

Decision

dated 24 May 1994 (K. 1/94)

The Constitutional Tribunal sitting with the bench composed of the Chairman, Lech Garlicki, and judges: Zdzisław Czeszejko-Sochacki, Stefan Jaworski, Wojciech Sokolewicz (Reporting Judge), Janina Zakrzewska (...)

held

article 17, section 2 of the Act dated 6 March 1993 on Amending Some Statutes on the Principles of Taxation and Some Other Statutes (Journal of Laws, Number 28, Item 127) **in the part concerning article 1, section 13f where it refers to the period of time prior to the publication of the law is inconsistent with the democratic rule of law expressed in article 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relationships between the Legislative and Executive Branches of the Republic of Poland and on Local Self government** (Journal of Laws, Number 84, Item 426).

(...)

Reasoning

III

(...)

The Constitutional Tribunal, in reference to its earlier decision K. 8/93 (Constitutional Tribunal's Collection of Decisions 1993, part II, p. 418) reiterates its view that according to the constitutional separation of powers, the creation of legal principles for the tax system constitutes a domain of the legislative branch. The legislative branch within whose scope state organs are – under article 1 of the Small Constitution – the Sejm and the Senate – enjoy wide discretion in choosing between various constructions of tax liabilities, realizing in different ways the State's economic policy, with tax policy manifest in these provisions as the instrument of its realization. The Constitutional Tribunal also maintains the view expressed in case K. 7/93 (Constitutional Tribunal's Collection of Decisions 1993, part II, p. 410) that the lawmaker is entitled to pass statutes commensurate to the approved political and economic goals, with this power being of particular importance at a time of constitutional changes.

The freedom enjoyed by the legislative branch is limited by principles and constitutional provisions as well as by an obligation to respect the values protected by these principles and provisions, but the presumption in doubt should be for the conformity of legal provisions with the Constitution, to be rebutted only upon the unquestionable demonstration of that statute's nonconformity with the Constitution. In the case at hand, not only is there no contradiction between the substance of the provision at hand and the Constitution, but also the change of law has been motivated by an effort to take into account, more than before, the principle of equality of taxpayers. Its constitutional significance has been recognized in case U. 4/91 (Constitutional Tribunals Collection of Decisions 1992, part I, p. 174). The Tribunal shall return to this issue in a further part of the judgment.

2. Stating the wide discretionary power of the legislative branch in forming the tax system and consequently also tax liabilities of citizen, the Constitutional Tribunal has concluded that such freedom has to be accompanied by a duty to observe strictly constitutional principles concerning issuance and implementation of legal provision related to taxation; these principles entail a constitutional requirement for a reliable and proper procedure. In order to enable citizen an honest fulfillment of their tax liabilities, it is necessary

to establish and implement respective legal regulations in a manner utterly in conformity with the above requirement.

3. The Constitutional Tribunal has stated beyond a doubt that the provisions in question entered into force in violation of constitutional principles of legislation. The essence of that violation is in their retrospective effect assumed by the lawmaker: they were adopted on 6 March 1993 and published on 16 April 1993, which is also a day of their entry into force but effective, as provided by the law, as of 1 January 1993.

In formulating rules providing the procedure of their entry into force the lawmaker used an inappropriate legislative methodology.

The legislative methodology based on a division between the notion of „entry into force” of a legislative act and the notion of gaining force by such provisions „at an earlier date” has been described before by the Constitutional Tribunal as highly reprehensible, and it was in reference to a case based on the same Act dated 6 March 1993 (in cases K. 8/93, Constitutional Tribunal’s Collection of Decisions 1993, part II, p. 418 and K. 13/93, unpublished judgment). Granting retrospective effect to the provisions limiting the rights equitably acquired by citizens, the Constitutional Tribunal has many times assessed as including in the above quoted judgments – inconsistent with the constitutional rule of law and its derivatives, e.g. in case K. 7/93, Constitutional Tribunal’s Collection of Decisions 1993, part II, p. 412 – with the principle of certainty of law. The Tribunal firmly upholds these views in the present case.

In addition, one needs to point to a convergence of views expressed in Constitutional Tribunal decisions, which stated that the principle of maintaining confidence in the State manifests itself, among others, in making and implementing such statutes that they do not become a trap of sorts for citizens and so that citizens are able to go about their business with the belief that they are not liable to suffer consequences that they were unable to predict when making decisions and taking actions, and with belief that their actions and the consequences thereof are legal under the law in force at the time and shall be recognized as such in the future (I PR 1/91, I PRN 34/91). The Supreme Court has justly observed here that the retrospective effect of legal provisions limits the sphere of freedom and responsibility of citizens, who, acting within a legal framework should be able to choose between different options and choices.

The above opinions fully apply to the present case in which legal provisions limiting retrospectively civil rights as taxpayers to deduct part of their income from certain sources for a certain purpose in order to calculate due income tax are being taken under review.

4. The disputed regulations entered into force retrospectively thereby without a suitable adjustment period, a *vacatio legis*. Even if a *vacatio legis* does not constitute a strict legal requirement, there were no rational circumstances justifying an exceptional diversion from the general rule. The Act dated 30 December 1950 on the Publication of the Journal of Laws of the Republic of Poland and of the Monitor Polski (Official Gazette) of the Republic of Poland (Journal of Laws, Number 58, Item 524, amend. Journal of Laws, 1991, Number 94, Item 420) contains in article 4 a provision which reads that in a normative (a source of law) act a period of *vacatio legis*, other than a 14-day period, is allowed for implementation of an act, but when such diversions are allowed it should result from the principles of legislative methodology. The Principles of Legislative Methodology constituting an Amendment to Resolution Number 147 issued by the Council of Ministers and dated 5 November 1991 on the principles of legislative methodology (OJ Number 44, Item 310) read – in paragraph 33, section 3 that only in extraordinary circumstances the effective date may be the same as the date of publication – that is without a proper suitable adjustment period – a

vacatio legis, however this does not apply to „a situation where a law imposes an obligation on citizens or other persons not subordinate to the state authorities.” The Principles of Legislative Methodology as adopted by the Council of Ministers resolution do not bind the lawmaker directly but, as the Constitutional Tribunal already had a chance to clarify because they codify universally accepted rules for legislative actions that the lawmaker should not divert without important reasons. In certain circumstances introducing a proper *vacatio legis* may be the lawmaker’s duty, anchored in constitutional provisions (see e.g. case K. 9/92, Constitutional Tribunal’s Collection of Decisions 1993, part I, p. 72 and P. 2/92, Constitutional Tribunal’s Collection of Decisions 1993, part II, p. 233).

When assessing the procedure under which the provisions in question have entered into force, the circumstance is of importance in which a limitation of the rights equitably acquired by citizens, albeit permissible, particularly when supported by some other constitutionally protected public legal interest, may take place only under a procedure allowing the interested parties to adjust to an existing situation and properly decide their business. A proper *vacatio legis* should then constitute a requirement of validity of disputed regulations.

5. A particularly meticulous scrutiny is required of a procedure accompanying the entry into force of legal provisions concerning economic activities of citizens, which often are the basis of their subsistence and create a sense of social security, and constitute a premise for major decisions concerning property, as phrased by the Constitutional Tribunal in case K. 8/93. In reference to legal provisions a degree of criticism is necessary when it comes to the assessment of each and every diversion from the constitutional rule of law, as derived from the democratic rule of law, including the ban on the retrospective effect of laws. Tax regulations undoubtedly belong to this group of provisions.

As it has been accurately indicated in jurisprudence „in a tax law, where public interest has been given a prominent position, and elements of binding power are found on a substantive and procedural level, legal guarantees for the protection of individual interest are of particular importance both in the process of making and implementing of the law. It is a general rule of article 1 of the Constitution that creates the basis for these guarantees in the Polish law. [presently – the constitutional provisions upheld by the Small Constitution] (R. Mastalski: *Orzecznictwo podatkowe Trybunału Konstytucyjnego a polski system podatkowy*, (Tax jurisdiction of the Constitutional Tribunal and the Polish Fiscal System), *Państwo i Prawo*, Number 4, 1993, p. 7).

The Constitutional Tribunal observed, as a side note, that for legal assessment of the challenged statutory provisions it is not relevant whether a large number of taxpayers have been affected by the unconstitutional mode of entry into force by these provisions. To affect just one taxpayer with a limitation of his properly acquired rights, is no lesser nonconformity with constitutional principles that a loss suffered by a more numerous group of taxpayers.

6. The Constitutional Tribunal has not swayed from its view that an imperative to protect citizens' equitably acquired rights, to build confidence in the State and its statutes, and a ban on retrospective limitation of their rights are not absolute, and by their nature they allow, in certain situations, for a diversion in legislative practice. As before, having considered case K. 15/91 the Constitutional Tribunal has reached the conclusion that at some point circumstances may occur justifying diversion from these principles, and then diversion is not inconsistent with principles of a democratic state as expressed in article 1 of the Constitution (presently, the constitutional provisions).

Diversion from, e.g. the principles forbidding retrospective effect or from protection of an equitably acquired right is permissible however – according to the Constitutional Tribunal – only „in extraordinary circumstances justified by a principle derived from the Constitution

(Constitutional Tribunal's Collection of Decisions 1992, part I, p. 158). The Constitutional Tribunal in specifying the notion of „extraordinary” circumstances, appended that it refers to circumstances more than extraordinary when for objective reasons there is a need to give priority to a specific protected value or value based on constitutional provisions. The uniqueness of a situation here should be assessed separately for each case, as it is difficult to work out a more general, universal rule (ibid., p. 163). The Constitutional Tribunal considered whether in the present case „more than exceptional circumstances” occurred, and in particular circumstances justifying a diversion by the lawmaker from the constitutional rules of legislation derived from the democratic rule of law. The Tribunal has not found such circumstances in this instance.

The Tribunal has agreed with a view expressed by the Minister of Finance that amending the substantive tax provisions served the principle of equal treatment of taxpayers drawing income from various sources – by extending to all taxpayers the right to a tax deduction of the cost of purchasing securities, regardless of the source of their income, which may be viewed as an effort to assure a better adjustment of statutory provisions to the constitutional principle of economic activity freedom, regardless of the form of property (article 6 of constitutional provisions) and to equality (article 67, section 2 of the constitutional provisions) – particularly that the latter principle has been given a broad interpretation in Constitutional Tribunal decisions (particularly cases U. 5/86, Constitutional Tribunal's Collection of Decisions 1986, p. 49 and U. 7/87, Constitutional Tribunal's Collection of Decisions 1988, pp. 10-11). But a positive view on amending the substantive content of the law should not, according to the Tribunal, overcome and even to counterbalance the negative assessment of the manner the amendments have been made, evidently in breach of a principle forbidding the retrospective effect, a principle of protection of equitably acquired rights and maintaining confidence in the State and its statutes. This certainly has not been the case of „more than extraordinary” circumstances, requiring the lawmaker to make amendments unconstitutionally, for example to remove a gross violation of certain principles contained in existing regulations or constitutional provisions, the protection of which would have priority over a duty to respect the constitutional procedural principles derived from the democratic rule of law. Also, the Constitutional Tribunal pointed out that the subject of civil rights, including the right not to be affected by retrospective norms, is always the citizen – the taxpayer. Hence any attempts to treat taxpayers as a uniform group and settling the account of their gains and losses as a group would have constitutional basis, expressing an individualistic and not collective concept of individual's rights.

7. Constitutional Tribunal took also into account the circumstance that the mode of amending legal provisions in question, by undermining the maintaining of confidence in state actions aimed at a wide privatization of national economy e.g. through selling Treasury stock and bonds and of other government-owned business entities to individuals, may negatively affect the development of national market economy whose principles „economic activity freedom” and „personal property protection” are formulated in articles 6 and 7 of the constitutional provisions. Defining these principles in constitutional provisions makes state actions aimed at the development of market economy a self evident value guaranteed by the Constitution.

8. The Constitutional Tribunal has limited itself to the statement of nonconformity of the provision in question only within the limit within which it refers to a period prior to the official publication of a law.

Such limitation is supported, from the procedural point of view, by the petition of the Commissioner for Citizens' Rights, but in terms of substance the amendment does not raise any major objections.

Furthermore, the Tribunal took into account the circumstance that the provision in question has not imposed a new tax but only modified, unfavorably for a certain group of taxpayers, the rules governing tax deductions. It should be remembered that in K. 13/93 the Tribunal expressed a view that new taxes should not be introduced in a current fiscal year, and if it already has taken place, a relevant provision should be repealed in reference to the whole scope of its binding power, particularly when calculation covers the whole year. Upholding this view the Tribunal took into account, in the present case, the divisibility of tax liabilities based on provisions in question, actually confirmed in a Ministry of Finance circular of 15 March 1994 where tax chambers and offices are advised to issue decisions not to determine or collect income tax from certain portion of income as provided for in article 21, section 1, subsection 34 of the Personal Income Tax Act received and spent in the period of January 1993 to April 1993, repealed under the Act dated 15 March 1993. The above recommendation has indicated clearly that according to the Ministry of Finance a separation of a given portion of income is feasible, therefore there is no need to declare nonconformity between the challenged regulations and the Constitution for an unlimited period of time, and, consequently, inasmuch as they refer to a period commencing at the time of a law's official publication.

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