Submitted: August 21st, 2023
Reviews completed: October 2nd, 2023
Published: October 23rd, 2023

Financial Law Review

No. 31 (3)/2023

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

ANNA DRYWA*

THE TAXPAYER'S RIGHT TO PRIVACY IN CONTEXT OF THE ARTICLE 48 OF THE POLISH ACT ON NATIONAL REVENUE ADMINISTRATION (KAS)[1]

Abstract

The considerations concern a problem that is rarely raised on the basis of tax issues, namely the taxpayer's right to privacy. They are carried out in the context of one of the legal regulations which has a significant impact on the development of the protection of the privacy of the taxpayer. It should be noted that the changes to tax rules introduced in the last decade clearly indicate that the tax legislator shifts the boundaries of the taxpayer's inviolable privacy sphere.

In the first part, an theoretical understanding of the notion of taxpayer's privacy will be considered. The considerations will serve as a starting point for the second part of the discussion, which focuses on the taxpayer's right to privacy by exploring normative basis for protection of taxpayer's privacy. The following third part addresses how specific tax rules affect the development of the protected and inviolable sphere of the privacy of a taxpayer. The study carried out leads inter alia to conclusion that the current status of the taxpayer's right to privacy seems questionable and not spotted enough, as the legislator invasions the private sphere of taxpayers using a number of tools to this end. The author therefore argues that the strengthening and updating the taxpayer's right to privacy protection is necessary.

Key words: tax, taxpayer, Taxpayer's rights, privacy, tax administration

JEL Classification: K34

* PhD, University of Gdansk, Faculty of Law and Administration, Poland, specializing in tax law, especially interested in taxpayer's rights; author of about 40 reviewed scientific outputs in the form of books, articles in journals, chapters in monographs, and conference papers.
Contact email: anna.drywa@ug.edu.pl, ORCID: 0000-0003-1830-4478.

[1] Research carried out under a research project financed by the National Science Center, No 2018/31/D/HS5/00543.

1. Introduction

The issue of the right to privacy is a subject which is widely discussed in the literature, but which is almost unnoticed under tax law. This may rise reflections on the nature of tax law, its interference and the existence of a conflict of private and public interests. This issue has many dimensions, one of which is the contradiction between the need of a taxpayer to maintain privacy and the necessity to check the proper performance of tax obligations.

At the same time, it should be noted that the subject of the taxpayer's right to privacy has not been given due attention to date. It was focused on the fight against crime and tax dishonesty and on the pursuit of fiscal efficiency. There can be no doubt that these are important objectives, but the price that all taxpayers pay for their implementation remains in the shadow. And *de facto*, the legislator introduces one after another, further tax regulations (amendments) that hit the private sphere of taxpayers. A clear example, one of the most recently introduced solutions, confirming this statement, should be the amendment to Article 48(1) of the Act on National Revenue Administration[2], which entered into force on July 1st, 2022,[3] introducing a qualitative change in the way in which financial information covered by the banking secrecy may be accessed even before the charges are made to a natural person, that is, during the *in-rem* phase. The taxpayer has a legitimate expectation, guaranteed by the Constitution of the Republic of Poland and acts of international law, that its privacy will be protected in tax matters as well, to the extent that interference in this area is not necessary in a democratic state of law.

The issue of protecting taxpayers' privacy appears to be increasingly important in the context of a changing tax reality, where the emphasis is more than ever put on protecting the fiscal interest, at the expense of limiting taxpayers' privacy, in particular by expanding their surveillance on an unprecedented scale.

The invasion of taxpayers' privacy, the use of ever-developing tools and advanced algorithms for data collection and processing, and the ever-increasing trend in the private sphere of taxpayers, rise reflection on the need to establish rules on the legal protection of taxpayers' privacy.

The article uses a dogmatic-legal research method and an analysis of the literature on the subject. This study is one in a series of publications on the taxpayer's right to privacy, and the author hopes that it will become a prelude to a broader discussion on the subject.

[2] Hereinafter referred to as KAS.
[3] Pursuant to Article 20(8) of the Act of 29 October 2021, Journal of Laws of 2021, item 2105.

In the first part of the paper, an theoretical understanding of the notion of taxpayer's privacy will be considered. The considerations will serve as a starting point for the second part of the discussion, which focuses on the taxpayer's right to privacy by exploring normative basis for protection of taxpayer's privacy. The following third part addresses how specific tax rules affect the sphere of the privacy of a taxpayer. This paper is a legal reflection on how tax law invades taxpayers' privacy, introducing legal basis for tax administration actions. The aim is to show the noticeable trend of increasing interference in the private sphere of taxpayers. The perceived invasion of taxpayers' privacy raises legitimate concerns about the direction of development of tax law adopted by the legislator. The aforementioned case of the legislative amendment to Article 48(1) of the Polish Act on National Revenue Administration (KAS Act) will be the exemplification for these theses.

The issue, that need to be proofed is that the current status of the taxpayer's right to privacy seems questionable, not spotted and not valuable enough, as the legislator invasions the private sphere of taxpayers using a number of tools to this end. The author therefore argues that the right to privacy should be renewed. Strengthening and updating the concept of the taxpayer's right to privacy protection is necessary.

2. Theoretical understanding the notion of taxpayer's privacy

First of all, it must be pointed out that the considerations relate to privacy, a phenomenon that is difficult to incorporate into a specific framework, not only terminological, but also empirical. Mr. Z. Zaleski rightly observes that the right to privacy raises more questions than gives the ready answers [Zaleski 2001: 138]. We are experiencing fundamental problems with the conceptualization of this concept because it has a complex and contentious nature, and the ontological issue raises a number of doubts[4]. In a common understanding, privacy is a term of many meanings[Posner 2008: 245], for everyone it means something different, and in addition it is dynamic, because it is affected by changes in civilization.

Although this is a phenomenon which is difficult to undergo research procedures, it is not only subject of interest for lawyers but also for sociologists, psychologists, philosophers, anthropologists, or even architects. The concepts of privacy and the right to privacy have been addressed in so many papers that they create a true patchwork of views formulated

[4] The problems with the conceptualization of the right to privacy are highlighted by a number of researchers dealing with this issue. See e.g. [Parent 1983: 341; Solve 2009: 1-2].

in different circumstances and over a broad timeframe, as well as from different perspectives[5]. However, there is no definition of privacy that would gain acceptance of the majority of the community. On the contrary, the debate on the understanding, meaning, ontology and even the axiology of the term "privacy" is very lively [Drywa 2022: 5-9 and cited literature there]. There are numerous and hot disputes over its understanding.

It all started with Warren and Brandeis article, who were the first to formulate a coherent concept of the right to privacy, seeing privacy as a value that requires legal protection. They understood it as the general right of an individual to be left to himself "the right to be let alone" [Warren, Brandeis 1890, reprinted: 7]. Since then, discussions have taken place on how to understand privacy (especially in philosophy, sociology and psychology) and the right to privacy (in legal sciences and case law). Their merits cannot be overestimated. However, although their understanding of the right to privacy was novel and, at the same time, clear and illustrative, and was particularly concise in this respect, its meaning is too broad and unlimited, in order to be used in law without correction[6]. It must be recognized that the phrase "the right to be let alone" reflects the essence of the right to privacy, although it does not allow to set precise boundaries.

The conceptual chaos that has grown up for more than 130 years is, among other things, used as an argument by opponents of the concept of the right to privacy, who indicates that in principle it is not known how the right to privacy is understood and how to fill it with content. However, I believe that the need to preserve privacy lies at the very heart of the right to individual freedom and autonomy. It is the core of human rights and, in itself, it represents humanism.

When it comes to privacy, it is a good starting point to say that this concept is intrinsically linked to the element of decision-making and autonomy. To this end, it should be noted that an individual develops a specific strategy not to disclose information, activities or experiences, or regulation of access to its space, so that the sphere is closely linked to secrecy or discretion, but does not fully comply with it. In turn, privacy is lost when the limits set by an individual governing the degree of admissibility of knowing its personal affairs, or the information concerning it, are not respected [Parent 1983: 306]. Privacy is, therefore, a decision about all aspects of one person's life [Sakowicz 2006: 22][7]. The purpose of the right to privacy is to protect the individual from unwanted and/or excessive

[5] Comparisons of the concepts of the right to privacy have been made several times by researchers, see e.g. [Kahn 2003: 374-409; Post 2001: 2087-2098; Solove 2002: 1099-1126].
[6] See comments in this respect by [Gavison 1980: 437-438; Thomson 1975: 295; Henkin 1974: 1426].
[7] Cited after [Szyszkowski 1979: 226].

interference by third parties.

From the multi-dimensional debate on the understanding of privacy, I believe that the particular attention should be paid to broad, comprehensive, three-element concepts, such as the one presented by Ruth Gavison [Gavison 1980: 437-438], for who privacy, means limited individual's availability to others. In her approach, the right to privacy governs the extent to which we are known to others, the extent to which others have physical access to us and the extent to which others are interested in us [Gavison 1980: 423]. Ruth Gavison rightly notes that we can lose privacy by becoming an object of interest, even if no new information is generated as a result of this action, and regardless of whether the interest is aware and intentional or unintentional [Gavison 1980: 429-430]. She lists three privacy building blocks: „secrecy" means a resource of information about an individual that have other persons; „anonymity" i.e. interest of an individual by others and „solitude", understood as a matter of physical access to an individual. A similar approach to privacy is presented by Judith Wagner DeCew It adopts a broad understanding of the concept of privacy and sees it as a specific umbrella covering various interests [DeCew 1986: 145].
The concepts adopted by Gavison and DeCew appear, in their core part, to be consistent, coherent and useful in law [Drywa 2022: 9-12]. I fully share the view of the validity of a broad view of privacy. The concept should be built on three aspects of privacy, which, in my view, form a comprehensive view of privacy. Privacy can therefore be assumed to be an area of physical and mental unavailability, where an individual decides on the possibilities, form and extent of access to it. Then, the expression of such a privacy will take three dimensions: relational (regulating social contacts; determining the nature and type of relationships), informational (determining the nature and resources of the information provided; the ability of an individual to control the information relating to it) and physical (physical availability to the person and its personal space) [Dopierała 2013: 22-29]. It is therefore a combination of these three aspects. They shall form a coherent whole. Since privacy is complex, the concept cannot be crammed into a too narrow theory (definition).
One of the most important dimensions of the taxpayer's privacy is the concern for information collected by the authorities and the regulation of the flow of information [Zaleski 2001: 107 for: Traver 1984: 635-644]. The second important area of protection of the privacy of a taxpayer is protection against the unlawful behaviour of authorities, for example, in carrying out activities involving a taxpayer's own or used properties. Protection of privacy is manifested in limitation of access to individual, its mental status and information on it [Motyka 2001: 38]. It is an individual that decides to disclose information

or establish relationships. It should be noted that in tax matters, this role was taken over by the legislator, introducing limits for possible interference in the private sphere of taxpayers. This is justified by an important public interest - by the need to ensure the financial stability of the State and, indirectly, by the security of the State. It is important to consider whether the legislator is properly building these barriers and placing them in the right places. Is it necessary in a democratic state of law, or only convenient for tax authorities, whenever the legislator shifts the limit of interference in the private sphere of taxpayers, because it makes it easier to carry out its activities?

3. Normative basis for protection of taxpayer's privacy

Privacy is, in the field of taxation, a secondary (derivative) object of interference in the sphere of individual freedom. The various legal and tax regulations related primarily to the procedure of tax assessment and control of the fulfillment of tax obligations simultaneously result in an invasion of the taxpayer's privacy. Taxation is an interference with subjective rights, primarily the right to property, but with the increase in the level of complexity of regulations, and the technological revolution, almost equally intensely with the taxpayer's right to privacy. Invasion of privacy is inherent in the tax problem. It takes on many dimensions. In connection with the implementation of tax laws, the taxpayer's private sphere is interfered with. Therefore, it becomes important to establish the normative basis of the taxpayer's right to privacy.

The protection of taxpayers' privacy requires, on the one hand, that the existing legal provisions enable them to the fullest extent possible, to maintain anonymity, solitude and disposal concerning information about themselves, and that reasonable and balanced conditions be laid down for permitted outside interference in these areas; on the other hand, it is about the way in which tax authorities act, which must not allow undue violations of the privacy of a taxpayer.

The right to privacy is also the product (invention) of the legal system. This has specific consequences, and at the same time means that the conceptual scope does not necessarily coincide with the concept of privacy developed on the basis of psychology, sociology or philosophy. The right to privacy refers to those privacy situations that will be provided with legal protection in a positive or negative manner. However, there are still problems with the interpretation and application of privacy enhancing standards.

The right to privacy is a fundamental human right, guaranteed by the international system for the protection of human rights and by regional systems for the protection of human

rights. It was introduced inter alia to the Universal Declaration of Human Rights of 1948[8], the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[9], the International Covenant on Civil and Political Rights of 1966[10] and to the Charter of Fundamental Rights of the European Union[11]. However, these regulations are very general, so there are still clear differences, even between European countries, as to what we should qualify for in the private sphere [Leith 2006: 11; Westin 1967: 29-32].

In the Polish legal order, the issue of the right to privacy has been regulated primarily in Articles 47 and 51 of the Constitution. By the constitutional law interference with a legally established range of human life is prohibited. The constitutional rules in Article 47 establishing the legal protection of private and family life, honor, good name and the right to decide on personal life are commonly referred to as the "right to privacy" [TK[12], SK 19/17]. However, the protection of privacy is not limited by the legislator to the general standard resulting from Article 47 of the Constitution, since certain aspects of it have been isolated, defined and are the subject of further constitutional provisions [Safjan 2007: 126]. The right to privacy includes inter alia freedom and confidentiality of communication (Article 49 of the Constitution) and information autonomy (Article 51 of the Constitution).

At the same time, it should be noted that defining the subjective scope of the right to privacy should only seemingly cause little dispute. The right to privacy as a human right, at the root of which is dignity, is vested in human individuals. However, in the field of tax law, a very clear problem of subjectivity is revealed, because we need to connect the idea of privacy not only with taxpayers - individuals but also taxpayers - legal entities. Transferring the concept of human rights and freedoms to legal entities, understandably, raises doubts. While the general basis for the right to privacy is included in acts of international law and the Constitution, as human rights, at the same time none of the

[8] The Declaration was proposed by the United Nations General Assembly in Paris on 10 December 1948. Article 12 states that “No one shall be taken to arbitrary interference with his privacy, family, home or respondent, nor to deals upon his honor and repudiation. Every has the right to the protection of the law against interference or attacks.”

[9] Article 8 States that 1. Everyone has the right for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.“

[10] Article 17 states that 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.“

[11] Article 7 States that “Everyone has the right to respect for his or her private and family life, home and communications.”

[12] Hereinafter “TK” stands for the Constitutional Tribunal.

norms of tax law establishes a general right to privacy for the taxpayer. Tax legislation introducing a taxpayer's right to privacy would remove doubt about the subjective scope of the right, as it would apply to all taxpayers. In contrast, specific instruments are introduced into tax laws to protect certain aspects of the taxpayer's right to privacy, a typical example being tax secrecy.

The literature has indicated for more than 50 years that the subject of the right to privacy can also be collective entities - families, groups or organizations, although this is not a unified view [Westin 1967: 7; Chrabonszczewski 2012: 20 and 30]. It should also be added that legal entities are entitled to personal property which, while not serving to protect such inherent values as life or dignity, is intended to enable them to function properly in accordance with the scope of their activities [SN, I CSK 294/18]. The scope and content of the personal assets of legal entities determines the scope and purposes of functioning in legal transactions. This is because the constitutional guarantee granted to the property rights of legal entities actually means strengthening the protection of the property of shareholders, and therefore - in the final analysis - serves individuals [TK, SK 12/98]. An analogous situation applies to the protection of the privacy of legal entities. Moreover, according to established case law, the need for protection against arbitrary or disproportionate intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, is recognised as a general principle of law of the European Union [CJEU, T-325/16: 34; CJEU, T-401/13: 83 and the case-law cited]. The possibility of extending the subjective side of human rights to entities other than human beings is no longer seen as a controversial issue, because the literature and case law have generally resolved it positively [Jagielski 2015: 147].

It is impossible to determine the exact course of the borderline between what is part of the sphere of privacy and what is not. The boundary is not rigid and unchangeable. This makes it very difficult to consider the taxpayer's privacy. This fact makes it necessary to consider the circumstances of each case in order to determine whether the taxpayer's privacy has been violated.

In a democratic state, the matter of taxation cannot be treated solely through the prism of the fiscal function. In the essence of the tax-legal relationship externalized problems involving two opposing interests, that is, the public interest and the private interest. The nature of tax law boils down to the fact that the public interest takes priority and dominates over the interests of the individual. The taxpayer's rights, in turn, limit the state's taxing authority and allow a relative balance to be struck between the state's

financial needs and the rights of the individual [Nykiel, Sęk 2022: 13]. An important issue, therefore, is to balance both interests and build a correct relationship between them. On the one hand the set of legal instruments that make up the taxpayer's rights provide effective guarantees to protect the interests of the individual [Gomułowicz 2005: 81]. On the other hand, however, taxpayers' rights, such as the right to privacy must be subject to restrictions, is not an absolute right.

Each act of international law that establishes the right to privacy directs signatory states to take effective measures to ensure that an individual's private sphere is duly protected, and any restrictions on this right must be specifically set forth in the law. They introduce these conditions of sufficient justification for interference with the right to privacy.

The same is in domestic law, as constitutional legislator stands that the right to privacy is not an absolute right and is subject to limitations[13]. The constitutional legislator, guided by the protection of the common good, introduces conditions for permissible interference with individual privacy. It should be noted that the legislator is limited to a certain extent, because for its legality these restrictions should bear the hallmarks of necessity in a democratic state under the rule of law. The constitutional legislator has built a framework of privacy that will enjoy legal protection. At the same time, he introduced the possibility and principles of interference with it in Article 31(3) of the Constitution, according to which limitations on the exercise of constitutional freedoms and rights may be established only by law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, health and public morals, or the freedoms and rights of others, while these limitations may not violate the essence of freedoms and rights.

The Constitutional Court, pointed out that the existence of a legal norm in Article 51(2) of the Constitution, from which the order of proportionality in the encroachment on the privacy of the individual is related to the need to determine whether the acquisition of information was necessary or merely "convenient" or "useful" to the authorities [TK, 41/02]. According to the principle of proportionality, the restriction of the taxpayer's right to privacy must be characterized by the adequacy of the purpose and the means used to achieve it, so the means adopted must allow the effective achievement of the objectives pursued, and at the same time be the least burdensome for the subjects to whom they are

[13] With regard to the right to respect for private life and protection of personal data, the CJEU judgment of July 16, 2020 r., Facebook Ireland and Schrems, C-311/18, EU:C:2020:559, p. 172; CJEU judgment of October 6, 2020, Joined Cases C-245/19 and C-246/19 and cited there judgments.

applied, or annoying to an extent no greater than is necessary to achieve the objective pursued [TK, K 21/96; TK, SK 2/10; TK, Kp 10/09; TK, P 11/10; TK, K 14/11; TK, P 24/12].

The legal standards governing the right to privacy are not of a close nature and moreover are characterized by a specific, non-prescriptive space that allows regulation to be adapted to current challenges and threats [Ferenc-Kopeć 2014: 131]. I see this characteristic as an advantage, because regulations cannot be interpreted and applied in a vacuum, in isolation from the facts and the surrounding reality [ECHR[14], Loizidou v. Turkey, 15318/89: §43]. The right to privacy should reflect the present, which means in principle its continuous re-definition in such a way as to respond to social conditions and expectations. A dynamic (renewable) view of privacy laws therefore seems justified[15]. This flexible approach to the right to privacy enables the current economic, cultural or social context to be taken into account and simultaneously setting the standard of protection. This comment seems to be particularly important under tax law and the trend in many countries to change assumptions and concepts of the tax law. The legislator introduces ineffective instruments to protect taxpayers' privacy and, at the same time, invade taxpayers' private sphere by establishing a broad basis for interference.

The right to privacy under tax law can be reduced to a series of regulations, procedural in nature, which to a certain (limited) extent result in the protection of the taxpayer's privacy. It is noticeable that none of the legal rules in force directly introduces the taxpayer's general right to privacy. Such a standard would give due importance to the need to protect the privacy of taxpayers. It can be said that it would be a specific principle of regulation for the construction and management of relations between an individual and the authority (tax authority) [Kahn 2003: 372]. The lack of such a general standard in tax law should be critically assessed. However, in particular, the general part of tax law has rules that applies to and regulate this matter in a positive way, i.e. by granting taxpayers a certain degree of protection of their privacy. It should be pointed out here that the main institution in this area is tax secrecy, whose main purpose is to prevent the sharing of collected tax information to any third parties. A similar function is the general principle of tax proceeding, whereby tax proceeding is open only to the parties. In addition, a specific instrument of formal restriction for tax authorities to interfere with the privacy of a taxpayer is introduced by legislator in Article 45 of the KAS Act, according to which the KAS authorities may collect and use information, including personal data from legal

[14] Hereinafter "ECHR" stands for the European Court of Human Rights

[15] The advantages and importance of the dynamic (renewable) meaning of the concept of the right to privacy can be seen in particular after an inspiring reading of "Odnawianie znaczeń" (Redefinition of Meanings"). See [Janion 1980: 5] and others.

persons, entities without legal personality and natural persons carrying on an economic activity, on events having a direct impact on the creation or amount of the tax liability or customs duty and process them.

4. The trend to reduce the extent of the taxpayer's inviolable privacy

The changes to tax rules introduced in the last decade clearly indicate that the tax legislator shifts the boundaries of the taxpayer's inviolable privacy sphere. A number of polish legal regulations (e.g. the introduction of the so-called JPK which is an implementation of SAF-T reporting format, online cash registers, cross-border information exchange, so-called STIR which is IT system of the Clearing House, exit tax and reporting of tax schemes) have gradually resulted in an extension of the scope of permissible interference with the private sphere of taxpayers. The tendency of the tax legislator to broaden the scope of interference with taxpayers' privacy shall be no longer unnoticed [Drywa 2022: 47-53]. The legislator introduces a number of provisions (amendments) which allow for interference in the private sphere of taxpayers to a certain extent. An only one example is the new wording of Article 48(1) of the KAS Act, which is an example illustrating shifting the border. It gives in fact, the tax authorities involved in criminal or tax offense proceedings, unrestricted access to information covered by the banking secrecy. The provisions of Article 49(2) in conjunction with Article 48(1)(1) of the KAS constitute an independent and autonomous legal basis for obtaining relevant information from banks. Thus, the tax authority, when making an appropriate request on the basis of the indicated provisions of the KAS, does not need to first ask a party to the tax proceedings for the provision of relevant information by it or to authorize the tax authority to request financial institutions to provide such information [WSA, I Sa/Go 212/20]. While the legislator introduces a few formal restrictions, they are apparent in nature. Authorities have easy access, for example, to information on turnover and balance of bank accounts, including the dates and amounts of individual receipts or charges even if the individual has not been formally considered suspicious.

The purpose of Article 48 of the KAS Act is clear; it constitutes an authorization for the tax authorities: Head of the National Revenue Administration, Chief of the Customs and Tax Office and Chief of the Tax Office to receive the financial information necessary to carry out the activities to determine whether the offense has been committed. It is therefore an instrument to obtain the financial information that the authority needs. It thus constitutes

an authorization for the tax authorities to intervene in the private sphere, to obtain financial information without the consent of the person concerned[16].

It is noticeable that the request may relate to two situations, firstly it may be linked to the preparatory proceedings already initiated and, secondly, to the explanatory activities. While the first of these cases is not of major concern, since this is a formal phase, the already justified doubts may arise from the second phase, i.e. the simultaneous authorization of tax authorities to access a wide range of financial information when investigations are carried out, the idea of which is "to orient" whether there are grounds for requesting and collecting data for drawing up the application to penalize and gathering data to prepare a request [Code of Conduct on Offenses: Chapter VII]. At the same time, it is important to bear in mind that the conduct being criminalized is obviously prohibited and socially harmful, but the extent of the damage of petty offences is significantly lower than offenses which are socially dangerous. Petty offences are relatively minor breaches, and the legislator has the same conditions and gives access to the same broad range of financial information in both situations. It is surprising that the legislator does not differentiate the conditions of access or the range of information that can be obtained. The conclusion is that the tax legislator allows tax authorities to have very wide access to financial information, making it much more easy for tax authorities to obtain information than to meet the legitimate expectation of protecting the privacy of taxpayers, especially in situations where the person is not in a suspicious status or is subject to the petty offence procedure.

However, we consider that tax authorities obtain this information inter alia from banks[17], that is to say, from institutions of particular trust, on which there is a strong conviction in the social opinion that banking secrecy will be maintained. It is also right and justified. The issue of requiring banks to provide banking-confidential information is regulated by Article 105 of the Banking Act. This provision introduces, inter alia, an obligation to disclose banking secrecy at the request of the Chief of the National Revenue Administration, the Chief of the Customs and Tax Office or the Chief of the Tax Office [Banking Act: Art. 105(2)(e)]. However, as provided for in the first, second and third indents of Article

[16] It should be noted that the legal regulation in this form was in force not only before the July 2022 amendment, but also regulations with analogous content were in force in the repealed Fiscal Control Act (article 33) of 28 September 1991, and the Customs Service Act (article 75) of 27 August 2009.

[17] The Head of the National Revenue Administration, the Head of the Customs and Tax Office or the Head of the Tax Office are entitled to request information from banks and credit unions, as well as from brokerage firms, investment fund associations, insurance companies, payment service providers.

105(1)(2)(e), banks are required to disclose information covered by banking secrecy but in the case when criminal proceedings or proceedings for fiscal offenses are ongoing. It should be concluded that the Banking Act does not impose an obligation on banks to disclose information that constitutes a tax secret in the event that the request is made in connection with pending prosecution for misdemeanor or fiscal misdemeanor. It should be therefore note the contradiction that exists between the provisions in Article 105, paragraph 1, item. 2(e) first indent and Article 105(1) pt. 2(e) second indent of the Banking Act and the provision in Article 48(1) of the KAS.

The provision provides for a relatively weak mechanism limiting the scope of the request. The tax authority making the request shall decide on the extent to which access to tax information is requested, assessing only whether there is a link with the preparatory or clarification proceedings initiated and whether the proceedings are being conducted in connection with acts committed in the field of the activity of a natural person, a legal person or an organizational unit that does not have legal personality. It should be noted that at the same time the legislator does not introduce any control mechanisms as to the extent of the request made. The tax authority shall determine the existence of such links between the financial information requested for a specific subject (range and type) and the scope of the activities. No model has been introduced to control the validity of a request, either by a court or even by a second instance body (re-examination). This remark is particularly important in view of the amendment that has been made to the provision and which significantly extends the personal scope of the request.

In view of the subject under consideration of the taxpayer's right to privacy, it is essential to recognize whether the amendment made to the provision of Article 48(1) of the KAS Act, as in force since 1 July 2022, provides that the request for certain financial information may concern a natural person or a legal person or an organizational entity that has no legal personality. In the previous versions of the regulation, the request could include financial information on natural persons who have the status of suspect. We see a qualitative change in the new version of the regulation. The power of the tax authorities has been significantly enhanced by the revision of the rules. The request to provide financial information need not concern a subject that is in a suspicious status. That is, it may take place before a provision is made for a statement of the charges to the person concerned. Thus, even in the *in rem* phase, the tax authority may request the information constituting a banking secret be made available. This must be critically assessed as being too far interfering with the privacy of the individual.

5. Conclusions

The right to privacy is deeply anchored in the Constitution and in international law, and these are the main legal basis of protecting the taxpayer's privacy. However this taxpayer's right might be restricted according to legal provisions. But it seems that legislator constantly broaden the scope of interference taxpayer's privacy. An example of this is the nature of the amendment made to Article 48 of the KAS Act. More importantly, the tax legislator more boldly enters into the privacy of taxpayers, because the narrative which emphasizes this necessity, which is reinforced by arguments on preventing bad tax practices and tax crime, is effective and seems to function perfectly. Surprisingly, taxpayers are not seeking to maintain their current privacy. It should be postulated for the widest possible range of private spheres to be protected. It is too early to write down the right to privacy for losses. It is necessary to seek to renew its value. Strengthening and updating the taxpayer's right to privacy protection is necessary.

Above analysed example leading to an invasion of the private sphere of taxpayers is only one which illustrates, a conflict of interest between the parties and a predominance of the public interest over private interests is reflected. Unfortunately, in Polish (or even European) legal culture, or public legal awareness, the need to protect privacy in relations between individuals and authorities has not been expanded in an expected way.

It is clear that the tax authorities must have adequate access to information so that tax settlements can be verified. Without undermining the need for tax authorities to have access to the necessary information, it should be noted that depending on the shape of the tax system and specific tax regulations, the amount of this information, the size of the resource to which tax authorities have access will vary. The current status of the taxpayer's right to privacy seems questionable, not spotted and not valuable enough, as the legislator invasions more broadly the private sphere of taxpayers. A scientific article is a good tool to draw attention to this.

References

Chrabonszczewski M.: Prywatność. Teoria i praktyka [Privacy. Theory and practice], Warszawa: Aspra, 2012.

DeCew, J.W.: The Scope of Privacy in Law and Ethics, Law and Philoshopia, vol. 5, No 2, 1986.

Dopierała, R.: Prywatność w perspektywie zmiany społecznej [Privacy in the perspective of social change], Nomos: Kraków 2013.

Drywa, A.: In Search for Useful Understanding the term „Privacy" in Tax Matters, Financial Law Review, No 27(3), 2022.

Drywa, A.: Taxpayer's Right to Privacy?, Intertax, vol. 50, Issue 1, 2022.

Ferenc-Kopeć, D.: Definicje legalne w dokumentach międzynarodowej ochrony praw człowieka [Legal definitions in international human rights instruments] (in:) Król, M., Bartczak, A., Zalewska, M. (eds.): Integracja zewnętrzna i wewnętrzna nauk prawnych [External and internal integration of the legal sciences], part 2, Łódź: Wydawnictwo Uniwersytetu Łódzkiego [Łódź University Press], 2014.

Jagielski M.: Podmioty w prawach człowieka [Subjects in human rights] (in:) Bielska-Brodziak A. (ed.): O czym mówią prawnicy, mówiąc o podmiotowości [What lawyers are talking about when they talk about subjectivity], Katowice: Wydawnictwo Uniwersytetu Śląskiego [Śląsk University Press], 2015.

Gavison, R.: Privacy and the Limits of Law, The Yale Law Journal, vol. 89, No 3, 1980.

Gomułowicz A.: Podatnik a państwo [Taxpayer vs. state] (in:) H. Dzwonkowski (ed.): Procedury podatkowe – gwarancje procesowe czy instrument fiskalizmu? [Tax procedures - procedural guarantees or an instrument of fiscalism?], Warszawa: C. H. Beck, 2005.

Henkin, L.: Privacy and Authonomy, Columbia Law Review, vol. 74, No 8, 1974.

Janion, M.: Odnawianie znaczeń [Redefinition of Meanings], Kraków: Wydawnictwo Literackie, 1980.

Kahn, J.: Privacy as a Legal Principle of Identity Maintenance, Seton Hall Law Review, vol. 33, 2003.

Leith, P.: The Socio-Legal Context of Privacy, International Journal of Law in Context, No 2, 2006.

Motyka, K.: Spory wokół prawa do prywatności – na przykładzie Stanów Zjednoczonych [Disputes over the right to privacy - an example from the United States] (in) Motyka, K. (ed.): Prawo do prywatności. Aspekty prawne i psychologiczne [Right to Privacy. Legal and psychological aspects], Lublin: Morpol, 2001.

Nykiel W., Sęk M.: Karta praw podatnika. Nowy instrument ochrony praw polskiego podatnika [Taxpayer Bill of Rights. A new instrument to protect the rights of the Polish taxpayer], Łódź: Wydawnictwo Uniwersytetu Łódzkiego [Łódź University Press], 2022

Parent, W.A.: A New Definition of Privacy for the Law, Law and Philosophy, No 2, 1983.

Parent, W.A.: Recent Work on the Concept of Privacy, American Philosophical Quaterly, vol 20, No 4., 1983.

Posner, R.A.: Privacy, Surveillance, and Law, Chicago: The University of Chicago Law Review, No 75, 2008.

Post, R.C.: Three Concepts of Privacy, The Georgetown Law Journal, No 89 (6), 2001.

Safjan, M.: Wyzwania dla państwa prawa [Challenges for the state under the rule of law], Warszawa: Wolters Kluwer, 2007.

Sakowicz, A.: Prywatność jako samoistne dobro prawne (per se) [Privacy as a self-contained legal good], Państwo i Prawo, No 1, 2006.

Solove, D.J.: Understanding Privacy, Cambridge-London 2009.

Solove, D.J.: Conceptualizing Privacy, California Law Review, vol 1087, No 90, 2002.

Szyszkowski, W.: Prywatność w Stanach Zjednoczonych, jej ochrona i realizacja (in) Góralski, W. (ed.): Prawa i wolności obywatelskie w państwach kapitalistycznych, Warszawa 1979.

Thomson, J.J.: The Right to Privacy, Philosophy & Public Affairs, Vol. 4, No 4, 1975.

Warren, S.D., Brandeis, L.D.: The Right to Privacy, Harvard Law Review, vol. 4, No 5, reprinted: Ex Libris Leopold Classic Library, 1890.

Westin, A.F.: Privacy and Freedom, New York 1967.

Zaleski, Z.: Prawa do prywatności - aspekty psychologiczne (in:) Motyka, K. (ed.): Prawo do prywatności. Aspekty prawne i psychologiczne [Right to Privacy. Legal and psychological aspects], Lublin: Morpol, 2001.

Legal Acts

Act of 10 December 1948, Universal Declaration of Human Rights.
Act of 1950 the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws of 1993, No 61, item 284).
Act of 1966 the International Covenant on Civil and Political Rights, (Journal of Laws of 1977, No 38, item 167).
Act of 7 December 2000, the Charter of Fundamental Rights of the European Union (Journal of Laws EC 202 of 2016, p. 389).
Act of 20 May 1971, Code of Conduct on offenses (Journal of Laws of 2022, item 2151).
Act of 28 September 1991, Fiscal Control (Journal of Laws of 2016, item 720), repealed.
Act of 29 August 1997 Banking Law (Journal of Laws of 2021, item 2439).
Act of 27 August 2009, Customs Service (Journal of Laws of 2016, item 1799), repealed.
Act of 16 November 2016 on National Revenue Administration (Journal of Laws of 2016, item 1948).
Act of 29 October 2021, On amending the Law on Personal Income Tax, the Law on Corporate Income Tax and certain other laws (Journal of Laws of 2021, item 2105).

Court rulings

Constitutional Tribunal (TK) judgment of 24 June 1997, K 21/96.
Constitutional Tribunal (TK) judgment of 8 June 1999, SK 12/98
Constitutional Tribunal (TK) judgment of 20 November 2002, K 41/02.
Constitutional Tribunal (TK) judgment of 18 October 2011, SK 2/10.
Constitutional Tribunal (TK) judgment of 12 January 2012, Kp 10/09.
Constitutional Tribunal (TK) judgment of 15 May 2012, P 11/10.
Constitutional Tribunal (TK) judgment of 31 January 2013, K 14/11.
Constitutional Tribunal (TK) judgment of 11 February 2014 , P 24/12.
Constitutional Tribunal (TK) judgment of 19 July 2018, SK 19/17.
European Court of Human Rights (ECHR) judgment of 18 December.1996, Loizidou v. Turkey, 15318/89.
Court of Justice of the European Union (CJEU) judgment of 21 September. 1989, Hoechst, C-46/87 and 227/88.
Court of Justice of the European Union (CJEU) judgment of 22 October. 2002, Roquette Frères, C-94/00, Court of Justice of the European Union (CJEU) judgment of 17 November. 2005, Minoan Lines, C-121/04 P,
Court of Justice of the European Union (CJEU) judgment of 25 November. 2014, *Orange* v *Commission*, T-401/13
Court of Justice of the European Union (CJEU) judgment of 16 July. 2020, Facebook Ireland and Schrems, C-311/18.
Court of Justice of the European Union (CJEU) judgment of 6 October. 2020, Joined Cases C-245/19 and C-246/19.
The Supreme Court (SN) judgement of 3 October. 2019, I CSK 294/18.
Provincial Administrative Court (WSA) in Gorzów Wielkopolski judgment of 16 September. 2020, I Sa/Go 212/20.