Anna Justyńska

Anti – Tax Avoidance Measures and the Protection of Taxpayers' Rights

(Mechanizmy przeciwdziałające zjawisku unikania opodatkowania a ochrona praw podatników)

SUMMARY

Doctoral Dissertation
prepared in the Faculty of
Law and Administration of
University of Lodz
under the supervision
of dr hab. Adam Mariański,
prof. UŁa

Łódź 2023

The Ph. D. dissertation concerns the issue of tax avoidance phenomenon and legal measures aimed at countering this phenomenon developed in domestic legal systems of states throughout the world as well as on the international level. Providing the definition of tax avoidance is a difficult task, because different countries have different level of acceptance for the existence of such a phenomenon. Nevertheless, in the most general terms, tax avoidance can be defined as a phenomenon of minimizing one's tax liability in the way which is not in accordance with the existing tax policy of a given state. It means that tax avoidance can be further defined by the scope of application of different legal measures aimed at countering this phenomenon developed and binding in a given legal system. This correlation can however be valid only insofar the legal measures aimed at countering tax avoidance explicitly follow the existing tax policy of a given state. It is recognized that tax avoidance phenomenon primarily concerns income tax. Still, tax avoidance phenomenon is substantially recognized in the area of value added tax as well, albeit not as frequent as in the area of income tax.

The necessity for countering tax avoidance is currently undisputable. Tax avoidance phenomenon gives rise to a significant number of negative consequences of different kind. Catalogue of negative consequences of tax avoidance comprises of not only the decrease of national budget revenues, but also embodies the array of social or economic consequences as well as the ones concerning the influence on human rights protection, which impact the well – being of the society as a whole. Tax avoidance is therefore not perceived as a "victimless crime" and equated – in its consequences – with tax evasion.

Despite their positive influence on countering the negative consequences of tax avoidance, legal measures aimed at countering tax avoidance give rise to the number of limitations in the area of fundamental rights. The question which arises is therefore that, whether the need for countering tax avoidance can justify any restrictions, limitations or infringements of fundamental rights. In the recent years there has been a dynamic growth of activity in the area of countering tax avoidance. The increase of the number of legal measures developed to counter tax avoidance has been followed by the demands for the increase of legal measures aimed at the protection of taxpayers' rights. The study performed in the Ph. D. dissertation aimed in the first place at assessing, whether the countering of tax avoidance has to be performed within certain limits and the claims for taxpayers' rights protection have strong legal foundations and – therefore – cannot be set

aside. Legal measures aimed at countering tax avoidance should therefore be compliant with the principle of proportionality and the principle of the prohibition of excessive interference with fundamental rights.

The aim of the Ph. D. dissertation is the evaluation of the existing legal measures aimed at countering tax avoidance from the point of view of their influence on taxpayer's rights as well as drawing conclusions as to the pattern shape of these legal measures which can ensure the balance between meeting public interest – by countering tax avoidance – and the protection of taxpayers' rights. The Ph. D. dissertation is also aimed at the determination, whether it is possible to create the system of legal measures aimed at countering tax avoidance which gives better protection of taxpayers' rights than the level of protection of these rights resulting from the implementation of the legal provisions of EU law.

The Ph. D. dissertation concerns the evaluation of the existing legal measures aimed at countering tax avoidance in the area of income tax law. The high level of the prevalence of tax avoidance phenomenon in the area of income tax gives rise to the extensive system of legal measures aimed at countering it, which results in the higher level of intrusiveness in the area of taxpayers' rights.

The Ph. D. dissertation is not aimed at the detailed analysis of the principles of operation of the system of legal measures aimed at countering tax avoidance in the Polish legal system as well as internationally. Given the extensive literature in the matter the complexity of the system as well as its rules of operation are considered known to the reader. The Ph. D. dissertation attempts to develop the catalogue of model factors, which can influence the existing system of legal measure aimed at countering tax avoidance in a manner that positively influences the impact of this system on the protection of taxpayers' rights.

The abovementioned aims of the Ph. D. dissertation determined its scope. The lack of the uniform definition of tax avoidance determined the necessity for establishing its meaning. Therefore, the first chapter of the Ph. D. dissertation aims at establishing the meaning of tax avoidance for the purpose of the further study. The dynamic increase of the activity aimed at countering tax avoidance determined the need for establishing, whether such extensive activities are indeed imperative in the modern legal systems and

whether the aim of countering tax avoidance can justify any infringement in the area of taxpayers' rights. The second chapter provides the extensive analysis of tax avoidance phenomenon from the point of view of its consequences of social and economic nature, which negatively impact the well – being of the society. Tax avoidance phenomenon is also presented from the point of view of its impact on the constitutional principles aimed at securing the public interest, such as the principle of tax justice, the principle of equality as well as the principle of universality of taxation. The scope of the second chapter also comprises of the analysis of the taxpayer's right to minimize one's tax liability, which attempts to give answer to the question, whether the existence of this right may justify the unacceptability of the countering of tax avoidance. Subsequently the second chapter also covers the analysis of the system of taxpayer's rights, followed by the comprehensive analysis of the axiological basis for the existence of the legal system of taxpayers' rights.

The following four remaining chapters of the Ph. D. dissertation concern the comprehensive detailed analysis of the particular types of anti – tax avoidance measures as regards the influence of their application on the level of ensuring the protection of taxpayers' rights. These considerations also comprise the attempt to identify the catalogue of factors which provide for safeguarding the higher level of protection of taxpayers' rights in the process of countering tax avoidance.

Accordingly, the third chapter concerns the admissibility of countering tax avoidance solely by means of the methods of interpretation – specifically – purposive interpretation or economic interpretation.

The fourth chapter concerns the issue of normative anti – tax avoidance measures of general nature, in particular – general anti – avoidance rule and their impact on safeguarding taxpayers' rights. The majority of anti – avoidance measures of general nature were introduced to the Polish legal system because of the obligation resulting from the UE law. The analysis performed in the fourth chapter of the Ph. D. dissertation therefore also concerns the issue of admissibility of implementation into the domestic legal system legal anti – tax avoidance measures of general nature, which do not reflect the wording of the relevant EU law provisions. To this end, the comprehensive analysis of the jurisprudence of the Court of Justice of European Union (CJEU) as regards the principle of the prohibition of abuse of rights has been performed. Subsequently, the fourth chapter concerns the issue of the impact of the so-called uniform interpretation

strategy on the level of protection of taxpayers' rights in the process of countering tax avoidance by way of application of anti – tax avoidance measures of general nature.

The fifth chapter of the Ph. D. dissertation concerns the issue of specific anti – avoidance measures. Primarily, the scope of the fourth chapter comprises of the specific anti – avoidance measures resulting from the ATA Directive. It has been established that there is a risk that the ATA Directive may oblige the EU Member States to implement its provisions into the domestic legal systems of the EU Member States irrespective of their impact on the level of protection of taxpayers' rights. Hence, the detailed analysis of these measures in light of their impact on the protection of taxpayers' rights has been performed.

The sixth chapter of the Ph. D. dissertation comprises of the extensive analysis of different legal measures assuring tax transparency of a taxpayer. The aim of these measures extends beyond the need for countering tax avoidance. Still, tax transparency of a taxpayer towards tax authorities is a key element of the process of countering tax avoidance and the capacity of tax authorities to detect tax avoidance behaviour. The obligation imposed on a taxpayer to disclose an array of information towards tax authorities may have a deterrent effect on taxpayers who become more reluctant as regards undertaking activities within the scope of tax avoidance behaviour. Taking into account the above – mentioned objectives the analysis performed in the sixth chapter concerns the following legal measures aimed at ensuring tax transparency of a taxpayer: (1) mandatory disclosure rules (MDR) obliging taxpayers to disclose information about so – called reportable tax arrangements; (2) procedures on exchange of information in tax matters; (3) public disclosure of some kind of information relevant as regards tax purposes. The analysis performed in the sixth chapter aims at identification the catalogue of factors, which may safeguard taxpayers' rights while ensuring the effectiveness of these measures.

The research has been performed using mainly doctrinal legal research methodology, which comprised of analysis of legal provisions, applicable in the domestic legal system of the Republic of Poland as well as relevant legal provisions of instruments of international and European law binding for the Republic of Poland. To the extent necessary the research has been performed using the comparative legal research methodology concerning the application of a certain kind of legal measure in the domestic

legal system of country other than the Republic of Poland. Subsequently, the analysis performed concerns the jurisprudence of the Constitutional Tribunal of the Republic of Poland, the jurisprudence of Polish administrative courts, the jurisprudence of the Court of Justice of the European Union, the jurisprudence of the European Court of Human Rights as well as the jurisprudence of the national courts of countries other than the Republic of Poland. The analysis takes into consideration opinions expressed by legal scholars as well. Finally, the analysis also concerns the materials being the result of the work undertaken by the OECD in the field of countering tax avoidance behaviour.

Anti – tax avoidance measures should express the uniform and clear tax policy of a given state and therefore give straightforward information about what kinds of taxpayers' behaviour are considered unacceptable. Moreover, the scope of anti – tax avoidance measures has a direct impact on the scope of taxpayers' behaviour considered acceptable tax planning in light of tax policy of a given state. The analysis performed in the Ph. D. dissertation confirmed that the aim to counter tax avoidance cannot justify any infringement of taxpayers' rights. The aim to safeguard the public interest and the aim to protect taxpayers' rights should therefore be balanced in the process of application of anti – tax avoidance measures. The analysis performed in the Ph. D. dissertation has led to the conclusion that ensuring the effectiveness of anti – tax avoidance measures creates an imbalance between the aim to safeguard public interest and the aim to protect taxpayers' rights. Moreover, it has been established that the level of protection of taxpayers' rights depends on specific solutions which subsequently form the content of a given anti – tax avoidance measure. In particular, it has been confirmed that although the specific anti – avoidance rules are perceived as ensuring the higher level of protection of taxpayers' rights than general anti – avoidance rules, there are some aspects of their content, which impact the overall conclusion, that these do not in fact safeguard the higher level of protection. It has also been established that although the automatic exchange of information procedures are perceived as creating the higher level of infringement of taxpayers' rights than the procedures on the exchange of information on request, the existence of a numerous procedural rights in the process of automatic exchange of information impacts the overall conclusion that the level of protection of taxpayers' rights in the automatic exchange of information procedures is in fact higher than in the procedures on exchange of information on request.

As has already been pointed out, the analysis performed in the Ph. D. dissertation comprised also of identification the catalogue of factors, which may positively influence ensuring the protection taxpayers' rights in the process of application of anti – tax avoidance measures as well as of determination, whether inclusion of specific solutions, positively influencing the level of protection of taxpayers' rights is permissible in light of obligations arising from international and European law to implement certain anti – tax avoidance measures into domestic legal system in a given wording. The analysis performed in the Ph. D. dissertation has led to the conclusion that such alternations or modifications of the existing system of anti – tax avoidance measures to some extent are indeed possible.

First of all, it has been established that countering tax avoidance by way of purposive or economic interpretation of tax law is unacceptable as regards its impact on the protection of taxpayers' rights. The change of so – called interpretative paradigm applicable in a given legal system enabling the deviation from the literal interpretation even if such a deviation is to the disadvantage of a taxpayer, is strictly interrelated with the wording and content of legal provisions of tax law and organizational and functional principles and regulations governing the operations of tax authorities. From the point of view of the need to safeguard taxpayers' rights it is impermissible to interpret any weaknesses in the wording and content of legal provisions in the area of tax law, which further lead to the decrease of public revenue. The admissibility of countering tax avoidance by way of purposive or economic interpretation of tax law is therefore conditional upon prior amendments to the legal system in the area of tax law, aimed at creating the content of legal provisions, which subsequently may enable taxpayers establishing the purpose of a given legal provision. Notwithstanding the above, anti – tax avoidance measures should not limit taxpayers' rights more than it is necessary to achieve the outcome of countering tax avoidance. It has been therefore established that the similar results may be achieved by way of introducing general anti – avoidance rules of normative nature. The existence of an alternative anti – tax avoidance measures, which may afford a similar level of effectiveness in the process of countering tax avoidance phenomenon deems unacceptable countering tax avoidance by way of purposive or economic interpretation of tax law.

As regards the general anti – avoidance rules it has been established that the following factors influence the level of protection of taxpayers' rights in the process of

application of these anti – tax avoidance measures: (1) the wording and content of the hypothesis of a legal provision, which states which behaviour of a taxpayer is deemed unacceptable; and (2) the existence and application of uniform interpretative strategy. The analysis performed in fourth chapter of the Ph. D. dissertation has enabled to identify the following factors in the area of the wording and content of the hypothesis of a legal provision constituting a general anti – avoidance rule, which may positively influence the level of protection of taxpayers' rights: (1) the hypothesis of a legal provision constituting a general anti – avoidance rule should comprise of two conditions, which should be examined separately: non – conformity with the purpose of tax law provisions and carrying out activities with the aim to obtain tax advantage; (2) establishing the fulfilment of one condition should not determine the decision about the fulfilment of another condition; (3) the assessment that activities have been carried out with the aim to obtain tax advantage should be done having regard to the objective factors, which may state that that these activities were of artificial nature; (4) the lack of non – tax motives to carry out the activities by a taxpayer should not ultimately constitute the inadmissibility of granting a tax advantage, if the activities cannot be deemed as artificial. As regards the uniform interpretative strategy it should comprise of the following: (1) the uniform interpretative strategy should identify the purpose of the act of interpretation of a general anti – avoidance rule, i.e. the application of a general anti – avoidance rule in a way which excludes activities performed by a taxpayer, which cannot be deemed as artificial as well as activities being the result of a choice resulting from legal system to choose a manner of operation being less burdensome from tax point of view; (2) there should be explicitly indicated the catalogue of materials, which may be analysed in order to draw information about the purpose of a given tax law provision; (3) the previous jurisprudence in the area of application of a general anti – avoidance rules should be taken into consideration while applying a general anti – avoidance rule in a given case, which subsequently obliges authorities applying a general anti – avoidance rules to extensively justify the adopted way of interpretation and application of a general anti – avoidance rule; (4) the in dubio pro tributario principle should be taken into consideration in the process of application of a general anti – avoidance rule, which may limit the excessive use of this anti – tax avoidance measure – in particular as a remedy for any discrepancies or irregularities of a given legal system. It cannot be unambiguously stated whether the interpretative strategy in the process of application of a general anti – avoidance rule should be of normative nature. Nevertheless, it should be noted that the publication of guidance as to the

application of a general anti – avoidance rule may positively influence the development of the uniform interpretative strategy.

The analysis performed in the fifth chapter of the Ph. D. dissertation has led to the conclusion that although the Member States of the European Union have been obliged to implement the specific anti – avoidance rules, indicated in the ATA Directive, the admissibility of such an implementation is dependent upon the impact of these anti – tax avoidance measures on the protection of taxpayers' rights. The implementation of these measures should be evaluated as to its compliance with EU primary law, the provisions of the Charter of Fundamental Rights, the provisions of the European Convention on Human Rights, as well as – although in the limited scope – the provisions of a domestic legal systems of constitutional rank. The analysis performed in the firth chapter of the Ph. D. dissertation has led to the conclusion that the specific anti – avoidance rules, arising from the ATA Directive create an imbalance between the need to secure public interest and the need to protect taxpayers' rights. The exceptional status of the ATA Directive provides however for the limited possibilities of amendments to the wording and content of the specific anti – avoidance rules until further rulings of the Court of Justice of the European Union deem certain provisions arising from the ATA Directive inadmissible. As regards the above objections it is therefore advisable that the implementation of the provisions of ATA Directive should only comprise of so – called minimum standard, which may be manifested by the following recommendations: (1) the exclusion of so – called standalone entities from the scope of application of interest limitation rules; (2) the increase of the limit of borrowing costs up to which the interest limitation rules do not apply to the maximum amount arising from the ATA Directive provisions; (3) the amendments to the limitation clause arising from the provisions on taxation of controlled foreign entities in order to enable application of these provisions in conformity with the appropriate ATA Directive provisions and applicable jurisprudence of the Court of Justice of the European Union, i.e. extending the scope of application of such a limitation clause to any controlled foreign entities, irrespective of its residence, provided that there are legal grounds for the purposes of exchange of information in tax matters between the state of residence of a taxpayer and state of residence of a controlled foreign entity; (4) enabling to deduct loss being the result of impairment of value of an asset or its destruction, which was previously subject to so – called exit tax, provided that such a loss cannot be deducted in the immigration state; (5) the introduction of relevant legal provisions aimed at

elimination of double taxation arising from the application of domestic legal provisions implemented as a result of obligations arising from the provisions of ATA Directive. In addition to the above the introduction of a monitoring system is being postulated because it is of exceptional importance to review the impact, which the specific anti – avoidance rules, arising from the provisions of ATA Directive, have on carrying out economic activities in undistorted manner. Moreover, it also should be remembered that the obligation arising from the provisions of ATA Directive to implement anti – tax avoidance measures into domestic legal systems of EU Member States concerns only the area of corporate income tax, excluding, in particular, taxpayers of personal income tax. It therefore means that the introduction of specific anti – avoidance rules in the area other than covered by the provisions of ATA Directive is subject to evaluation as regards their conformity with primary EU law as well as domestic legal provisions of constitutional rank. For that reason, there are no obstacles to determine such a content of these provisions which ensures the higher level of protection of taxpayers' rights than the level of protection of these rights being the result of implementation of the provisions of the ATA Directive. Specifically, it is being postulated that as regards the application of the legal provisions on exit tax in relation to taxpayers of personal income tax the obligation to pay tax should be deferred until the moment of actual realisation of profits from the disposal of an asset. Such a solution is perceived as positively impacting the level of protection of taxpayers' rights in the process of application of the provisions on exit tax.

As regards the mandatory disclosure rules, being one of the mechanisms ensuring tax transparency of a taxpayer towards tax authorities within domestic legal system, it has been established that these provisions significantly interfere with the right to privacy of taxpayers because of the wide scope of their application. However, the obligation to implement these provisions into domestic legal systems of EU Member States arising from the Directive 2018/822 results in limited possibilities of amendments in order to lessen their impact on safeguarding taxpayers' rights as regards cross – border tax arrangements. It is therefore being postulated that the implementation of the provisions of Directive 2018/822 should reflect only the so – called minimum standard, arising from these provisions and – therefore – do not impose any wider obligations on taxpayers. It should also be noted that the provisions of Directive 2018/822 are not being applied to so – called domestic tax arrangements. Hence, it should be indicated that there are no obstacles as to the introduction of the content of mandatory disclosure rules, being applied

to domestic tax arrangements, which covers only the arrangements with a high probability of meeting objectives of tax avoidance behaviour. The scope of mandatory disclosure rules should be the reflection of the uniform tax policy in the area of unacceptable tax behaviour of taxpayers. It is postulated that the publication of so – called "white lists" of tax arrangements which are not required to be disclosed may limit the wide scope of mandatory disclosure rules.

Regarding the procedures on exchange of information in tax matters the following factors may positively impact the level of protection of taxpayers' rights: (1) the risk of disclosure of trade secret information may be limited by way of introduction legal provisions safeguarding certain procedural rights, which may guarantee active participation in the procedure on the exchange of information in tax matters; (2) the refusal to disclose information covered by professional secrecy of a professional legal counsel should be admissible not only as regards information obtained by the attorney in the course of his actions, as a defense attorney or trial attorney, but the scope of professional secrecy under the procedure for exchange of information on request should be the same as the scope of professional secrecy under the system of reporting of tax schemes (arrangements); (3) it is postulated to introduce detailed legal provisions concerning the matter of admissibility of the use of information, obtained in an unlawful manner, including information obtained from persons, protected under the legislation, implementing the provisions of Directive 2021/2101; (4) there should be a unified international system introduced to protect the confidentiality of data at the international level, which can ensure that the taxpayer's right to access information concerning him and to control its use is not unduly restricted. In view of the wide scope of information to be exchanged under tax information exchange procedures, particular importance for securing respect for rights of a substantive nature should be attributed to rights of a procedural nature, in particular: (1) the right to be informed of the request for information, or the intention to provide information; (2) the right to participate in the information exchange procedure, including the right to judicial review of the merits of the request for information. Depriving taxpayers and other entities involved in the procedure of exchange of information of procedural guarantees in the course of a given procedure should be considered as going beyond what is necessary for the realization of public interest objectives. In order to ensure the efficiency of the system of exchange of information in tax matters, it is sufficient that the procedural rights are being limited in certain

exceptional cases, for example, in situations in which their enforcement would hinder the exchange of information, or significantly delay its implementation. It should be remembered that granting of certain procedural rights in the course of procedures for the exchange of information may also favorably affect the improvement of relations between the taxpayer and tax authorities, as increasing the level of trust in the actions of tax administration bodies.

Among the analyzed legal mechanisms ensuring tax transparency of the taxpayer legal mechanisms ensuring tax transparency of taxpayers to the public interfere to the highest degree with taxpayer's rights. For this reason, it should be postulated that the obligation to disclose tax relevant information to the public should be limited only to taxpayers of corporate income tax generating revenues of a significant amount, excluding so-called family companies, being in close connection with the person of the owner. It should be taken into account that that the obligation to make public a certain type of tax relevant information may play a significant function in ensuring an appropriate level of transparency of the tax administration's actions towards the public. This is because public access to tax information may exert pressure on the tax administration to increase the effectiveness of its actions in the area of counteracting tax avoidance – In particular, in cases where, as a result of public disclosure, information about the low effective tax rate of the largest taxpayers, doing business in the territory of a given country, is revealed. The legal provisions should therefore impose an obligation for the public disclosure of information on individual arrangements, or agreements by which the taxpayer obtains the right to a tax advantage. This is because the secrecy of such agreements may adversely affect the efforts to increase the level of confidence of taxpayers in the activities carried out by the tax administration, particularly with regard to the impartiality of these activities in the field of anti – tax avoidance.

Summing up it should be highlighted that if tax avoidance behaviour is being defined by the recourse to the scope of the anti – tax avoidance measures there is a risk, that too wide a scope of these mechanisms, deviating from the guidelines stemming from the tax policy of a given state, may adversely affect the level of trust of taxpayers in the actions of the tax administration, and thus interfere with the chances of reducing tax avoidance by encouraging voluntary compliance with tax obligations within the framework of the taxpayer's relationship with the tax administration, based on mutual cooperation. It is therefore of crucial importance that the system of anti – tax avoidance

measures should be strictly aimed at countering the actions of taxpayers that are considered undesirable in light of the tax policy pursued by a given state. At the same time, the system of anti – tax avoidance measures should not be a remedy for all "inaccuracies" of the income tax system, thus performing a corrective function.