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Advance tax rulings in Poland – general or individual?[1]

Interpretacje podatkowe w Polsce – ogólne czy indywidualne?

Abstract. The article attempts to reflect upon the specific competition between individual and general tax interpretations. It refers to the evolution of Polish legal regulations, but also compares them with the solutions in force in other countries. The authors point to the emergence of indirect legal solutions which combine the features of general and individual tax interpretations. On the whole, they assess this trend in changes in a positive manner.

Keywords: tax rulings; Poland; tax law.

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Streszczenie. Artykuł stanowi próbę refleksji nad swoistą konkurencją interpretacji indywidualnych i ogólnych w praktyce podatkowej. Odnosi się on do ewolucji polskiej regulacji prawnej, jednak konfrontuje ją także z rozwiązaniami obowiązującymi w innych krajach. Autorzy wskazują na pojawianie się rozwiązań prawnych pośrednich, które łączą cechy interpretacji ogólnych i indywidualnych. Tendencję zmian oceniają zasadniczo pozytywnie.

Słowa kluczowe: interpretacje podatkowe; Polska; prawo podatkowe.

1. Introduction

If we were to search for a characteristic feature of the Polish tax system, it would certainly be a widespread use of advance tax ruling. In Poland, the most common tax rulings are called: "tax law interpretations", hence the term "tax interpretation" will be used in this publication together with a description specifying the nature of the given interpretation.

Individual interpretations have been available to Polish taxpayers for many years. They are cheap (the fee is only PLN 40)[2]. They are obtained rather quickly, i.e. within a maximum of 3 months of the day of submitting the application[3]. As a result, as many as 37,000 individual interpretations were issued annually at their peak[4]. General interpretations in Poland have been issued much less frequently. 14 general interpretations were issued in 2012, 16 in 2013, 11 in 2014, 11 in 2015, 9 in 2016, and 6 in 2017[5].

Differences between individual and general interpretations do not lie in the rights of entities, which behave in accordance with the guidelines contained therein. The scope of protection is identical. The tax authority must always issue a tax decision in accordance with the law, even if it would be contrary to the content of the interpretation. However, the taxpayer is entitled to protection. If the tax consequences of an event had

[2] Article 14p of Tax Ordinance Act of 29 August 1997, Dz.U. [Polish Journal of Laws] of 2018, poz. [item] 800 with subsequent amendments, hereinafter: "o.p."
[3] Article 14d o.p.
[4] http://www.mf.gov.pl/documents/766655/4819376/dzialalnosc_BKIP_2015.pdf p. 3.
[5] Electronic database of tax interpretations: http://sip.mf.gov.pl/.

occurred before the interpretation was issued, the taxpayer is exempted from the obligation to pay interest for late payment. As far as the future effects related to the moment of issuing the interpretation are concerned, the taxpayer will be exempted from the obligation to pay the tax upon request made to the tax authority. As a result, the taxpayer will be charged with the tax in the amount which would result from the interpretation[6]. Unfortunately, this rather idyllic picture is often far from reality. Increasingly, tax authorities are searching for insignificant differences between the taxable economic operation and the factual description contained in the general interpretation or in the application for an individual interpretation, in order to demonstrate that the taxpayer is not entitled to the protection that results from the interpretation.

However, the personal scope of the effectiveness of the protection varies. In the case of individual interpretations, protection was initially available only to the entity applying for an interpretation, whereas in the case of general interpretations, it is available to anyone who carries out the operation to which the interpretation relates. However, this difference is gradually becoming blurred, a situation which will be addressed in this publication.

The same applies to the mode of issuing the interpretation. Initially, the difference was obvious: individual interpretations were issued on request, while general interpretations were issued by the Minister of Finance *ex officio*. Currently, however, the taxpayer may also apply for the issuance of a general interpretation[7]. Owing to some formal requirements related to such a request, it is almost impossible to issue a general interpretation on request.

A significant difference is that general interpretations are not subject to challenge, whereas individual interpretations can be challenged before an administrative court on principles similar to challenging tax decisions.

6 Article 14m o.p.
7 Article 14a § 1 o.p.

2. Individual interpretations and general interpretations – advantages and disadvantages

Of course, the answer to the question of which type of interpretation is better from the point of view of the functioning of the tax system is obvious. Indubitably, these are general interpretations. Of course, they may sometimes give rise to doubts from the point of view of constitutional principles, especially when they are binding, but if this aspect were to be omitted, at first glance it would be ideal to completely eliminate individual interpretations in favour of general interpretations. However, this is a utopia. It is not always possible to describe all potential facts in a general interpretation.

An important advantage of a general interpretation is that it can often replace many individual interpretations. This makes it possible to make significant savings in the operating costs of tax administration. Polish individual interpretations are cheap for the taxpayers, but the administrative cost of issuing one is estimated at over PLN 1,000[8]. Additionally, each individual interpretation may be challenged before the court, again increasing the costs of the tax system.

General interpretations serve, by their very nature, to unify the interpretation practice. They present a single, consistent view on the interpretation of tax law regulations. Achieving such uniformity in the case of individual interpretations is much more difficult. In Poland, individual interpretations are issued by a separate organizational structure of the tax administration – the National Revenue Information Service (Krajowa Informacja Skarbowa – KIS). The work of the KIS is managed by the KIS Director, who is the authority competent to issue individual interpretations. Because of the country's size and the number of issued tax interpretations, it was not possible to place the entire KIS in one location. The seat of the KIS Director is located in Bielsko-Biała, but it also consists of 5 local offices. Which local office will prepare the interpretation is an

[8] About 230 EUR.

internal KIS issue. Also from the applicant's point of view, the fact that the case will be investigated by an employee from a different city in Poland is not an issue. In practice, the entire procedure does not require direct contact between the applicant and an employee of the authority. If the taxpayer were to complain about the interpretation to the administrative court, the accuracy of the judgment would be determined not by the seat of the authority which issued the interpretation[9], but exceptionally by the seat of the taxpayer[10].

Striving to centralize the issuance of tax interpretations is the result of the previously binding solutions, when individual interpretations could be issued by each tax authority. It was a solution which led to the disintegration of the practice of interpreting Polish tax law. Moreover, tax authorities often did not have employees that would be able to issue individual interpretations concerning very unique tax problems.

Centralization did not encompass interpretations concerning local taxes. Those are still issued by heads of communes, town and city mayors[11]. They are binding only in the territory of particular local government units. Therefore, even a taxpayer who has identical facilities, but located in different communes, in order to be certain about the interpretation of tax law provisions concerning e.g. real estate tax, must apply for individual interpretations to all the communes where these facilities are located. Thus, local government interpretations are extremely individual. This is because only the applicant benefits from protection and only in relations with the authority that issued the interpretation.

General interpretations implement the constitutional principle of equality very well[12]. The bulk issuance of individual interpretations cre-

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9 Such a rule applies pursuant to Article 13 § 2 of the Act of 30 August 2002 on proceedings before administrative courts, Dz.U. of 2018, poz. 1302 with subsequent amendments.

10 Pursuant to the Regulation of the President of the Republic of Poland of 22 February 2017 on transferring to other voivodeship administrative courts certain cases concerning the activities of the director of the National Revenue Information Service, the President of the Social Insurance Institution and the President of the Agricultural Social Insurance Fund, Dz.U. of 2017, poz. 367.

11 Article 14j o.p.

12 Article 32 of the Constitution of the Republic of Poland.

ates the risk that taxpayers in identical situations will be treated differently, so creating the risk of violating this principle.

However, the legislator did not react to these problems for a considerable time. It was not until 2016 that more serious changes were introduced, the common aim of which was to reduce the number of individual interpretations and to improve their usefulness for taxpayers[13].

3. Individual interpretations *versus* general interpretations – which are more important?

Until the end of 2015, individual and general interpretations had the same legal value. This meant that the issuance of a general interpretation did not prevent the application for and issuance of an individual interpretation which would have dealt with an identical problem. In practice, a taxpayer who had an individual interpretation that would be contrary to the general interpretation could choose the one which he would apply and which would determine the scope of the exemption to which he would be entitled. In practice, therefore, he could chose a more favourable interpretation. The taxpayer affected by the general interpretation could directly question it before the administrative court, even though he could not challenge it. He could file a request for an individual interpretation, which the tax authority would have issued probably in accordance with the content of the general interpretation. Then the holder of the individual interpretation could challenge it before the administrative court.

Since 1 January 2016, the existence of a general interpretation has made it impossible to issue an individual interpretation to a taxpayer on the basis of an identical legal and factual situation[14]. In such a case, the interpreting authority must refuse to issue an individual interpretation. In addition, the authority will indicate to the applicant a general interpreta-

[13] At the same time, however, the trust that a taxpayer could so far place in tax interpretations had been weakened. This issue remains beyond the scope of this study.

[14] Article 14b § 5a o.p.

tion as regards his query. If the order in which the interpretation is issued is reversed, i.e. the general interpretation is issued after the individual interpretation, the individual interpretation will expire[15]. However, the holder of an individual interpretation will be protected until the interpretative authority determines that the individual interpretation has expired by way of the issuing and serving of the decision. Therefore, the protection resulting from an individual interpretation will not expire automatically, but only when the holder of the individual interpretation has been informed about it.

At first glance, such a solution seems justified. It protects well the interests of the holder of an individual interpretation, who, after all, has arranged his business having confidence in it. However, from the point of view of rationalising tax administration costs, the assessment is no longer unambiguous. In Poland, individual interpretations are issued indefinitely. As a result, there are currently about 170,000 of them in the electronic database of interpretations. In the case of bulk issuance of general interpretations, searching the database of interpretations would be quite laborious, and additionally, KIS employees would then have to determine the expiry of each individual interpretation separately. This would then be subject to judicial review.

However, the problem does not lie only with the costs of such an operation. The problem is also its longevity. It will never be possible to determine at the same time that all individual interpretations have expired. Even if all expiration orders were drawn up and then sent to the holders at the same time, they would not be served at the same time. In addition, KIS employees' mistakes are to be taken into account, as they are sure to miss an interpretation. This all poses the risk of diversifying the legal situation for taxpayers in identical factual situations.

One may risk a somewhat controversial claim that the current legal solution excessively protects the interests of holders of individual interpretations. These taxpayers do not even have to demonstrate a minimum of diligence in verifying whether their individual interpretation has not

[15] Article 14e § 1a(2) o.p.

expired as a result of the issuance of a general interpretation. However, for example, in the case of binding tariff information issued on the basis of a Union customs code[16], which becomes invalid following the publication of more general "interpretations"[17], the moment of publishing the latter interpretation marks the end of the protection for the holder of the binding tariff information. The holder must therefore exercise a minimum of care as he must follow the Official Journal of the EU where information on the more general "interpretations" referred to above is published[18].

This does not mean that the proposal to give greater meaning to general interpretations should not be implemented. The problem lies in the fact that a sensible concept has been poorly implemented. In practice, in Poland the problem described above is not particularly dramatic. The Minister of Finance simply issues few general interpretations.

4. Joint applications for the issuance of interpretations submitted by counterparties

Naturally, a larger number of entities participate in economic operations. They often have conflicting interests related to the taxation of this operation. As a result, each counterparty may apply for its own tax interpretation. Since separate interpretations are issued for each counterparty, the risk of issuing divergent tax interpretations is thus increased. Especially since the applications of taxpayers acting jointly may be considered separately, sometimes even by different local offices of the KIS. A separate application for an interpretation by each counterparty increases the workload of tax authorities.

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16 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, [2013] OJ L 269/1.

17 Such as notes and opinions of the WCO or the European Commission. The same effect is triggered by a judgment of the EU Court of Justice which is contrary to the binding tariff information.

18 Article 34 of Union Customs Code.

The solution is provided by two new procedures which appeared on 1 January 2016. The first one is the so-called joint application for an individual interpretation[19]. An individual interpretation is still formally issued, but a request for an individual interpretation may be made by two or more interested persons who are in the same factual situation or who are to participate in the same future event. In order to avoid a multitude of entities in the course of the interpretation procedure, the parties concerned must identify one entity to be party to the interpretation procedure. The procedure will result in the issuance of one interpretation that will make an assessment from the point of view of tax law for the entire operation. It will be served to the person who has been designated as a party to the proceedings and the others will receive a copy of it.

From the point of view of the protection resulting from the interpretation, the situation of all these entities will be identical – all the interested persons will benefit from the interpretation. According to the administrative courts, the differences start appearing when the interpretations are challenged. In accordance with the rather controversial, but also uniform views presented in the rulings of administrative courts, such an individual interpretation may be challenged only by the party of the proceeding[20]. It is quite a dangerous solution for other entities, especially as the parties to transactions which have conflicting views on the interpretation of a tax law provision may also file a joint motion.

Despite some shortcomings, the introduction of this institution should be assessed positively. Undoubtedly, the purpose of introducing this provision is to reduce the number of requests submitted by several entities for which, as a result, identical individual interpretations are issued, which is to improve the effectiveness of interpretative authorities.

Of course, taxpayers can always make separate requests for interpretation.

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19 Article 14r o.p.

20 I find it difficult to agree with this view, but it is presented quite clearly in the rulings of administrative courts: decisions of the Supreme Administrative Court of 22 December 2016, II FZ 889/16 and of 14 February 2017, II FZ 967/16.

5. Requests for interpretation concerning the actions of potential counterparties

The second solution that aims at making it possible to obtain individual interpretations for a larger number of entities consists in issuing interpretations which will be used only by the applicant's contracting parties. It will relate to potential contractors who are not even known at the stage of applying for interpretation. This is a significant difference compared to the previously described joint applications for interpretation, where protection is granted only to those entities that have submitted a joint application. This solution is a deviation from the principle that the applicant submits an application for an interpretation for himself and it is he who benefits from it. In the case of this mutation of an individual interpretation, the applicant applies for an interpretation for another entity. It is therefore still an individual interpretation, but it also has the characteristics of a general interpretation.

The impulse for the introduction of this regulation was the judgment of the Supreme Administrative Court of 22 May 2013[21]. The problem arose in the context of implementing a public procurement. A contractor (construction company) constructed a hospital building. The dispute was whether the service should be taxed at a standard rate of value added tax (VAT) or at a reduced rate. The contractor did not have an individual interpretation, but the contracting authority (investor) did and it concluded that the service should in fact be taxed at a reduced rate. However, the interpretation was not useful as it is the contractor who is the tax payer of the VAT. Nonetheless, the court came to the conclusion that the general principles of law (the Supreme Administrative Court referred to the principle of trust) support extending the protection resulting from the interpretation also to the applicant. It is true that, from the point of view of the law, the judgment is very controversial as it is difficult to identify the legal basis for the court's position. However, it must be admitted that from the axiological point of view, the court was right. It is good that the legislator followed the path indicated by the court.

[21] I FSK 863/12.

The abovementioned solution can only be used by a small number of tax payers. Only the contracting authority, pursuant to the Public Procurement Act of 29 January 2004 (i.e. an entity executing investments financed with public funds) may request an interpretation that will be used by any entity to which a public contract is to be granted in the future[22]. Therefore, this solution cannot be used by every entity, but only by those who spend public funds. Such a limitation seems unjustified. It is a good institution, but its scope of application is definitely too narrow.

6. Established interpretation practice

However, there are more exceptions to the principle that an individual interpretation protects only its holder. "The established practice of interpretation" is that interesting solution. This is not a new kind of interpretation, but only an extension of the protection which results from the individual interpretation to entities that have not applied for it. The established practice of interpretation has been defined as the views prevailing in individual interpretations in the period for which the tax is paid and in the preceding 12 months[23]. If the taxpayer establishes the existence of such a practice, he may invoke it as if he had invoked an individual interpretation. A well-established interpretation practice in a sense replaces an individual interpretation. This legal institution was intended to discourage taxpayers from applying for interpretations relating to typical legal problems with respect to which individual interpretations have already been issued on several occasions. Unfortunately, in reality, relying on the established interpretation practice is much more risky than requesting an individual interpretation.

This is because of the low stability of the established interpretation practice, as it changes automatically with the appearance of successive interpretations – hence the instability. However, changing an individual interpretation requires the active participation of the interpretative authori-

[22] Article 14s o.p.
[23] Article 14n § 5 o.p.

ty, and the change may be additionally challenged before the court. The situation of the holder of an individual interpretation is therefore much more stable[24]. In effect, a rational taxpayer who finds that there is an established interpretation practice, should apply for the issuance of an individual interpretation. The practice referred to would be an argument supporting the issuance of the interpretation. It is therefore a very useful solution for taxpayers, but it contributes to the reduction in the number of issued individual interpretations only in a small degree. Especially considering that establishing the existing one may be hard, and, in addition, the practice may change over time, so the taxpayer must constantly follow the individual interpretations that are subsequently issued.

The established interpretation practice is an institution whose introduction fits well into one of the important problems related to the functioning of tax interpretations not only in Poland. It is the problem of equal treatment of taxpayers: how to justify the fact that one taxpayer is protected against the demands of the tax authority only because he applied for an interpretation and another did the same, but is taxed because he does not have an interpretation?

Usually, the legislator distinguishes general interpretations from individual interpretations by clearly indicating the scope of subjective protection resulting from an individual interpretation. However, even the existence of a provision limiting the personal scope of the protection resulting from the interpretation to the holder does not always mean that other entities have not sought to benefit from that interpretation. Some general principles of law, and in particular the principle of non-discrimination, may be the basis for an extension to the protection[25]. Of course, such a solution is accepted only in some legal systems. For example, in the USA it was allowed, but only to a limited extent, for a taxpayer to refer to third party tax interpretations (letter ruling). An entity which did not have an interpretation favourable to it could de-

[24] M. Wilk, *Utrwalona praktyka interpretacyjna [Established interpretation practice]*, „Przegląd Podatkowy", 2017, No 10, p. 20.

[25] C. Romano, *Advance Tax Rulings and Principles of Law. Towards a European Tax Rulings System?*, IBFD Amsterdam 2002, p. 268.

mand from the authority to be treated in the same way as the holder of the interpretation, invoking the obligation of equal treatment, especially if the interpretation was obtained by its competitor, and it was denied being treated equally without any justifiable reason[26].

7. "General-individual" interpretations in other countries

Interpretations issued at the joint request, or interpretations issued for future potential contractors, which were introduced in Poland in 2016, are not a particularly original solution when one looks at regulations in other countries.

In Australia and New Zealand there are the so-called product rulings[27]. They consist in the fact that a specific interpretation issued for a specific product, e.g. financial, can be used by all future purchasers of the product. These interpretations are made public, so a potential buyer can get acquainted with them[28]. In the case of Australian law, however, such interpretations are treated as general interpretations (public ruling)[29]. Besides, Australian law provides for the existence of other similar institutions, such as class rulings, which may concern specific classes of taxpay-

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[26] Judgment of United States Court of Claims as regards *IBM Corp v. United States* of 16 April 1965 (343 F.2d 914), http://openjurist.org/343/f2d/914/international-business-machines-corporation-v-united-states. The verdict was passed against the background of a rather specific factual and legal situation. Rand obtained a letter ruling according to which its computers were not subject to excise duty. IBM also requested a similar ruling, but did not receive it. The IRS then revoked Rand's ruling, but only with future effect, which meant that it actually had taken advantage of a tax holiday. In this judgment, the court referred to the view of the US Supreme Court in the *United States v. Kaiser* case of 1960, where the Supreme Court stated that "commissioners cannot tax one and not tax another without any rational reason based on the differences between them". The judgment is analysed by N.A. Sugarman, *Tax Ruling Procedure Revisited,* "William and Mary Law Review" 1968, vol. 9, issue 4, p. 1027 (https://scholarship.law.wm.edu/wmlr/vol9/iss4/10/).

[27] C. Romano, *Advance Tax Rulings and Principles of Law. Towards a European Tax Rulings System?* IBFD Amsterdam 2002, p. 269.

[28] In New Zealand at: https://www.ird.govt.nz/technical-tax/product-rulings/.

[29] https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-(rulings)/Product-rulings/.

ers. For example, it is advisable to apply for them when it comes to benefits for employees of a given type. The tax administration clearly explains on its website that it is about avoiding the submission of many identical requests for individual interpretations[30].

It is difficult to assess whether these provisions were any inspiration for the Polish legislator, but it can undoubtedly be said that Polish solutions are based on a similar concept. It is interesting that Australian law treats product interpretations as general interpretations. It seems that when classifying interpretations, more emphasis is placed on the circle of entities entitled to refer to them (therefore they are general) than procedural issues, such as the mode of issue.

8. Conclusion

There is a clear tendency to increase the importance of general or individual interpretations, but only those which do not concern only one particular taxpayer. Undoubtedly, the legislator has legitimately given general interpretations primacy over individual interpretations. However, the details of the regulation should definitely be assessed negatively – the right idea has been implemented in an unfortunate way.

There is also a tendency to limit differences between general and individual interpretations. The reasons for this process are twofold. Firstly, the legislator wants to reduce the number of issued individual interpretations. Secondly, the extension of the scope of subjective application of individual interpretations implements the constitutional principle of equality. Both objectives are worthy of acceptance. For this reason, the evolution of Polish law should be assessed very positively.

Of course, this does not mean acceptance of the transition to a model analogous to the Czech Republic, where specific general interpretations of

[30] https://www.ato.gov.au/General/ato-advice-and-guidance/ato-advice-products-(rulings)/class-rulings/when-to-consider-applying-for-a-class-ruling/.

the so-called *D-pokyny*[31] dominate, and individual interpretations (the so-called *závazné posouzení správcem daně*) have a completely marginal significance.

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[31] They are published in the Financial Newsletter of the Ministry of Finance. Their goal is to unify the interpretation of tax law, help the understanding and orientation in the unclear tax law system. D-pokyny are not generally binding rules.