Decision

dated 24 July 1997 (K. 21/96)

The Constitution Tribunal'sitting with the bench composed of the Chairman Lech Garlicki. Zdzisław Czeszejko-Sochacki, Krzysztof Kolasiński (Reporting Judge), Ferdynand Rymarz and Błażej Wierzbowski.

(...)

held

1. article 1, sub-section 1 of the Act dated 31 May 1996 Amending the Tax Liabilities Act and Amending Certain Other Acts (Journal of Laws, Number 75, Item 357) **in the part extending the powers of the tax authorities provided for in the Tax Liabilities Act dated 19 December 1980** (consolidated text in Journal of Laws, 1993, Number 108, Item 86; amendments in Number 134, Item 646;1995, Number 5, Item 25, Number 85, Item 426) **by insertion of articles 34b and 34c conforms with articles 1 and 87, section 2 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government** (Journal of Laws, Number 84, Item 426; amendments in 1995, Number 38, Item 148, Number 150, Item 729;1996, Number 106, Item 488), **and is not inconsistent with article 56, section 1 of the said constitutional provisions.**

2. article l, sub-section 2 of the Act dated 31 May 1996 Amending the Tax Liabilities Act and Amending Certain Other Acts, contravenes articles 1 and 56, section 1 of the constitutional provisions referred to in point 1 above in the part consisting in the insertion of article 49h, sections 2 and 4, to the Tax Liabilities Act dated 19 December 1980, since it violates the democratic rule of law and the resulting protection of private life and access to courts; however, it is not inconsistent with article 87, section 2 of the said constitutional provisions.

3. articles 2 to 4 of the Act dated 31 May 1996 Amending the Tax Liabilities Act and Amending Certain Other Acts conform with articles 1 and 87, section 2, of the aforesaid constitutional provisions in the part referring to the enforcement of decisions in item 1 of this decision and concerning administrative tax proceedings; neither are they inconsistent with article 56, section 1 of the same constitutional provisions.

Reasoning

(...)

III

(...)

1. The fundamental objection raised by the applicant is the alleged violation of the civil right to private life. Since none of the constitutional provisions currently in force *expressis verbis* mentions the existence of such a right, the Constitutional Tribunal has initially considered whether it is possible to infer the right to private life from the general constitutional rules and in particular from the interrelation of the principle of a State under the democratic rule of law (article 1 of the constitutional provisions) and the protection of the inviolability of correspondence (article 87, section 2 of the constitutional provisions).

The idea of the right to private life has only recently been gaining importance in both constitutional regulations and court decisions. However, it is already well-established in modern democratic states. It incorporates rules applicable to various spheres of an individual's life, and their common denominator is vesting an individual with the right „to live his/her own life arranged according to his/her own will, where any external interference is reduced to the necessary minimum" (A. Kopff: „Koncepcje prawa do intymności i do prywatności życia. Zagadnienia konstrukcyjne", *Studia Cywilistyczne,* vol. XX, 1972). Thus understood private life primarily refers to personal, family and social life and is soεtimes described as „the right to be left alone" (see W Sokolewicz: „Prawo do prywatności", *Prawa człowieka w Stanach Zjednoczonych,* Warsaw 1985, p. 252). It is generally assumed that private life also applies to the protection of information about a given person and guarantees, *inter alia*, a certain state of independence where an individual can decide on the scope and extent of availability and disclosure of information about his/her life to other persons.

In general, the right to private life has been expressly guaranteed in new constitutions; it has also been expressed in international legal acts concerning the protection of human rights. It is in particular laid down in article 12 of the Universal Declaration of Human Rights, article 17 of the International Covenant on Civil and Political Rights and article 8 of the European Convention on Human Rights. Since both the Covenant and the Convention have been ratified by Poland, the rules laid down therein are binding on the Polish lawmaker. (...)

In light of such rules (article 8 of the Convention) we must say that: first, the Convention has not set inflexible limits on the right to private life and „the personal and family sphere" being the fundamental object of protection, has been left open-ended. It has actually been assumed that this sphere will be more precisely defined and appended over the course of the Convention's application. Secondly, the Convention, when talking about „respect" not only prohibits the State's interference in an individual's private life but also imposes certain obligations on the State (in particular with respect to family life - see Decision of the European Court of Justice in the case Marck versus Belgium, 1979, A-31); third, the maintenance of the right to private life is not absolute and may be curtailed subject to the fulfillment of certain formal and substantive conditions listed in article 8, section 2. As far as European Decisions are concerned, the crucial role is played by the requirement that any interference must be according to law and they underline the fact that such laws must be adequately precise. The Court has adjudicated in Malone versus United Kingdom, 1984, A82 (police wire-tapping and registration of telephone calls): „The powers vested in the administration cannot be expressed in terms of absolute authority. It is contradictory to the principle of the rule of law. Thus, the law should define in a sufficiently clear way the scope of discretion in decision-making granted to relevant bodies and the application procedure in light of the lawful purpose of the regulation ..." (similar Decisions: Kruslin and Huving versus France, 1990, A-176).

The existence of the right to private life in the Polish legal system has been confirmed through Supreme Court decisions which, in its Decision III ARN 18/94 of 8 April 1994, related the idea of protecting personal interests (articles 23 and 24 of the Civil Code) to the sphere of private life and the intimate sphere by, *inter alia*, pointing out that: „Protection in that respect may extend to include the disclosure of facts from personal or family life, abuse of information received, collecting... information and opinions concerning the intimate sphere for publication or other disclosure."

The Constitutional Tribunal has reviewed, against the above background, whether the right to private life may be considered constitutional *de lege lata*. The recognition of the right to private life under international regulations on human rights is of decisive importance here,

likewise the relation of that right to the general principle of the rule of law in the Decisions of the Court of Justice. It allows one to assume that the recognition and maintenance of due protection of the right to private life is a necessary element of any State under the democratic rule of law and hence falls within the general clause of article 1 of the constitutional provisions. The previous Decisions of the Constitutional Tribunal have already enhanced the belief that the democratic rule of law also covers certain substantive matters, in particular those related to individual rights and freedoms. That line of reasoning led to the inference from article 1 of the constitutional provisions of such aspects for the legal status of an individual's access to courts (Decision dated 7 January 1992, K. 8/91, Constitutional Tribunal's Collection of Decisions 1992, part. I, p. 76 ff, and numerous subsequent Decisions), the right to dignity (resolution of 17 March 1993, W.16/92, Constitutional Tribunal's Collection of Decisions 1993, part I, p. 165) and the right to life (Decision dated 27 May 1997, K. 26/96, Constitutional Tribunal's OTK ZU Number 2/1997). In the opinion of the Constitutional Tribunal, article 1 of the constitutional provisions also provides a basis for formulating the constitutional right to private life understood, *inter alia*, as the right to maintain the inviolability of information about his/her private life. In addition to the reference made to the general idea of a rule of law, the Tribunal deems it advisable to support this conclusion with three more specific arguments:

- First, article 87, section 2 of the constitutional provisions (expressly providing for the inviolability of correspondence) may be regarded as an expression of a wider principle related to the general right to private life. In that respect, reference should be made to the interpretation of article 56, section 1 of the constitutional provisions as the Tribunal considered those provisions an important point of reference when inferring „access to courts" from article 1 of the constitutional provisions.

- Second, the right to private life is universally recognized and guaranteed under international acts on human rights. The ratification of such acts by Poland can justify the construction of the meaning of the principle of a „state under the democratic rule of law" on the basis of legal standards and consequences of such acts.

- Third, the right to private life has been expressly guaranteed under article 47 of the Constitution dated 2 April 1997. Although this provision is not binding in law yet, it expresses the present understanding of an individual's rights and freedoms, i.e., the context for reading the meaning of article 1 of the binding constitutional provisions.

Though recognizing the rank of the right to private life, the Constitutional Tribunal'stresses that, just like other individual rights and freedoms, it is not absolute and may be subject to restrictions. However, such restrictions must be formulated in a manner complying with constitutional requirements (see in particular Decision U. 6/92 of 19 June 1992, Constitutional Tribunal's Collection of Decisions 1992 art I, p. 204; resolutions: W. 3/93 of 2 March 1994, Constitutional Tribunal's Collection of Decisions 1994, part I, pp. 159-159, and W. 8/93 of 16 March 1994, Constitutional Tribunal's Collection of Decisions 1994, part I, p.168; Decisions: K.11/94 of 26 April 1995, Constitutional Tribunal's Collection of Decisions 1995, part I, pp. 132-133; K.12/95 of 21 November 1995, Constitutional Tribunal's OTK ZU Number 3, 1995, p. 141; resolution W 14/95 of 24 April 1996, Constitutional Tribunal's OTK ZU Number 2, 1996, p.136). It means that, *inter alia*, a limitation of any right or freedom may only take place when it is justified by some other constitutional norm, rule or value, and the extent of such limitation must be proportional to the importance of the interest to be furthered by the limitation. In this light, the Decisions of the Constitutional Tribunal conform with the rules ensuing from article 8, section 2 of the European Convention and the future article 31, section 3 of the Constitution.

2. The right to private life also covers the maintenance of inviolability of information about a citizen's financial situation and hence it also refers to bank accounts (and similar) and transactions made by a citizen. It particularly apples to a situation when a citizen acts as a private person, that is, when not acting as an entrepreneur The rules challenged in the Act of 31 May 1996 by the Commissioner for Citizens' Rights refer to the aforesaid matters and hence should be analyzed in light of their conformity with article 1 of the constitutional provisions.

In the applicant's opinion, the violation of article 1 of the constitutional provisions by the challenged provisions of the Act dated 31 May 1996 Amending the Tax Liability Act and Amending Certain Other Acts, occurred because the challenged provisions do not meet the standards of the democratic rule of law that have been laid down to protect the sphere of private life in article 17 of the Intentional Covenant on Human Rights and article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. On the other hand, however, the applicant points out that the challenged provisions were intended to harmonize Polish law, in the subject matter thereof, with the legislation of the States associated in the Organization for Economic Cooperation and Development (OECD).

We may detect a certain antinomy in the lawmaker's assumptions, namely that the OECD, that is, an organization associating countries with the most developed economies, does not observe the International Covenant on Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms and, furthermore, has recommended that Poland violate these important acts of international law.

The fact that the request to review the constitutionality of the provisions of the challenged law is. based on the above assumption indicates that the norms contained in these acts of international law are differently understood by the applicant and the bodies representing the OECD and, probably, by the governments of the majority of OECD countries.

Article 17 of the International Covenant of Human Rights provides that no one shall be subjected to arbitrary or unlawful interference in his/her private life, family, home or correspondence, nor to unlawful attacks on his/her honor and reputation, and that everyone has. the right to the protection of the law against such interference or attacks. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that everyone has the right to respect for his private and family life, his home and his correspondence.

In the applicant's opinion, the challenged provisions of the Act dated 31 May 1996 Amending the Tax Liability Act and Amending Certain Other Acts transgress the admissible limits of interference by a public authority into private life. When the tax authorities were provided with access to bank, credit, money and trading accounts and other banking documents that may also refer to personal payments, they obtained the authority to control the private life of citizens and, consequently, to violate their private life. Therefore, it is necessary to claim that each case of inquiry by the tax authorities into banking documentation for the purpose of controlling the private life of citizens would be a violation of the challenged law. The tax bodies are not authorized to control the private life of citizens and any activity aimed in that direction would be unlawful. Hence, it is not possible to sympathize with the opinion expressed in the allegation's reasoning, namely that the tax authorities obtained the authority to control the private life of citizens. The problem is whether the provision of tax offices with the authority to carry out tax audit by reference to banking documents which may contain documents relating to a citizen's personal payments can be justified with a sufficiently

important public interest and, as a matter of secondary importance, whether proportionality has been fulfilled with respect to the importance and the requirement of protecting that public interest and the extent of disclosure of banking documents to tax inspection bodies. (...)

Before the effective date of the challenged law, banks disclosed banking documentation when requested by a court or prosecutor. They were able to exchange, on the basis of reciprocity, information about loans extended, bank account activity and balances to the extent required for granting loans, credits and bank guarantees. The banks were obligated to preserve the inviolability of bank account activity and balances under article 48, section 1 of the Banking Law; however a derogation was provided in section 3 of that article in order to secure banks' interests from unreliable customers. Although all banks are bound to maintain banking secrecy, the disclosure of the aforesaid information to other banks undoubtedly widens, considerably, the group of people with access to such information.

The challenged provisions of articles 34b and 34c of the Tax Liability Act do not provide for any radical extension of the group of people with access to banking secrets. Under the former, a bank only had to make available and disclose banking information to the tax official actually handling the tax proceedings concerning a given taxpayer, while the latter limits the number of tax officials having access to the said information to three persons only, that is the official who handles the case, his/her direct superior and the head of the tax office concerned. Article 49i of the law provides for criminal liability for disclosure of information covered by fiscal secrecy. Thus, at present, fiscal secrecy is not protected to a lesser extent than banking secrecy which is usually described as business secrecy.

We are not convinced by the applicant's objection that the law provides for no limitations of the power of a tax inspection office to request the disclosure of banking information and documentation by a bank when a taxpayer refused to disclose it or as to the authority of such a tax office to request such information from a bank. In this case, the request for disclosure of banking information cannot be submitted by the tax official handling a given tax case but only by the head of the tax office. Therefore, the advisability of exercising that option by the tax office is internally reviewed by the head of the tax office. He/she should, pursuant to article 4b, section 4 of the law in question, pay special attention to the principle of mutual trust between financial institutions and their customers. The head also defines the extent and date of disclosure and the grounds therefor. The information requested is disclosed in compliance with the procedure laid down for documents containing data bound by business secrecy.

However, the head of the tax office does not approach the bank with a request for disclosure of banking information in the form of an administrative decision that might be appealed before the Chief Administrative Court; it amounts to a limitation of the civil right to be heard before a court of law as regards the protection of information covered by banking secrecy against a tax office. Nevertheless, the disclosure to tax offices of banking information that may also contain data from citizens' private sphere of life, with disregard for the court, may be deemed admissible in certain special cases, when it can be justified with an important public interest and provided that such information is covered by business secrecy.

The especially unwelcome consequences of restrictive regulations on banking secrecy include: 1) the State is deprived of some income since the tax service does not have access to information about business transacted, 2) the reliance by citizens on the tax system is under threat since certain taxpayers conceal special transactions which leads to an uneven distribution of the tax burden, 3) international cooperation between tax services is hampered. In order to eradicate such anomalies, the tax authorities should not be treated like any other

third party as regards access to banking secrecy, while being obligated to maintain secrecy vis-a-vis third parties.

The curtailment of protection of banking secrecy and thus the principle of protecting the private life of citizens can be justified with the principle of tax equity. It refers to improving the efficiency of tax collection and detecting tax-related crimes and income derived from other kinds of criminal activity.

Exceptions from the rule to keep banking secrecy also existed in the previous legal state. The most extensive exception consists in the mutual exchange between banks of information about loans extended, bank account activity and balances to the extent required for granting loans, credits and bank guarantees. That exception was introduced to secure banks' interests and to reduce the risk of banking transactions.

On the other hand, the introduction of another exception from the rule to keep banking secrecy in favor of tax authorities can be justified by the State's fiscal interests and, indirectly, citizens' interests - the people who pay taxes are interested in the practical enforcement of tax equity.

The banking information and documents disclosed to tax authorities are then covered by fiscal secrecy; any breach of fiscal secrecy is subject to penalty. The procedure provided for the transmission of such information and documents and the reduction of the number of tax officials with access thereto satisfy the requirement of preserving the secrecy of such information and documents vis-a-vis third parties.

We are not convinced by the applicant who claims that the sole admissibility of accepting a statement from a taxpayer, without any chance of verifying its authenticity when it is reasonably questionable, can sufficiently protect the State's fiscal interest. The institution of fiscal penal proceedings, if any, in order to verify a questionable statement filed by a taxpayer, would be far more burdensome for him/her than reading banking documentation against the taxpayer's will. It could be regarded as an abuse of authority for the tax inspection office to institute such proceedings.

In proceedings before a tax authority, a taxpayer enjoys, as a party to the proceedings, the guarantee of correct proceedings provided for in the Code of Administrative Procedure. Therefore, it may provide explanations and raise objections as to the banking information disclosed to the tax authority. A final decision in a tax-related case can be appealed before the Chief Administrative Court. Therefore, the omission to provide a taxpayer with access to courts at the stage of proceedings aimed at disclosure of banking information to a tax authority does not mean that such a taxpayer is deprived of the opportunity to verify the correctness of a tax-related decision reached on a basis of such information before a court.

3. As regards the constitutionality of article 49h whereby the Minister of Finance (section 2) and the President of the Supreme Chamber of Control (section 4) are authorized to publish information about the amount of taxes paid or tax arrears of individual taxpayers engaged in economic activity, one should first of all heed the lawmaker's failure to define the grounds for admissibility of public disclosure of such information by the said organs. It is beyond doubt that, in light of the present wording of that provision, both the Minister of Finance and the President of the Supreme Chamber of Control are authorized to select taxpayers at their discretion and to make public use of the information obtained through specific proceedings. The said provision does not impose upon the Minister of Finance or the President of the Supreme Chamber of Control any conditions warranting the publication of such information. Thus, the interested party has no legal opportunity to challenge the admissibility of such information whose secrecy it prefers for various reasons, none affecting

any public interest, e.g., in view of its competition. Each taxpayer engaged in economic activity has the right to a certain „private life" of operation, unless its purpose is to cover up criminal activity or evade certain responsibilities under public law. By vesting in the public authorities the power to interfere with the sphere of private life, the lawmaker should have defined the measures and procedures for protecting an individual's freedoms and rights. The provision of protection to an individual against arbitrary measures of public authorities is an important feature of the democratic rule of law. Nonetheless, despite the recognition of defective formulations in article 49h, sections 2 and 4, the Prosecutor General is able to perceive negligible normative accuracy. In his opinion, it would be sufficient to secure an interpretation consistent with the Constitution and oriented as noted in the historical section of this reasoning. However, in the opinion of the Constitutional Tribunal, that orientation would not be binding and, secondly. would in fact entail a supplement to the rule while it is the lawmaker and not a court body who is empowered to do that. The absence of express conditions enabling both the Minister of Finance and the President of the Supreme Chamber of Control to publish both the amount of taxes paid and the amount of tax arrears, constitutes a gross violation of the constitutional rule of law laid down in article 1 of the constitutional provisions and, in particular, the definiteness of norms permitting any interference with the sphere of private life, with which such a State should comply.

The Constitutional Tribunal also shares the opinion of the Commissioner for Citizens' Rights, namely that the provisions permitting the publication of information about the amount of taxes paid or the amount of tax arrears can be deemed repressive. The publication of information about facts, even when they are true, can cause adverse effects to interested parties, both in view of their business and reputation, that is personal dignity. Hence the rule providing for the possibility to take such actions in relation to a citizen must comply to very detailed substantive requirements (sufficient specification) and procedural requirements (access to court). The failure to satisfy such requirements must result in the unconstitutionality of the challenged regulation.

The question of publishing information about the amount of taxes paid and the amount of tax arrears is, however, outside the scope of constitutional protection of the inviolability of correspondence since it refers to facts established *ex officio* by public authorities and does not authorize the publication of tax returns filed by individual taxpayers.

4. Articles 2-4 of the Act dated I May 1996 Amending the Tax Liability Act and Amending Certain Other Acts, as mentioned in sub-section of the allegation, as regards the enforcement of the provisions listed in item 1 of the allegation and referring to administrative proceedings, introduce provisions to the following laws: the Banking Law and the Law on Public Trading in Securities and Trust Funds, whereby references are made to the challenged law. They might be recognized as inconsistent with the Constitution, however only if the provisions listed in item 1 had been found to be inconsistent with the Constitution. (...)