, does not completely exclude the application of anti-tax avoidance provisions, i.e. general anti-optimization clause. An approximation of the functions performed by each regulation will make it possible to state whether there are any relations between these regulations.

4. Transfer pricing regulations

Mechanisms for the application of transfer pricing between related parties increasingly they are more often used for tax optimization as well as for avoidance taxation. Functions of transfer pricing regulations can be defined as below.

Contrary to the general anti-abusive clause, the concept of transfer pricing can be understood as universality by referring to the OECD guidelines on transfer pricing for multinational enterprises and tax administrations (hereinafter: OECD 2010 guidelines and OECD 2017 guidelines). Income of multinational enterprises is taxed – with respect to intra-group transactions - using the separate unit method. In other words, a transaction with a group entity is in principle - from the point of view of the tax consequences - taxed in the same way as a transaction with an entity outside the group. Transfer prices are the prices at which a company transfers goods and intangible goods or provides services to related companies. The OECD guidelines emphasize that it should not be automatically assumed that related entities are trying to manipulate their profits, and "the need to adjust transfer prices in accordance with the principle of free competition. arises irrespective of any contractual obligation by the parties to pay a special price or any intention of the parties to minimize the tax. When comparing the An anti-optimization clause with a transfer pricing institution is necessary to indicate that The function of the anti-optimization clause is only to counteract tax avoidance, therefore the condition for the application of this concept is the statement that the taxpayer has taken certain actions mainly or exclusively to obtain a tax benefit.

What needs to be emphasized, neither the general concept of transfer pricing, nor its normative expression in Polish law assume that the condition for its application is the avoidance or any other form of deliberate minimization of the tax burden. The conclusion of the above is the statement that the purpose of related entities when determining the transfer price is not significant. The key is only to determine whether the transfer price corresponds to the arm's length principle. This distinction is essential from the point of view of indicating the mutual relations between the anti-optimization clause and the transfer pricing mechanism. These provisions should be applied on a par with other provisions regulating the structure of income tax and there are no derogation-type relations between them and the anti-optimization clause.

The personal scope of the anti-optimization clause application is universal: it can potentially apply to all transactions, while the scope of transfer pricing application is limited to transactions between related parties. From this point of view, a conflict between these standards is also not excluded.

Transfer prices are prices at which an enterprise transfers goods and intangible goods or provides services to related enterprises [Bany 2017: 17]. The commentary to the OECD model convention emphasizes that in the case of transactions concluded between related entities, it should not be assumed that these entities are trying to optimize their profits. Moreover, the need to adjust transfer prices in accordance with the principle of free competition arises regardless of the content of the contract concluded between the parties and the resulting

obligation to pay the price. As a result, an arm's length tax adjustment is not an attempt to circumvent the underlying non-taxable contractual obligation and may be needed even where the aim is not to minimize or avoid the tax. Transfer pricing control should not be confused with the control of tax fraud or tax avoidance, even if occasionally used for such purposes. The making of the determination of the transfer price should be seen primarily as an endeavor to avoid distorting national tax revenues. This principle is a corollary of the principle of free competition, whether or not the cause of this distortion is the multinational enterprise seeking to minimize the tax [the aggregate sum of taxes owed by the group in all tax jurisdictions] or not. What should be kept in mind, and it should be clearly emphasized, the profit adjustment resulting from a transaction concluded between related parties is generally identified quantitatively. It should be understood that this adjustment does not replace the essence of the transactions actually concluded with more active transactions. This was clearly expressed in the OECD 2010 guidelines: “Apart from exceptional cases, the tax administration should not ignore actual transactions or replace them with other transactions [Bany 2017: 33]. Worth emphasizing, despite the impact of the BEPS report on the OECD 2017 guidelines, which explicitly treats transfer pricing regulations as a tool against tax avoidance, the above-mentioned reservation was also included in this latest version Guidelines [OECD 2017: 78]. In addition, it is noted that related entities, precisely because of the connection, they have the possibility to enter into a much wider range of legal relationships, those that rarely or even do not occur in relationships between independent entities. This is not yet a reason to reject such transactions or replacing them with others. Especially since "the restructuring of commercial transactions would be a completely arbitrary act, creating the danger of double taxation in the event that the second tax administration does not share views on how the transaction should be structured". The provisions of the Personal Income Tax Act regulate the transfer pricing mechanism as follows If (...) the entities of the transaction are related to each other - and if, as a result of such relationships, conditions differing from those are established or imposed that would be established by independent entities and as a result the taxpayer does not show income or shows income lower than that which would be expected if the above-mentioned relations did not exist - the income of a given taxpayer and the tax due are determined without taking into account the conditions resulting from these relations (...). Such income is determined by way of estimation, using the following methods strictly defined in the act: comparable uncontrolled price, resale price, reasonable margin or - last but not least - transaction profit [Personal Income Tax Act, art. 11 § 2].

5. Key differences

The essence of the anti-optimization clause is to counteract tax avoidance practices. The condition for its application is a statement that the taxpayer has taken specific actions aimed mainly or exclusively at achieving a tax benefit.

It is indisputable that neither the general concept of transfer pricing nor its axiological expression In Polish tax legislation, they do not assume that the condition for its application is the avoidance or any other form of deliberate minimization of the tax burden. On the basis of the OECD guidelines presented above, it can be stated that the goal of related entities when determining the transfer price remains irrelevant, and the only thing that matters is whether the transfer price corresponds to the arm's length principle. This difference is apparently crucial from a theoretical point of view and should incline to an unequivocal answer to the question about the relationship between the anti-optimization clause and the provisions on transfer pricing. The regulations of the Polish anti-optimization clause undoubtedly mention the provisions on transfer pricing among the special regulations preventing tax avoidance, which may conflict with the anti-optimization clause: When regulating the general anti-tax avoidance clause, the existing in the current legal system, specific legal norms constituting the basis for modification of the tax liability in connection with the change in the structure of economic events between entities. Such special standards there are provisions of the income tax acts which regulate the arm's length principle. The application of the arm's length principle applies to evidence proceedings and allows for taxation of the so-called "Potential earnings" where the terms agreed or imposed between the related parties differ from those agreed between the independent parties. The arm's length principle should be separated from the norms regulating the general clause in order to avoid possible doubts and conflicts in the application of these standards.

6. Conclusion

The conclusion of the above is the statement that currently the regulations on transfer pricing define their function by counteracting tax avoidance, but understood differently than for the purposes of the anti-optimization clause. The essence of counteracting is understood as making transactions between related entities in violation of the arm's length principle. Bearing in mind the function of both mechanisms, it should be noted that the subjective scope of the application of the anti-optimization clause is universal. Potentially, in accordance with the provisions of the regulation, it may be applied to all transactions aimed at tax avoidance. The scope of application of transfer pricing is limited to transactions between related entities. From this point of view, a

conflict between these standards is also not excluded.As a result of the application of the disposition of the anti-optimization clause, it is - in terms of the facts - replacing the actual event [activity] with another event hypothetical, which in the opinion of the tax authority is more adequate to the achieved economic results than the actual event. A kind of reclassification of a legal transaction takes place, the civil law consequences of which remain in force, while the tax consequences are repealed. In the case of transfer pricing, the OECD guidelines clearly treat the procedure of omitting the actual transaction or substitution its different as unique. It should be emphasized that while the guidelines themselves allow exceptions to this, the content of the Polish regulations does not contain any grounds to claim that they can be used for such "transaction restructuring" The disposition of Polish TP standards is clear: as a result of their application, the revenue from the transaction is estimated, and not the transaction as such is questioned.

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