JUDGEMENT
of 3 April 2001
Ref. No. K. 32/99*

The Constitutional Tribunal, in a bench composed of:

Wiesław Johann – Presiding Judge
Biruta Lewaszkiewicz-Petrykowska – Judge Rapporteur
Andrzej Mączyński
Jadwiga Skórzewska-Łosiak
Janusz Trzciński,

Joanna Szymczak – Recording Clerk,

having considered an application from the Commissioner for Citizens' Rights at a hearing on 3 April 2001, in the presence of duly authorised representatives of the parties to the case at hand: the Applicant, the Sejm of the Republic of Poland, Minister of Finance and Public Prosecutor-General, to determine that:
the tax concept set forth by Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 paragraph 1-4 of the Act of 8 January 1993 on Tax on Goods and Services and Excise Duty (Journal of Laws – Dz.U. No. 11, item 50, subsequently amended) does not conform to Article 217 and Article 87 paragraph 1 of the Constitution of the Republic of Poland, and that
the current text of Article 54 paragraph 4 does not conform to Article 7, Article 87 and Article 217 of the Constitution of the Republic of Poland,

adjudicates as follows:

1. Article 2, Article 4 subparagraph 1 and 2 and Article 54 paragraph 1, 2 and 4 of the Act of 8 January 1993 on Tax on Goods and Services and Excise Duty (Journal of Laws – Dz.U. No. 11, item 50; subsequently amended: 1993 No. 28, item 127, No. 129, item 599; 1994 No. 132, item 670; 1995 No. 44, item 231, No. 142, item 702 and 703; 1996 No. 137, item 640; 1997 No. 111, item 722, No. 123, item 776 and 780, No. 137, item 926, No. 141, item 943, No. 162, item 1104; 1998 No. 139, item 905, No. 161, item 1076; 1999 No. 50, item 499, No. 57, item 596, No. 95, item 1100; 2000 No. 68, item 805, No. 105 item 1107; 2001 No. 12, item 92) **conform to Article 87 paragraph 1 and Article 217 of the Constitution of the Republic of Poland, and Article 54 paragraph 4 also conforms to Article 7 of the Constitution.**

2. Article 54 paragraph 3 of the Act referred to in point 1, considered to impose an obligation upon the minister responsible for public finances only to announce the contents of the appendices to the Act, conforms to Article 87 paragraph 1 and Article 217 of the constitution of the Republic of Poland.

Statement of Reasons:

I

* The sentencing part of the judgement was published in the Journal of Laws [Dziennik Ustaw] – Dz.U. No. 32, item 385

1. In his application to the Constitutional Tribunal of 29 September 1999, the Commissioner for Citizens' Rights requested the Tribunal to determine that the tax concept set forth by Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 paragraph 1-4 of the Act of 8 January 1993 on Tax on Goods and Services and Excise Duty (Journal of Laws – Dz.U. No. 11, item 50, subsequently amended) does not conform to Article 217 and Article 87 paragraph 1 of the Constitution of the Republic of Poland. In the Commissioner for Citizens' Rights' opinion, these provision state that the goods and services that are subject to the tax and the amount thereof are determined by a classification carried out by the Central Statistical office („GUS"). In the meantime, in Article 217 the Constitution has *expressis verbis* formulated the principle of statutory exclusivity in tax law and the imposition of taxes; the specification of those subject to a tax and the rates of taxation shall be determined solely by means of an act of parliament. The Commissioner for Citizens' Rights said that before the current Constitution had come into force, he had twice expressed his reservations to the Minister of Finance about making the tax duty and the rate of tax dependent upon the statistical classification set forth by GUS. He considered such a regulation impermissible in a state ruled by law. However, his application did not inspire efforts to change the existing regulation.

In Article 217, the Constitution of 2 April 1997 expressly formulated the principle of statutory exclusivity which is meant to ensure the certainty, stability and foreseeability of tax. These features are certainly not guaranteed if the subject and rate of tax are based on a statistical classification. And yet in the challenged Act, the rate of tax on goods and services (unless otherwise stated in the Act) on a specific commodity or service depends on its inclusion in a category of goods or services mentioned in the appendices to the Act. Any doubts raised in connection with untypical goods and services are resolved by the GUS Research and Development Centre, whose opinion determines the tax obligation and the amount thereof. In such a situation, stability is not prejudged by the fact that the tax rates set forth in the Act have not changed over the past five years, because the rate of tax has fluctuated on account of changes to the statistical classifications.

Further explaining the basis for his opinion that the above provisions do not conform to the Constitution, the Commissioner for Citizens' Rights presented the legal concept used in the aforementioned Act. According to paragraph 2 thereof, tax on goods and services is payable on the sale of goods and services in the territory of Poland. Article 4 of the Act, containing a „glossary," says in subparagraph 1 that goods are taken to mean movable objects, as well as all forms of energy, buildings, concepts and parts thereof, mentioned in the classifications issued on the basis of the regulations governing the State statistics. Under the terms of Article 4 subparagraph 2, services are taken to mean the services mentioned in the classifications issued on the basis of the regulations governing the State statistics, as well as construction and refurbishing work. Therefore the classifications possess fundamental importance for determining the rate of tax. Trade may be subject to the basic tax rate (22%) or preferential rate (7%, 0%) or may be exempt from tax altogether, depending on the symbol of the commodity or service imparted by the classification.

The statistical classifications, i.e. the Systematic Products List („SWW") and Products and Services Classification („KWiU") to which the Act refers, were introduced by directives issued by the GUS Chairman. According to the challenged Article 54 paragraph 3 of the Act, if a new classification of goods and services is introduced, the Minister of Finance, in conjunction with the GUS Chairman, must release appendices to the Act taking into account the terminology resulting from the new classification. In the performance of this obligation, the Minister of Finance published the appropriate tables in an directive dated 31 March 1995 (Journal of Laws – Dz.U. No. 44, item 231). At the same time, § 2 of this directive states that

a change in the terminology of services after 21 March 1995 does not cause a change in the rate of tax on goods and services. In the Commissioner for Citizens' Rights' opinion, by laying down this regulation the Minister of Finance violated Article 54 paragraph 3 of the Act, for the Sejm had not empowered the Minister of Finance to determine the contents of the appendices, but only to „technically adapt" the contents of these appendices to the new GUS classification. In this situation, said the Commissioner for Citizens' Rights, there was no legal basis on which to apply for tax purposes classifications which were no longer applicable in statistics. This view is all the more justified because the former Act on State Statistics ceased to be effective on 1 November 1995. It was replaced by the Act on Public Statistics of 29 June 1995 (Journal of Laws – Dz.U. No. 88, item 439, subsequently amended), on the basis of which (Article 40 paragraph 2) the Council of Ministers issued a Regulation dated 18 March 1997 concerning the Polish Goods and Services Classification („PKWiU"). A 6-volume appendix to this directive contains a classification of the goods and services binding in statistics, records, documentation and accounting, as well as in registry offices and information systems in the public administration. The Regulation, with its appendices, came into effect on 1 July 1997, but, under the terms therein, the older classifications (SWW and KWiU) and the new one (PKWiU) were used parallel to each other for a transitional period until 30 June 1999. However, an amendment to the Act on Tax on Goods and Services, adopted on 20 May 1999, added a new paragraph 4 to Article 54, saying that „for the purpose of collecting tax on goods and services and excise duty, the statistical classifications that were in force prior to 1 July 1997 shall continue to be applied until 31 December 2000." Thus, the scope of the tax in question is still largely regulated by the directive, bearing the status of an act, issued by the GUS Chairman. Summing up, the Commissioner for Citizens' Rights says that such a legal state of affairs violates not just Article 217, but also Article 87 of the Constitution, which says that regulations and enactments of local law are sources of universally binding secondary law. Ministerial directives are internal in nature, and are binding only upon the organisational units for which the minister who issued them is responsible.

The Commissioner for Citizens' Rights also expressed reservations over the fact that the subject of tax is established under rules issued on the basis of and for the purpose of implementing an act other than the tax law. The doubt arises whether such a legislative technique conforms to the constitutional principle of a state governed by law. The SWW and KWiU classifications, created for statistical purposes, are subject to constant modifications. In specific cases involving tax on untypical goods and services, the tax rate is determined by an opinion by GUS, voivodship statistical office, a GUS scientific research unit or by statistical experts. In the case of differences of opinion on the classification of a particular commodity or service, a decision is reached by the statistical bodies, therefore they sometimes have the final say on exemption from tax or on the imposition of a particular rate. Consequently, the scope of taxation is not stable, and the regulations that deal with it are unavailable. The Commissioner for Citizens' Rights stressed the influence of this state of affairs on the situation of taxpayers, who are burdened with the duty to calculate the tax themselves, and hence a risk that they will not apply the correct tax rate. Any mistake in classifying a commodity or service on their part leads to negative consequences. The Commissioner for Citizens' Rights also pointed out the difficulties faced by the tax authorities because the various bodies to whom the Act applies (tax offices, fiscal control chambers, producers, wholesalers and other entities that appear in various stages of the trading process) classify the same product or service in different ways, resulting in differences in taxation.

In the Commissioner for Citizens' Rights' opinion, the above arguments support the view that the questioned provisions do not conform to Article 217 and Article 87 of the Constitution.

In a letter of 11 January 2001, the Commissioner for Citizens' Rights upheld his earlier application and expanded the scope of constitutional review, seeking a recognition that Article 54 paragraph 4 of the Act on tax on goods and services in its current version does not conform to Article 7, Article 87 and Article 217 of the Constitution of the Republic of Poland. The Commissioner for Citizens' Rights underlined the topicality of the charges raised in the application despite the amendments to the challenged law, which occurred after the application had been submitted. At the same time, he stressed that the expansion of the application caused by an amendment to the Act „does not alter the *meritum* of the application".

Relating to the Minister of Finance's position, the Commissioner for Citizens' Rights pointed out that the „warning" in the letter against the impact of the Constitutional Tribunal's recognition of the application proves the substantive meaning of the appendices to the Act; they determine the amount of the tax on particular goods. However, these appendices are usually the result of an agreement between the Minister of Finance and GUS Chairman, and are based on the SWW and KWiU statistical goods classification which ceased to have effect on 1 July 1997. This classification, maintained on the basis of the amended Article 54 paragraph 4 of the Act on tax on goods and services, is a directive by the GUS Chairman, issued on the basis of the now-defunct Act on State Statistics. In the light of Article 87 of the Constitution, it cannot be regarded as a source of law.

In the Commissioner for Citizens' Rights' opinion, basing the tax system on executive regulations which, on account of their status, are not considered a source of law and are no longer in force is a breach of Article 217 and Article 7 of the Constitution of the Republic of Poland.

2. In a letter of 20 January 2000, the Public Prosecutor-General said that Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 paragraph 1-4 of the Act of 8 January 1993 on Tax on Goods and Services and Excise Duty (Journal of Laws – Dz.U. No. 11, item 50, subsequently amended) does not conform to Article 217 and Article 87 paragraph 1 of the Constitution of the Republic of Poland. He considered the Commissioner for Citizens' Rights' views justified and fully shares the charges expressed in the Commissioner for Citizens' Rights' application. In the Public Prosecutor-General's opinion, these charges concerned the scope of the Act in tax legislation and in the constitutional system of legal sources.

In the Public Prosecutor-General's opinion, Article 217 of the Constitution imposed far-reaching restrictions upon the legislator in deciding what tax issues he can regulate himself (by means of acts of parliament) and what issues he must refer to executive instruments. The Constitution itself has particular requirements as to the exactitude and scope of tax laws; for instance, they must define the subject of the tax. In the meantime, the legislative technique employed in the challenged provisions makes it impossible to construct the subject of the tax on goods and services legislation solely on the basis of the provisions of the Act; these are too vague and incomplete. To establish the subject of the tax, it is essential to refer to extra-statutory instruments which do not have binding force of law. This is another reason for the constitutional non-conformity of the challenged provisions.

Referring to the contents of the Commissioner for Citizens' Rights' application, the Public Prosecutor-General said that the SWW and KWiU classifications, to which the challenged provisions of the Act refer, were issued by the GUS Chairman in the form of an directive. Therefore, in view of the entity who issued them and their legal form, they were not sources of universally binding law under the terms of Article 87 and Article 92 paragraph 1 of the Constitution; apart from acts of parliament, such a status is held solely by directives issued by the entities mentioned in the Constitution on the basis of a particular authorisation

mentioned in the Act and for the purpose of its implementation. Legal instruments in the form of directives cannot shape the legal situation of citizens today. Sharing the applicant's view, the Public Prosecutor-General indicated the major difficulties with applying the law in connection with the existing manner of regulation. The risk of a faulty calculation of tax is borne by the taxpayers, who have the duty to calculate it themselves.

On account of the potential impact on the State finances of the Constitutional Tribunal's decision that the challenged provisions do not conform to the Constitution, the Public Prosecutor-General requested that these provisions be deprived of their legal effect within eighteen months of the promulgation of the judgement (Article 190 paragraph 3 of the Constitution).

In a letter of 26 February 2001, the Public Prosecutor-General said that a reconsideration of the charges raised in the application had caused him to change the opinion he expressed previously, i.e. in the letter of 20 January 2000. According to the Public Prosecutor-General's changed opinion, Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 paragraph 1-4 of the challenged Act are not in non-conformity to Article 217 and Article 87 paragraph 1 of the Constitution of the Republic of Poland, and furthermore, Article 54 paragraph 4 of the Act is not in non-conformity to Article 7 of the Constitution.

In his statement of reasons, the Public Prosecutor-General said that Article 217 of the Constitution does not prevent the legislator from employing technique of referring goods and services for individual classification issued on the basis of the regulations on public statistics. The procurator pointed out that the subject of tax on goods and services is trade in goods and services, and the forms of this trade have been set out at length in art 2 of the Act. The legislator is not obliged to list in the Act on tax on goods and services the goods and services which may be the subject of trade, for the concept of „goods and services" is universally known. Listing them in the Act would be technically difficult and, furthermore, objectively unjustified because the State already has official statistical lists prepared by the relevant administrative bodies. Including a list of goods and services in the Act would be a mere transposition of an official classification from one legal instrument to another. Thus, in the Public Prosecutor-General's opinion, the concept of the subject of the tax adopted in the questioned provisions does not breach the principle of exclusivity of tax law expressed in Article 217 of the Constitution.

In the Public Prosecutor-General's view, this principle is also not breached by the manner of determining tax rates. The amount of these rates and the categories of goods and services to which individual rates or exemption apply have been set forth in the Act and in the appendices which form an integral part thereof. The legislator uses the classification symbols solely to identify a specific commodity or service as a category set forth in the appendix.

Considering the question of the conformity of the questioned provisions to Article 87 paragraph 1 of the Constitution, the Public Prosecutor-General expressed the view whereby the statistical classifications to which the Act refers do not possess the nature of legal norms. They are merely lists of goods and services used in trade. They do not contain normative contents which would shape the legal situation of an entity. That is why these classifications need not take the form of an act or directive which, according to Article 87 paragraph 1 of the Constitution, are the sources of binding law in Poland. To support his view, the Public Prosecutor-General recalled the stance of the Constitutional Tribunal (Ref. No. *K. 6/99,* Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 7/1999) whereby it is necessary to distinguish between, on the one hand, universally biding regulations which provide the source of binding law and, on the other hand, extra-statutory regulations, principles and norms to which the first regulations refer. These referrals are made by the law, thanks to which the law is sensitive to the economic reality and to social problems connected

with it. However, the mere fact of a referral to these extra-statutory regulations does not turn them into legal norms. This observation applies fully to the statistical classifications to which the challenged Act refers.

In conclusion, the Public Prosecutor-General relates to the charge against Article 54 paragraph 3 of the challenged Act, which authorises the minister responsible for public finances, in conjunction with the GUS Chairman, to release appendices to the Act, taking into account the terminology resulting from the new classification of goods and services. In the Public Prosecutor-General's opinion, this provision does conform to Article 87 paragraph 1 of the Constitution because it does not authorise the minister to lay down the law himself, but to tidy up the existing legal order. This release assumes the technical form of a promulgation, is purely reproductive, and its purpose is to reflect the terminology adopted in the new classification.

3. In a letter of 3 November 2000, the Marshal of the Sejm provided explanations regarding the Commissioner for Citizens' Rights' application. He said that the application itself suggests that the Commissioner for Citizens' Rights perceives the difficulty with the absolute need to adapt the Act on tax on goods and services to Article 217 of the Constitution. The applicant admits the possibility of regulating the subject of the act by means of a secondary act, provided that such an act is the regulation, and not a directive. In the Marshal's opinion, the legislator presents the same position, which is why Article 54 paragraph 4 of the challenged Act is transitional. Keeping it in force is not the result of the legislator's desire to sanction „bad legislation," but is intended to protect citizens and the state's finances. An absence of this provision would boost the rate of tax on goods and services on a series of goods and services.

In conclusion, the Marshal of the Sejm pointed out that the Act on tax on goods and services was adopted under a different constitutional order. The draft of a new Act is envisaged, which will take into account both the requirements of the Constitution and the directives of the European Union.

In a letter of 16 March 2001, relating to Commissioner for Citizens' Rights' expanded application, the Marshal of the Sejm upheld his previous view, adding to it the opinion whereby Article 54 paragraph 4 of the Act on tax on goods and services also conforms to Article 7 of the Constitution.

Arguing with the charge that Article 217 of the Constitution had been breached, the Marshal stresses that Article 2 of the Act on tax on goods and services possesses fundamental importance for defining the subject of tax, this subject being trade in goods and services. Article 4 subparagraph 1 and 2 of the Act is „purely an aid to the implementation of Article 2". According to the Marshal, the principle of legislator's rationality contradicts the requirement that a definition of each commodity and service be contained in the Act. The rate of tax has also been set forth in the Act. The legislator adopted a rate of 22% as a matter of principle, and those goods and services that are subject to lower rates or are exempt altogether are listed in the appendices which constitute an integral part of the Act.

Referring to the charge whereby Article 87 paragraph 1 and Article 7 of the Constitution had been breached, the Marshal said he was convinced that statistical classifications do not possess the status of an instrument that lays down a norm, essential if a given instrument is to be recognised as a source of universally binding law. Containing standards that are used also in production, record-keeping and statistics, these classifications protect the provisions of the Act against instability. They are formulated by duly authorised bodies, so there is no basis to claim that the principle of legalism and law and order, expressed in Article 7 of the Constitution, has been violated.

In the Marshal of the Sejm's opinion, the principles of the Constitution are also not violated by the purport of Article 54 paragraph 3 of the Act on tax on goods and services. This provision authorises the minister responsible for public finances to release appendices to the Act, taking into account new classifications, but does not allow him to define the subject of tax.

4. In a letter dated 11 December 2000, the Minister of Finance said that the tax concept adopted in Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 paragraph 1-4 of the Act on tax on goods and services is not in non-conformity to Article 217 and Article 87 paragraph 1 of the Constitution. Associating the definition of goods and services with the classifications issued on the basis of the rules governing state statistics should not be regarded as a breach of the basic law because the Act serves as an element of the entire legal system, therefore a referral to other existing regulations is a frequent legislative operation. In the case of the challenged Act, a referral to the classifications is only meant to clarify the terms used in them, therefore this is a purely technical referral. Therefore, the role of a statistical classification is subservient to the provisions of the Act. In the Minister of Finance's opinion, Article 217 of the Constitution cannot be regarded as banning tax legislation from making references to other legal provisions. Consequently, the subject of the tax and the tax rates should be regarded as having been regulated in the Act in a manner that conforms to the Constitution.

Next, the Minister of Finance pointed out the possible impact of a repeal of the challenged provisions. In his opinion, this would result in all goods and service being subject to the 22% basic rate of tax on goods and services. A reduction in the rates of tax on goods and services would require „a very careful definition of individual commodities such as a horse, parsley, beetroot, diapers for babies, gasoline, cigarettes, yachts etc.," said the Minister. There would also be the problem of creating a special body to interpret the concepts used in the Act.

The Minister of Finance also pointed out Poland's obligations to adapt its tax terminology to the methodology of the European Union and Eurostat. Despite what the Commissioner for Citizens' Rights says, these obligations, stemming from international agreements, prevent the statistical authorities from classifying goods at their discretion. The Minister pointed out that in European countries, two methods are used to identify goods and services that are subject to tax on goods and services: the method of referral to statistical classification (Germany, Italy, Czech Republic) and the method where a country's Minister of Finance himself decides which goods should be subject to a rate lower than the basic rate (France, Sweden, Hungary).

In Poland, the first system has been adopted: for tax on goods and services purposes, the SWW, KOB, KWiU and other classifications are used. A new classification, the so-called PKWiU, was introduced in 1997. An annex thereto, drafted by GUS, came into effect on 1 January 2000 and consists of 509 pages of A4 size. At present there is no key which would allow a general conversion from the old classification (SWW) to the new one (PKWiU), therefore the period of time in which the new classification can be used at the same time as the hitherto one has been extended. The deadline currently contained in Article 54 paragraph 4 of the Act on tax on goods and services, 31 December 2002, will not only permit a „conversion" of the old terminology to the new one, but will also adapt it to EU directives. After all, under the terms of the treaty on association, Poland is obliged to apply EU tax concepts, including the customs classification, based on the so-called CN code.

Summing up, the Minister of Finance pointed out that the Statistical Research and Development Centre, whose work has been criticised by the Commissioner for Citizens' Rights, was abolished over 4 years ago; GUS has no authority either to impose tax on goods

and services or determine its amount. The Minister stressed that the duty to pay tax on goods and services, the goods and services to which it applies and the rates thereof have been set forth solely in the Act on tax on goods and services. Referral to the classifications is a purely technical operation.

In connection with an expansion of the scope of the Commissioner for Citizens' Rights' application, the Minister of Finance once again expressed his position. In a letter of 16 March 2001, the Minister of Finance repeated that the concept contained in Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 of the Act on tax on goods and services is in full conformity to Article 217 of the Constitution, for the principle expressed in this provision should not be regarded as an obligation on the part of the tax legislator to list all the definitions for a given commodity or service used for tax on goods and services purposes. This would be very difficult from the point of view of legislative technique, and also superfluous because there are already lists of goods and services in Poland drawn up by the relevant administrative body.

Classifications are lists of groups of goods and services and of specific goods and services, marked with numeric symbols permitting their statistical identification. The minister pointed out that in statistics, economics, foreign trade and customs, these classifications serve a purpose similar to that of weights and measures or conversion tables. Because of their universal application, they are also referred to in the concepts of tax law. In the Minister's opinion, a referral to the classifications guarantees greater objectivism and clarity in establishing the subject of tax on goods and services than would have been the case if the legislator had defined the individual goods and services in the Act on tax on goods and services. By way of example, the Minister indicated appendix 5 to the Act, which lists some 80 materials and items of equipment used in concept which attract a 7% rate of tax on goods and services. The Minister said that it would be virtually impossible to define them in the Act. He also noted the similarity between the classifications used in Poland and those in the EU countries, and even the need in some spheres to adapt the Polish classifications to the EU ones, an obligation imposed by EU directives.

The Minister of Finance noted a certain change in the Commissioner for Citizens' Rights' opinion. The expansion of the Commissioner for Citizens' Rights' application concentrates on criticising the fact that despite the validity of Article 54 paragraph 3 of the Act on tax on goods and services, this Act refers to old statistical classifications which are no longer in force. In the Minister's view, the Commissioner for Citizens' Rights' expanded opinion indicates that in principle, the Commissioner for Citizens' Rights acknowledges the possibility of using the classifications. In this context, the Minister of Finance explained at length the reasons why the legislator prolonged (until 31 December 2002) the use of the PKWiU statistical classification for tax on goods and services purposes, pointing to difficulties resulting from the absence of an official key of associations between the new and old statistical lists. In the current situation, said the Minister, the view was justified whereby a postponement of the introduction of PKWiU is an expression of the legislator's conscious effort to establish procedures which will ensure objective, tried and tested parameters for the application of tax on goods and services.

Taking into account the above objective of the legislator's activity, the Minister of Finance opposed the applicant's charges levied against Article 54 paragraph 4 of the challenged Act. The contents of the classifications prove that they are merely lists of names of groups of products and services and their numerical symbols. They do no contain any substantive contents which might shape the legal situation of taxpayers. Furthermore, the Minister of Finance said that as of the moment of the full adoption of the terminology and statistical symbols for tax on goods and services purposes, these classifications became an integral part of the Act on tax on goods and services. The Minister referred to the statement of

reasons for the Constitutional Tribunal judgement in the case Ref. No. K. 6/99 (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 7/1999), from which it transpires that the tax legislator may use the classification for reference purposes, for the Tribunal indicated the distinction between the regulations that are the source of universally binding law and regulations and norms which, though not part of the system of universally binding law, may nevertheless be referred to by the binding regulations. The observance of these rules may be part of the duties of those to whom the source regulations are addressed. In the Minister's opinion, the Commissioner for Citizens' Rights did not take these arguments into consideration when he claimed that Article 54 paragraph 4 if the Act violates the principle of legalism and law and order. Furthermore, the Minister underlined the transitory nature of this provision.

Referring to the claim whereby Article 54 paragraph 3 does not conform to the Constitution, the Minister of Finance said that the promulgation of appendices which take into account the new terminology is purely a technical, formal operation intended to preserve order. Such an operation by the minister does not signify a breach of the certainty of tax law and should not upset citizens' trust in the State and the law.

Summing up, the Minister of Finance said that the provisions of the Act on tax on goods and services questioned by the Commissioner for Citizens' Rights are not in breach of the provisions of the Constitution.

5. In a written statement of claim of 28 March 2001, the Commissioner for Citizens' Rights asked for the inclusion among the case evidence of two legal opinions of two professors on financial law: Prof. Dr Ryszard Mastalski and Prof. Dr. Cezary Kosikowski. Both opinions were attached to the written statement.

II

At the hearing on 3 April 2001, the representatives of the applicant and of the remaining parties to the case upheld the stance expressed in the communiqué.

The Commissioner for Citizens' Rights' representative fully supported the expanded application, at the same time asking the Constitutional Tribunal to treat the attached legal opinions by the financial law professors as additional justification for the application. He repeated that – in the Commissioner for Citizens' Rights' opinion – the GUS classifications have a direct influence on tax on goods and services. He stressed that this influence manifests itself in two spheres: the classifications determine the subject of the tax and the rate thereof, and also allow GUS authorities to perform an interpretation of these rules. The concept of goods and services, as the foundation of the subject of taxation, should be accurately defined in the Act; the absence of such a definition determines a breach of Article 217 of the Constitution. The obvious unconstitutional nature of Article 54 paragraph 4 of the challenged Act results from the fact that it dictates the application of regulations that are not binding, and even ones that do not exist.

The representative of the Sejm of the Republic of Poland, supporting the view that the challenged provisions do conform to the Constitution, stressed that because the Act on tax on goods and services generates the State's biggest income, the subject of this tax and the rates thereof are decided by Parliament during heated debates. Because these decisions are also carefully monitored by public opinion, thy are the subject of particularly close examination. Therefore it is obvious that it is the Sejm, and not the GUS classifications, that determine the basic elements of the tax. The classifications are needed only to precisely define the tax concessions and exemptions set forth in the appendices to the Act. However, in this regard

they do not possess the function of laying down norms, but merely fulfil the purpose of a technical directive.

The Minister of Finance's representative, asking for recognition of the challenged regulation as being in conformity to the Constitution., said that the concept of goods and services is defined in the Act; the classifications – which do not lay down norms – are a source of terminology, in other words they provide a more detailed description of goods and services. Such a description must always be sought outside the Act, regardless of the model of the regulations. Disputes over the identity of a specific good or service that appears in trade cannot be excluded, even if the legal regulation is completely separated from the classification. In the opinion of the Minister of Finance's representative, the use of the old classification determines the stability of tax liability, for a referral to lists which are no longer current guarantees the permanence of the features of individual goods and services. The Minister of Finance's representative stressed that the Ministry is working on a „transposition" of the contents of the old classification onto the new one in connection with Poland's preparation for membership of the European Union. This circumstance dictates the deadline for the completion of this work – 31 December 2002.

The Public Prosecutor-General's representative upheld the stance expressed in a letter dated 26 February 2001. She claimed that the GUS classifications are not a source of law, but are a supplement to the law in a technical sense. Practical problems with the classification of individual goods and services are inevitable, even if all the goods and services that are subject to tax on goods and services are listed in the Act.

In their final speeches, the representatives of the applicant and of the parties to the case, upholding their own argumentation, moved for a decision in accordance with their stances.

III

The Constitutional Tribunal established the following:

1. The challenged Act regulates so-called tax on goods and services, one of the forms of tax on trade. This tax was first applied in France, and spread to Europe as a result of the harmonisation of trade taxes envisaged in Article 99 of the Treaty of Rome. To implement this goal, over a dozen directives were issued, the most important of which Directive VI of 17 May 1977 (*77/388/EWG*) on a joint system of Tax on Goods and Services (Official Journal of the European Communities No. 145/1), subsequently modified and adopted in the EU internal market by a directive of 16 December 1991. (*91/680/EWG*) on a joint system of Tax on Goods and Services and an amendment to the sixth directive on account of the abolition of tax boundaries.

In Poland, tax on goods and services, abbreviated to VAT, replaced two previous forms of turnover tax: one applicable to entities of the socialised economy (act of 26 February 1982 on taxes on entities of the socialised economy; uniform text 1987 Journal of Laws – Dz.U. No. 12, item 77) and one payable by all other entities engaged in production, services and trade (act of 16 December 1972 on turnover tax; uniform text 1983 Journal of Laws – Dz.U. No. 43, item 191). VAT was introduced by the Act of 8 January 1993 on Tax on Goods and Services and Excise Duty, promulgated together with six appendices which list the groups of goods and services which are exempt from tax or to which preferential rates apply (Journal of Laws – Dz.U. No. 11, item 50). This Act has already been a target of interest by the Constitutional Tribunal several times. However, the subject of review was the conformity of the executive instruments issued on the basis of the Act to the Act itself, as well as to Article 92 of the Constitution (comp. *Constitutional Tribunal judgement of 5 January 1998, Ref. No. P. 2/97,* Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 1/1998,

item 1). What is being challenged this time is the conformity to the Constitution of the solutions contained in the act itself, namely – the concept of the subject of the tax.

The final version of the Commissioner for Citizens' Rights' application says that the tax concept set forth in Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 paragraph 1-4 of the Act on tax on goods and services does not conform to Article 87 and Article 217 of the Constitution (original scope of application), and furthermore, Article 54 paragraph 4 itself does not conform to Article 7 of the Constitution (expanded application). Though charges are levied at the whole of Article 54 of the Act, the statement of reasons lacks even a brief remark on Article 54 paragraph 2. This provision applies only to the levying of tax on goods and services on imports, and the obligation expressed therein to give the products listed in the appendices the names that stem from the PCN terminology has no significance for the concept of the subject of the tax. Therefore, in effect the subject of the charge is Article 54 paragraph 1, 3 and 4 of the Act. The question of the non-conformity of Article 54 paragraph 4 of the Act to Article 7 of the Constitution is closely linked to the remaining charges, for the basis of the application is the Commissioner for Citizens' Rights claim that the tax on goods and services regulation not only fails to conform to the need for a statutory regulation of tasks expressed in Article 217 of the Constitution, but was also adopted by the public authorities in breach of the limits of action laid down by the law (a breach of Article 7 of the Constitution) and is based on statutes which are not sources of universally binding law (a breach of Article 87 paragraph 1 of the Constitution). In the Constitutional Tribunal's view, on account of the close substantive link between the charges, in this case there is no way of separately examining the conformity of the questioned provisions to the individual models of constitutional review. A proper determination of which provisions currently form the concept of tax on goods and services will permit a simultaneous assessment of conformity to Article 217 and to Article 7 and Article 87 paragraph 1 of the Constitution.

2. Of fundamental, primary importance for the fulfilment of the principle of a state ruled by law in the tax sphere is an effective intervention by the State in a company's financial affairs in a manner that conforms to the Constitution. Article 217 of the Constitution, setting forth which features of the tax sphere actually require statutory regulation, places upon the ordinary legislator the manner of regulating tax issues. In the Constitutional Tribunal's opinion, Article 217 of the Constitution provides that statutes should at least determine who should pay tax (the object), what phenomena in social and economic life are subject to tax (the subject), and how much tax should be paid. (comp. *Constitutional Tribunal judgement of 16 June 1998, Ref. No. U. 9/97*, Constitutional Tribunal's Decisions -OTK in 1998, p. 306). In legal teachings, it is stressed that the legislator's wrongful regulation of these elements by reference to the extra-statutory legal instruments cannot be purged by the procedure of applying the tax law by courts (ibidem). In order to assess the justification of the judgement in this case, it is necessary to contrast the tax on goods and services rules with the presented, basic requirements posed upon tax regulations by Article 217 of the Constitution.

The legal concept of the subject of the tax adopted in the reviewed Act on tax on goods and services is complicated. The most vague expression of this is contained in Article 2 paragraph 1 and 2 of the Act, which says that „the sale of goods and the paid provision of services on the territory of the Republic of Poland " and "the export and import of goods and services" is subject to tax. In the following paragraph, Article 2 paragraph 3, the legislator mentions other forms of trade that are neither a sale nor the paid provision of services, to which Article 2 paragraph 1 and 2 apply. In turn, Article 3 paragraph 1 lists some activities that are exempted form tax. Thus, as the Public Prosecutor-General rightly said in his stance of 26 February 2001, Article 2 lists exhaustively all forms of legal business which are subject

to tax. Such a scope of the tax was confirmed in Article 13, which opens chapter 2 devoted to tax on goods and services. In this article we read that „the activities discussed in Article 2 are subject to Tax on Goods and Services, hereinafter known as *tax*". At the same time, Article 4 of the Act, listing the legal definitions of the concepts used in the Act, states that in the Act:

„1) goods are taken to mean movable objects, as well as all forms of energy, buildings, constructions and parts thereof, being the subject of the activities discussed in Article 2, mentioned in the classifications issued on the basis of the regulations governing state statistics

2) services are taken to mean the services mentioned in the classifications issued on the basis of the regulations governing state statistics, as well as concept and refurbishing work."

From Article 4 subparagraph 1 and 2 on might conclude that goods and services are only the things that are listed in the classifications. The wording of Article 4 subparagraph 1 and 2 suggests that the reconcept of the norm requires a consultation of the classification to which this article refers, because without it one cannot determine which goods and services are covered by the Act. However, such a view is premature when one considers Article 54 paragraph 1 of the Act, which is also the subject of the charge. One should remember that the original wording of this provision already separated the subject of tax on goods and services from the fact that the goods or services have been listed in the classifications referred to in Article 4. In its original version, Article 54 paragraph 1 of the Act, intended to be a transitional provision, said: „Until such time as the Central Statistical Office has set forth the classifications of goods and services, but no later than 31 December 1995, the goods and services that ere the subject of the activities discussed in Article 2, not contained in the: Systematic list of products, Classification of building facilities, Integrated foreign trade goods terminology and Classification of services, are subject to the rate of tax mentioned in Article 18 paragraph 1" (Journal of Laws – Dz.U. 1993 No. 11, item 50). Therefore, from the very beginning, it was accepted that tax on goods and services shall be applied to all products and services that are the subject of trade or – in other words – form the subject of the activities mentioned in article 2 of the Act. The legislator extended the binding force of Article 54 paragraph 1 several times: at the moment when the application in this case was filed, the final date of validity was given as 31 December 2000, but during the course of the proceedings the date was extended to 31 December 2002 by means of the Act of 17 November 2000 on an Amendment to the Act on Tax on Goods and Services and Excise Tax (Journal of Laws – Dz.U. No. 105, item 1107). According to the current text of Article 54 paragraph 1 of the Act, until 31 December 2002 any goods and services not mentioned in the classifications that were issued on the basis of the rules governing state statistics are subject to the tax determined in Article 18 paragraph 1, in other words 22%.

Summing up the remarks concerning Article 54 paragraph 1 of the Act, it should be said that although this provision refers to the statistical classification, a reference to it possesses a singular nature. One can describe this as a negative reference because the provision expands the tax duty to cover trade in all products and the provision of all services, regardless of the contents of any statistical classification. Therefore, in a certain sense, the contents of Article 54 paragraph 1 of the Act neutralises the meaning of that part of Article 4 subparagraph 1 and 2 which refers to the classification. Significant is the first part of Article 4 subparagraph 1, which indicates that goods are movable objects, all forms of energy, buildings, constructions and parts thereof. The inclusion of goods and services in a classification no doubt determines their inclusion in the scope of tax, but this does not mean that activities involving goods and services not mentioned in the classifications are free of tax. Decisive in these cases is an answer to the question: Is a specific object a good (is it movable, or energy, etc.) and if specific paid activity involving an object can be considered a service in the usual sense of the word?

The Constitutional Tribunal indicated the importance which Article 5 of the Act on tax on goods and services has on a definition of the subject of the tax. Although this article says which objects are subject to the tax, it also indirectly provides a framework for the concept of services. According to Article 5 paragraph 1 subparagraph 1, tax on goods and services payers are persons who „are engaged in their own name and on their account in the activities discussed in Article 2, in circumstances which suggest that they intend to perform these actions regularly". Comparing this with art Article 2, it is necessary to determine that taxpayers are persons who provide paid services with an intention to do so frequently. „The intention to perform services regularly," the criterion of Article 5 paragraph 1 of the Act on tax on goods and services, should also include the situations that arise following the conclusion of an agreement establishing a long-term legal relationship, in other words an agreement in which the taxpayer is bound to render a performance regularly. The need to include such agreements in tax on goods and services becomes obvious when we consider the regulations included in the Act of 9 September 2000 on tax on civil law operations. Among those operations subject to this tax, listed exhaustively in Article 1, this Act mentions neither rental agreements or contracts of lease, therefore these contracts are not subject to tax on civil law operations. The Tribunal underlines the change in legal status vis-à-vis the Act of 31 January 1989 on stamp duty which, in Article 1 paragraph 1 subparagraph 2), includes in the list of operations that are subject to stamp duty „contracts of lease and sub-lease and rental and sub-rental agreements" (letter b). After the repeal of the Stamp Duty Act of 1989 and as a result of the exclusion of leases and rentals from the act on civil law operations, the legislator's idea on taxing these two types of agreement is clearer. The mere conclusion of a rental agreement and contract of lease is not taxable, but the action inferred in them – the paid provision of one's property to someone else – is qualified as a service which, in principle, is subject to tax on goods and services.

In the Constitutional Tribunal's opinion, a comparison of the provisions of the Act on tax on goods and services with those of the Act on civil-law operations permits the view that the legislator gives a very broad interpretation of the concept of service; service should be „taken to mean any behaviour or forbearance, except for actions involving the sale or delivery of goods in favour of another entity on the basis of a civil-law agreement or in the performance of a public service duty (W. Modzelewski [in:] *Prawo podatkowe. Komentarz do podatku od towarów i usług, podatku akcyzowego, podatku od gier [Tax law. Commentary to the tax on goods and services, excise tax and tax on games]* Warszawa 2000, p. 34; likewise W. Wójtowicz [in:] *Prawo podatkowe [Tax law],* Brant 2000, p. 180). Although a service possesses a certain legal basis, the condition for taxation is the very action of the taxpayer in performing a deed or providing his own property for use by another person if – obviously – this provides the source of constant benefit.

In the Constitutional Tribunal's opinion, all the above arguments can be juxtaposed with the applicant's charge that the extent of the tax obligation depends directly on the content of the classification. To interpret the provision it is essential to consider the legal circumstances in which it functions, for in order to judge conformity to the Constitution, one cannot judge provisions that are removed form their context. The wording of a specific provision of a statute does not always contain all the elements required to construct the legal norm. In the Constitutional Tribunal's opinion, to construct the currently binding norms that define the subject of tax, it is necessary to resort to four provisions: Article 2, Article 13, Article 4 subparagraph 1 and 2 and Article 54 paragraph 1. From these Articles it transpires that tax is payable on the sale of goods and the paid provision of services listed in the classifications that were issued on the basis of the regulations governing state statistics, and on the sake of goods and paid provision of services not mentioned in these classifications. Although there is a certain lack of cohesion between Article 4 subparagraph 1 and 2 and Article 54 paragraph 1 of

the Act, on the basis of Article 54 paragraph 1 – and this needs to be stressed – the sale of all goods and the provision of all services is taxable. Common sense dictates that Article 54 paragraph 1 determines the universal nature of tax on goods and services and – consequently – removes doubts about the subject of the tax. This provision changes the substantive meaning of Article 4 subparagraph 1 and 2 of the Act, challenged in the application. Despite its contents, the tax is payable whether or not the given commodity or service is mentioned in any classification.

Therefore the Constitutional Tribunal rules that – in the light of Article 54 paragraph 1 of the Act – the inclusion of a commodity or service in a classification does not determine the regulation of this commodity or service by the Act, and therefore the tax as well. The scope of the tax burden is generally regulated by a legal instrument possessing the status of a statute, at least until the end of 2002. A complete definition of the subject of the tax stems from Article 2 and Article 13 of the Act on tax on goods and services, for it involves an activity as such, regardless of the commodity or service concerned.

The classifications referred to in Article 4 subparagraph 1 and 2 of the Act could affect the subject of the tax only as of 1 January 2003, provide of course that no amendments occur to the tax on goods and services regulations. However, the Constitutional Tribunal doubts whether even in the hypothetical legal state due to emerge after 1 January 2003 it would be correct to assume that the classification will have a direct influence on the subject of the tax, for the classification was not created expressly for tax purposes, but is an attempt to set in order the goods and services involved in business activity; it includes the goods and services that exist on the market, mainly for the purpose of conducting statistics. In turn, these goods and services are generally known by us and used daily. Therefore it is illusory to think that by creating a new list of name of goods which we generally use, we can make significant changes to the real world. A classification names, categorises and numbers the phenomena occurring in trade, but has no causative force. For instance, it is difficult to imagine it transferring a given category of foodstuffs to building materials, etc. Therefore, a classification created for statistical purpose is unsuitable for use by the state as a tool with which to shape taxation policy, even if this were the intention of the people who manage state finances. Therefore the view that the classification should directly influence the subject of tax seems exaggerated, to say the least.

Proceeding to consider the rate of tax on goods and services, another tax element which, under the terms of Article 217 of the constitution, should be regulated in the Act, the Constitutional Tribunal stresses that the Act also satisfies this requirement. Of decisive importance in this regard is Article 18 paragraph 1, which introduces a basic tax on goods and services rate of 22%. This rate applies to all goods and services. Exceptions are listed in successive subparagraphs of Article 18, to be discussed later. The Tribunal points out that Article 54 paragraph 1 of the Act not only contains a basic statutory definition of the subject of the tax, but also introduces the principle whereby the tax on goods and services rate is 22%. This regulation, in its current form, will cease to apply at the end of 2002.

In these opinions, the Tribunal avoids the problem of the entities covered by the tax, even though, in the light of Article 217 of the Constitution, they should also be set fourth in the Act. However, the application did not question the correctness of the provision in this regard, for it is obvious that tax on goods and services is payable by every entity that performs the activity set forth in the Act.

Summing up this fragment of its deliberations, the Constitutional Tribunal states that in the current legal situation, on the basis of Act, trade in all goods and the aid provision of all services is subject to tax on goods and services. The rate of tax on goods and services is 22 %. According to Article 217 of the Constitution, the subject of the tax and the basic rate are regulated by the Act. It is not necessary to resort to any other legal instruments to establish the

subject of the tax and the rate. This transpires from a literal interpretation of the regulations, and cannot be challenged. It eliminates the remaining charges expressed in the application, at least as far as the subject and rate of tax are concerned, for if the subject and rate of tax on goods and services are concerned, a review of the constitutional conformity of other legal instruments meant to shape these tax elements, as it were, is unjustified.

3. Proceeding to assess the regulation of tax exemptions and concessions one should point out that Article 217 of the Constitution does not possess a uniform nature, as the Tribunal has already said in its adjudication (comp. *judgement of 9 November 1999, Ref. No. K. 28/98*). On the one hand, this provision says that the Act possesses an exclusive prerogative in „imposing taxes and other public dues, and establishing the subjects, objects and rates of the tax." On the other hand, the final fragments of Article 217 of the Constitution dictate that the „principle of granting tax concessions and exemptions and establishing the rate of tax" should be regulated by an act of parliament. In the Constitutional Tribunal's opinion, this means that „most of the possible regulations are left to executive instruments – for if the sole prerogative of the act refers absolutely only to the definition of 'principles' or 'categories,' there are no constitutional obstacles for detailed matters to be regulated by executive instruments" (ibidem). Therefore, insofar as the imposition of tax and the definition of its rate and the subjects and objects to which it applies require regulation by means of an act of parliament, which requirement is satisfied by Article 2 and Article 54 paragraph 1 and Article 18 paragraph 1 of the Act on tax on goods and services, the granting of concessions and exemptions is subject to certain relaxation of the rules. This does not exclude the possibility of setting forth these exemptions in regulation.

The Constitutional Tribunal used the above general remark to underline the distinct status of the regulations which introduce tax reductions. However, in the case at hand there is no need to refer to an interpretation of the second part of the Article 217 of the Constitution. In the Constitutional Tribunal's opinion, the legislative technique used by the legislator in determining some of the tax reductions and exemptions requires separate assessment. The point of departure is Article 18 of the Act, which, in subparagraph 1, sets forth the basic tax rate. Successive subparagraphs introduce lower rates of tax, thus:

– in paragraph 1a – a rate of 3% is envisaged on all the goods mentioned in Appendix 1 to the Act,

– in par 2 – a rate of 7% is envisaged on the goods and services mentioned in Appendix 3,

– in paragraph 3 – a 0% rate on exports of goods and services (provided that certain condition are fulfilled).

In addition, Article 7 paragraph 1 subparagraph 2 of the Act grants a tax exemption on the services mentioned in Appendix 2. Therefore, tax exemption and reductions are closely linked to the inclusion of the relevant goods in an appendix to the Act. When setting forth the groups of goods and services in each appendix, the legislator used the numerical symbols and terminology used by GUS.

In such a legal situation, one cannot challenge the fact that the appendices are based on GUS classifications. However, as the Constitutional Tribunal makes clear, in this case the contents of the classification influences tax only insofar as the goods and services mentioned therein are contained in the relevant appendix to the Act on tax on goods and services. The appendices to this Act are an integral part thereof and require publication in the Journal of Laws. The Constitutional Tribunal firmly opposes the Commissioner for Citizens' Rights' view whereby the contents of the appendices was agreed upon between the Minister of Finance and GUS Chairman. It is enough to take a look at the transcripts of Sejm sessions to convince oneself that every inclusion of a specific commodity or service in an appendix is the

subject of a heated Sejm debate and vote by the entire chamber (comp. Transcript of 63rd Sejm session on 16 November 1999, pp. 227-229); this session voted on changes to appendices 2 and 3 covering, among other things, urban transpiration services, construction and road maintenance, the maintenance of streets, roads, squares and bridges, etc.). When one reads the appendices, one notices that the description of the goods and services is in two parts, a careful description, and the corresponding classification number. Its is also worth noticing that not all items in the classification have a statistical classification number; some have merely a description of the taxed object. This shows that the Sejm determined the contents of the appendices on the basis of the socio-economic importance of a specific commodity or service, and also disproves the idea that the appendices arise as a result of a mere mechanical copying of the classifications granted by the Minister of Finance and GUS Chairman. Thus, as far as tax on goods and services rates and exemptions are concerned, no changes to the statistical rules affect the situation of taxpayers as long as they have not been published in the Journal of Laws. Just like all amendments to legislation, amendments to the contents of appendices are subject to the entire legislative process, including voting, and are then published in the Journal of Laws. An example is the 17 November 2000 amendment to the Act on tax on goods and services (Journal of Laws – Dz.U. No. 105, item 1107). In Article 1 subparagraph 17, the legislator made an alteration to Appendix 3 by deleting item 88 and, in subparagraph 17, he altered the text of item 7 in Appendix 8. Therefore, in the Constitutional Tribunal's opinion, there is no confirmation of the idea that fluctuations to tax regulations, not always published, affect the rate of tax.

In the Constitutional Tribunal's opinion, by means of the inclusion in the appendices of those goods and services whose tax rates have been reduced or which have been exempted by the legislator, the contents of the classification are deprived of their substantive meaning, but henceforth serve only a technical function. The classification only provides the essential terminology for the authority that is formulating the contents of the appendices, and for the legislator himself serves as a kind of collection of names or glossary.

A reference to classifications in the appendices becomes more obvious when one considers that basically, the point is the regulation of exemptions from the 22% tax rate. As we know, exemptions cannot be given a broad interpretation. Therefore they must be described precisely. One must agree with the Minister of Finance whereby only a reference to a statute created specifically to define and set in order goods and services permits the preservation of a precision of formulations.

The Constitutional Tribunal believes that the use of the classification terminology and symbols contained in an appendix to the Act published in the Journal of Laws – Dz.U. does not breach the requirement set forth in Article 217 of the Constitution, to formulate tax law in the form of an act of parliament. In the Tribunal's opinion, the use of GUS classification standards and terminology via the appendices to the Act dispels the charge whereby tax matters are regulated by instruments of lower rank for, in establishing tax, an appendix to the act of parliament possesses significance, and not the classification from which the appendix draws its terminology. Therefore one may note that reductions in tax laws and exemptions are also regulated in the Act. Therefore the charge of a breach of Article 87 paragraph 1 of the Constitution is unjustified.

Summing up this part of its findings, the Constitutional Tribunal points out that the content of the cited provisions of the Act on tax on goods and services leave no doubt that in current legislation, neither the establishment of the subject of tax nor the amount of tax payable require the relevant classification issued on the basis of the rules governing state statistics. Under the terms of Article 2 in connection with Article 54 paragraph 1 of the Act on tax on goods and services, tax on goods and services is payable on all goods and services. The basic tax rate and reduced rates are set forth in the same Act, whilst those goods and services

that are exempt from tax or subject to a reduced rate are listed in and described in appendices to this Act.

IV

1. The Constitutional Tribunal is convinced that, as the hitherto reasoning has shown, there is no justification for the charge of constitutional non-conformity of the tax concept set forth in Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 paragraph 1-4 of the Act on tax on goods and services because the content of the GUS statistical classification does not determine any of the elements of the tax concept. However, because the application, particularly after its expansion, underlines the constitutional non-conformity of maintaining the GUS statistical classification, the Constitutional Tribunal has considered it necessary to relate to the charge of a breach of Article 7 and Article 87 paragraph 1 of the Constitution.

When the challenged Act on tax on goods and services was adopted, the basic classifications and terminology were issued on the basis of Article 12 paragraph 1 of the Act of 26 February 1982 on State Statistics (Journal of Laws – Dz.U. z 1989 r. No. 40, item 221) on the strength of a directive by the GUS Chairman. These directives were published in the GUS Official Journal and were changed in line with changing conditions. The current Act of 29 June 1995 on Public Statistics (Journal of Laws – Dz.U. No. 88, item 439, subsequently amended), in Article 40 paragraph 1, places the GUS Chairman under an obligation to formulate, in conjunction with the heads of the relevant state administrative authorities, basic classification and terminology needed to define and describe social and economic processes, the mutual relations between them, and their interpretation. According to Article 40 paragraph 2, standard classifications and terminology are introduced on the basis of regulations by the Council of Ministers. The Council of Ministers has already issued seven such regulations, including that of 18 March 1997 on the Polish Classification of Goods and Services (PKWiU) (Journal of Laws – Dz.U. No. 42, item 264), which came into effect on 1 July 1997. One should add that on the basis of Article 61 of the Act, the GUS Chairman's directives containing the SWW, KU and KOB classifications issued on the basis of previous regulations have been recognised as classification standards within the meaning of Article 40 paragraph 1 of the Act on Public Statistics.

The Commissioner for Citizens' Rights and Public Prosecutor-General correctly point out that on the basis of a decision by the Minister of Finance, the significance of the new classification contained in the directive of 18 March 1997 for the determination of tax on goods and services was abolished. The state of affairs that existed under the previous act on statistics was frozen, as it were, until the end of 2002. It is necessary to scan the legal instruments which led to such a situation. Act. 54 paragraph 3 of the Act on tax on goods and services (added to the Act by Article 1 subparagraph 30d of the amendment of 9 December 1993, Journal of Laws – Dz.U. No. 129, item 599) says that „if new classifications of goods and services are introduced (...), the minister responsible for public finances, in conjunction with the Chairman of the Central Statistical Office, shall promulgate appendices to the Act, taking into account the terminology stemming from the new classifications." Thus, the Minister of Finance has been burdened with the duty of making sure that appendices to the Act on tax on goods and services conform to the contents of standard classifications. Only once has the Minister fulfilled this duty and, in a communiqué of 31 March 1995 (Journal of Laws – Dz.U. No. 44, item 231) promulgated 6 appendices taking into account the terminology stemming from directive no.47 by the GUS Chairman of 29 December 1993 on the classification of products and services (GUS Official Journal No. 24, item 132 and 1994 No. 5, item 52). At the same time, the 2 paragraph of the above communiqué said: „A change

to the terminology discussed in paragraph 1 does not result in a change to the rate of Tax on Goods and Services after 31 March 1995." In this way, the Minister of Finance separated the question of tax from any changes to the statistical regulations. The Minister of Finance's decision was sanctioned by the legislator: on the basis of Article 1 subparagraph 8d of the amendment of 20 May 1999 (Journal of Laws – Dz.U. No. 57, item 596) the legislator added to Article 54 of the questioned Act a new paragraph 4 reading as follows: „For the purpose of collecting Tax on Goods and Services and excise duty, until 31 December 20000 the statistical classifications in force prior to 1 July 1997 shall be applied." Subsequently, after the application in this case had already been submitted, the validity of Article 54 paragraph 4 was extended until 31 December 2002.

In view of these circumstances, the Constitutional Tribunal agrees with the views of the applicant and Public Prosecutor-General, expressed in a communiqué of 20 January 2000, whereby by introducing point 2 to the announcement, the Minister of Finance exceeded the authority vested in him on the basis of Article 54 paragraph 3 of the challenged Act. Therefore, in relation to par 2 of the announcement of 1995, the application to determine non-conformity to Article 7 of the Constitution was justified. However, this fact cannot be a subject of assessment in these proceedings, if only for formal reasons: the application is not directed against the Minister of Finance's announcement. In the Tribunal's opinion, the abovementioned communiqué by the Minister of Finance, especially paragraph 2 thereof, were clearly intended to make tax rates dependent on fluctuations to the statistical regulations, in other words they were intended to make the tax rates stable. By adding paragraph 4 do Article 54 of the Act, the legislator himself, as it were, „froze" the former statistical classifications (in force prior to 1 July 1997) for the purpose of determining tax on goods and services. The application of the classifications is currently based on Article 54 paragraph 4 of the Act, and not on the Minister of Finance's announcement. But even if point 2 of this communiqué were to be repealed as a result of its constitutional non-conformity, the appendices will continue to be used until the end of 2002, on the basis of the Act, the terminology set forth in the classifications that are no longer used in statistics.

The Constitutional Tribunal is convinced that if the charge of a breach of Article 7 of the Constitution is justified as far as the Minister of Finance's communiqué of 1995 is concerned, because the Minster exceeded the authority vested in him by Article 54 paragraph 3 of the Act, this charge is not justified if the target of the assessment is meant to be Article 54 paragraph 4 of the Act. This thesis requires expansion. The above provision says: „For the purpose of value added tax and excise duty, the statistical classification in force up to 1 July 1997 shall be applied up to 31 December 2002." The Tribunal stresses the need to distinguish between two verbs used in the above-quoted provision; being in force and application of the classifications. The validity of the classifications is limited by the date 1 July 1997. The previous classifications, issued on the basis of the GUS Chairman's directive, are not in force. Yet the legislator says that these classifications must be applied for tax purposes. In the light of the Tribunal's previous findings regarding the significance of the terminology used in the classifications, the expression „application of classifications" used in Article 54 paragraph 4 is quite understandable. It means that when formulating the appendices to the Act on tax on goods and services, the legislator used the names and numbers that were used in the previous classifications. The glossary to which Article 54 paragraph 4 refers are not the newly-formulated classifications

Neither does the Constitutional Tribunal agree with the view that the provision of Article 54 paragraph 3 of the Act, sating that if a new classification of goods and services is introduced, the minister responsible for public finances and the GUS Chairman will release appendices containing the terminology provided by the new classification, does not conform to the Constitution. The Tribunal shares the view of the Public Prosecutor-General expressed

in his stance of 26 February 2001, as well as in the stances of the Marshal of the Sejm and Minister of Finance of 16 March 2001, whereby this provision does not authorise the Minister of Finance to create norms of tax law, but merely to perform technical actions involving the provision of symbols to goods and services stemming from the current statistical list. In any case, the Commissioner for Citizens' Rights himself admits that in Article 54 paragraph 3, the Sejm authorise the Minister of Finance to „technically adapt the contents of the appendices to the new GUS classifications." The effect of this purely recreative work of the Minister of Finance assumes the form of a communiqué, which certainly does not lay down the law. Therefore the charge of a non-conformity to Article 54 paragraph 3 and Article 87 paragraph 1 of the Constitution is not justified. Furthermore, the Tribunal pointed out that when the old classifications are „frozen," there is no need to announce the new symbols, therefore Article 54 paragraph 3 is not and cannot be applied. Until the end of 2002, this provision is virtually dormant. Establishing its actual sense could prove unnecessary in the future, when the contents of the appendices will have to be updated by incorporating in them the symbols of goods and service imparted in the new classifications.

On account of the future, hypothetical application of Article 54 paragraph 3 of the Act, the Constitutional Tribunal stresses once again that this provision must be regarded as nothing other than an obligation upon and authorisation for the Minister of Finance to promulgate the contents of the appendices, indicating their current statistical numbers. It does not authorise him to make any changes to the appendices approved by the Sejm which exhaustively list the goods and services that are subject to a preferential rate of tax or are exempted from it.

The Constitutional Tribunal repeats that the classifications are not binding law, but a collection of terms and definitions of the goods and services that appear in trade. Legal language often uses words whose meaning it does not define. Their meaning is known from common parlance, but sometimes it proves necessary to look them up in a dictionary or encyclopaedia. But that does not mean that the dictionary and encyclopaedia thus become part of binding legal order. The statistical classifications perform the role of a dictionary for the purpose of tax on goods and services. That does not mean that they are a part of binding law. The legislator certainly does not try to give them such a role in Article 54 paragraph 4 of the Act because he clearly places their validity prior to 1 July 1997. Consequently, in the Constitution Tribunal opinion, there is no justification of the charge that Article 54 paragraph 4 of the Act on tax on goods and services does not conform to Article 7 and Article 87 paragraph 1 of the Constitution.

By the way, the Tribunal considers it essential to point out that the constant application of the former classification, first based on the Minister of Finance's communiqué and now stemming from the challenged Article 54 paragraph 4 of the Act, has a stabilising effect on the entire concept of the Act on tax on goods and services. It is worth stressing that the SWW and KU classifications were applied still during the period when the laws on turnover tax were still in force. Therefore they are already deeply rooted in the practice of the tax authorities and in the consciousness of taxpayers, and one can find an interpretation of their terminology in adjudications. Therefore the names taken from them are constant

2. The Commissioner for Citizens' Rights' application contains yet another charge against the tax concept in force; the point is the effect of a divergent interpretation of classification standards. Referring to this charge, the Constitutional Tribunal regards it necessary to underline first of all the scope of the problem. In view of the principle adopted in the Act whereby trade in all goods and services is subject to a 22% rate of tax on goods and services, the need for interpretation occurs only if tax reductions or exemptions are used. As C. Kosikowski rightly said in an opinion which the Commissioner for Citizens' Rights attached to the statement of reasons for his application, „for tax purposes, the identification of

goods and services need not be connected with their statistical classification because, regardless of it, a 22% rate of tax on goods and services is always involved" (p. 3 of the opinion). Therefore any differences in opinion may concern only the identification of a specific commodity or service included in one of the appendices to the Act, because „the furnishing of goods and services with statistical symbols applies only to goods and services that are exempt from tax on goods and services or taxed at a lower rate than 22%" (ibidem). This preliminary reservation allows a proper assessment of the problem of the interpretation of classification standards raised by the Commissioner for Citizens' Rights.

In practice, the need for an interpretation may occur when a taxpayer, wishing to take advantage of a tax reductions or exemption, accepts that his performance belongs to the category of goods and services mentioned in the appendix. Because the appendices are expressed in the „language of the classifications," in other words using the terminology and symbols formulated and used by GUS, the legislator has also left the interpretation of the legislation to public statistics offices. Against the background of the Act on Public Statistics, the sole prerogative to make interpretations was granted to the relevant statistical authorities on the basis of Directive 29 by the GUS Chairman dated 1 October 1993 (GUS Official Journal No. 14, item 90). According to this directive, these prerogative included the issue of so-called classification opinions and the provision of explanation and assistance in qualifying products. One of the tasks of the Research-Development Centre of the State Statistical Information System, in existence at the time, was to make such interpretations. This Centre was abolished by means of Directive 12 by the GUS Chairman dated 15 May 1996 (GUS Official Journal No. 6-319). According to the now-defunct Act on Public Statistics, GUS's authority to make these interpretations emanate directly from Article 40 paragraph 1.

Against the background of this legal situation, and recognising the sole prerogative of the statistical authorities, the Chief Administrative Court (NSA) denies to tax authorities and the Finance Ministry the right to make classifications (comp. *NSA judgements in: Poznan 23 December 1997, I SA/Po 1047/96*, the Chief Administrative Court's decisions – ONSA 1997, No. 4, 178; *Katowice 12 December 1996, SA/Ka 2098/95*, Economic Law 1997, No. 11, p. 24). At the same time, here are clear difficulties with determining the legal nature of opinions issued by statistical bodies. On the one hand, the NSA accepts that apart from these bodies, „no one reaches similar decisions in this regard" (thesis taken from the NSA judgement in Katowice), whilst on the other hand the NSA believes that in administrative proceedings, opinions and interpretations on statistical classifications serve as evidence which must conform to Article 75 of the Code of Administrative Procedure and which is subject to assessment by the authority that is applying the law (thus *NSA judgements in Lublin 5 December 1997, I SA/Lu 1259/96*, not published.; *Łodz 21 September 1995, SA/Łd 171/95*, M.Pod.[Tax Monitor] No. 4/1996, p. 123; *Łodzi 10 February 1998, I SA/Łd 1147/96*, not published). Against this background it is necessary to emphasise the NSA's efforts to protect taxpayers against the negative effects of fluctuating, unpublished classification opinions. The NSA rightly said that „fluctuating interpretations by a state administrative body (voivodship statistical office) must not cause negative consequences for entity that acted with confidence in that authority's knowledge and in the correctness of the SWW statistical qualification opinion received" (*NSA judgement in Poznan, 25 May 1995., SA/Po 255/95*, M.Podat.[Tax Monitor] No. 10/1995, 308). In a different adjudication, the Court said that the negative results of an change of interpretation cannot affect a taxpayer who, through no fault of his own, was not aware of the new interpretation and applied the classification previously considered correct (*NSA judgement in Wrocław 28 November 1997, I SA/Wr 744/96*, not published). This line of reasoning is generally approved in legal writings (comp. L. Etel, *Glosa do wyroku NSA z 25 lipca 1997 [Gloss to the Chief Administrative Court judgement of 25 July 1997]*), *SA/Wr 3352/95,* OSP 1998, No. 6, item 109).

The Constitutional Tribunal is convinced that – in the case at hand – the NSA's interpretation in favour of the taxpayer is the correct one, leading to the preservation of the principles of a state ruled by law, for the need to make an interpretation is inseparably connected with the application of the law. Relating this to the Act on tax on goods and services, one must state that as long as the Act provides preferential rates and exemptions, there will be problems with identifying goods and services. The Constitutional Tribunal regards it as obvious that the rules that categorise the goods and services available on the market cannot be formulated in such a way that every single action undertaken by an economic entity is classified in a clear manner that dispels all doubts. Even if new goods and services that appear on the market are added to the relevant category, this classification will never be able to „keep up" with the market. In the Constitutional Tribunal's view, the creation of a complete, comprehensive classification, encompassing all goods and services, is objectively impossible, regardless of the status of the legal instrument which would contain this classification. In other words, difficulties with interpretation during the classification of goods and services cannot be eliminated by incorporating the classification in the Act. As the Public Prosecutor-General rightly admitted, the inclusion of a list of goods and services in the Act would be a purely mechanical operation involving the transfer of statistical classifications to a substantive act. In view of the impossibility of completely eliminating interpretations in this regard, the Constitutional Tribunal stresses once again that it is essential to protect the taxpayer in the process of applying regulations. In a state governed by law, the taxpayer cannot be punished for not knowing the interpretation of rule which is not published and which is not a source of law, and in particular, he cannot be affected by a change in the interpretation of rules made by the state statistical authorities.

V

In view of the above, the Constitutional Tribunal evaluates that the current legal situation, in which the classification of goods and services for statistical purposes determines neither the subject of nor the object of the tax, satisfies the terms of Article 217 of the Constitution. In this case, the Constitutional Tribunal considers it expedient to stress again that the interpretation produced as a result of a juxtaposition of Article 2 and 54 paragraph 1 of the Act conforms to the EU standards adapted in the VI Directive 77/388/EWG of 17 May 1977, which defines the subject of tax in a general way; i.e. deliveries, services, imports and exports (comp. M. Barszcz, *Czynności opodatkowane VAT na podstawie VI dyrektywy EWG [VAT taxed activities on the basis of EEC VI Directive]* Monitor Podatkowy [Tax Monitor] 1998 No. 11; H. Litwińczuk, *Prawo podatkowe przedsiębiorców [Entrepreneurs' Tax Law]*(Warszawa 2000, p. 355 et seq.). The concept of „delivery," which the directive introduced in place of „sale," was formulated expressly for tax purposes; it was meant to stress that tax is payable on actions which need not be sales within the meaning of civil law. Under the terms of Article 5 of the directive, delivery is taken to mean the transfer of control over an item or a disposition executed by the owner. Such items include electricity, gas and other forms of energy. The concept of service was defined in a negative manner: services are all kinds of actions other than delivery, performed by the taxpayer during his economic activity (Article 4 and 6). Therefore EU legislation has adopted a general definition of the actions that are subject to tax and has rejected a listing of goods and services.

At the same time, the Constitutional Tribunal stresses that with the general definition of the subject of the tax and in view of the fact that the amount of the basic tax rate is set forth in the Act (as is the case in the currently-binding Article 18 paragraph 1 of the Act), it remains for the appendices to regulate only the question of the goods and services that are exempted from tax or subject to a lower rate thereof. Because by the nature of things this involves an

exception to the rule, from the point of view of legislative technique it is expedient to include them in the Act or in the appendices thereto.

In the Constitutional Tribunal's opinion, an analysis of the currently-binding law permits the view that the concept of the subject of tax created by Article 2 in connection with Article 4 subparagraph 1 and 2 and Article 54 of the Act on Goods and Services and Excise Duty does not breach the principle, expressed in Article 217 of the Constitution, of the exclusivity of the Act in tax legislation, nor does it expand the scope of sources of universally-binding law envisaged in Article 87 paragraph 1 of the Constitution. Neither does Article 54 paragraph 4 of the Act breach the principle of the rule of law expressed in Article 7 of the Constitution.

Therefore the Constitutional Tribunal passes the judgement as in the sentence

Dissenting opinion
of Judge Andrzej Mączyński
to the Constitutional Tribunal's judgement of 3 April 2001.
case Ref. No. K. 32/99

I am submitting a dissenting opinion to the Constitutional Tribunal's judgement of 3 April 2001 (*Ref. No. K. 32/99*) because I cannot agree with the view that the provisions of the Act on Tax on Goods and Services and Excise Duty („Act on tax on goods and services") challenged by the Commissioner for Citizens' Rights are in conformity to the provisions of the Constitution of the Republic of Poland cited by the applicant.

I believe that the content of the regulation („tax concept") contained in Article 2 in connection with Article 4 subparagraph 2 and Article 54 paragraph 1 and 4 of the Act on tax on goods and services to the extent to which it requires the application of „classifications issued on the basis of the rules governing statistics" is in breach of the requirement, set forth in Article 217 of the Constitution, to define in the Act the subject of the tax and rate of tax applicable to it. According to the stance adopted in the Constitutional Tribunal's judgement in the case Ref. No. K. 28/98 (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 7/1999, item 156, p. 786, 787), this requirement is more severe and more far-reaching than the requirement, envisaged in the final part of Article 217 of the Constitution, to define in the Act the rules for granting tax reductions and exemptions, which permit an elaboration of the statutory principles by means of a directive issued on the basis of the Act and taking into account the guidelines expressed therein.

According to Article 2 paragraph 1 of the Act on tax on goods and services, the subject of tax includes the „paid provision of services." The expression „provision of services" occurs not only in everyday language, but also in the pronouncements of lawyers, and even in legal texts. Its meaning is not precise. On the contrary, it is one of these expressions with a typically ambiguous meaning. Against the background of the rules governing contractual liabilities, there is a distinction between, on the one hand, contracts for the provision of services (including such contracts as contracts of mandate and contracts for the performance of a task) and, on the other hand, contracts on an assignment of rights (e.g. sales contracts) or contracts for the use of someone else's property or capital (i.e. contracts of lease). Generally speaking, the concept of the provision of services does not include passive activity (forbearance, discontinuation), but only activity which possesses an active nature (comp. F. Dessemontet, *Le contrat de service,* Zeitschrift für Schweizerisches Recht, 1987, p. 107-112). Of course, when creating the concept of a tax called „tax on goods and services," the

legislator did not have to guide himself by the meaning of the term „provision of services." However, intending the tax duty to be associated with an understandable service – as per the remarks of the commentator on the act quoted in the explanation of reasons – as „any behaviour or forbearance, except for the sale or delivery of good," in favour of another entity on the basis of a civil-law agreement or in the performance of a public duty," the legislator should have defined the subject of the tax in the body of the Act in a suitable manner, and not restricted themselves to the term „provision of services," which does not have such a broad meaning. When formulating the Act, the legislator no doubt realised the inadequate meaning of „service" because he attempted to define (elaborate) it for tax purposes. The role of a legal definition in the Act in question is played by that part of Article 4 subparagraph 2 in which building-refurbishing services are included in the category of services. It is difficult to resist the reflection that in this manner, an issue was regulated whose regulation in the absence of such a provision should raise no doubts. In the remaining scope, the legislator used a technique involving a referral to „classifications issued on the basis of the statistics governing regulations." The very use of this technique need not be deemed unconstitutional, provided that the referral is made to a provision contained in an instrument that possesses the status of a law. But in this case, the legislator referred the provisions neither to another act, nor to an act that is a source of universally binding law, but to an act that originated in the state administrative body, and one which was not subject to publication in the Journal of Laws. Such an operation is not just a breach of legislative technique (§ 9 paragraph 2 and § 101 paragraph 1), but also a breach of Article 217 of the Constitution, for regardless of what the aforementioned classifications are, their inclusion in the tax law (via a referring provision) gives them legal significance, because on the basis of the legislator' instructions they must be taken unto consideration when the subject of the tax is defined.

A supplement to the faulty regulation envisaged in Article 2 in connection with Article 4 paragraph 2 of the Act on tax on goods and services is Article 54 paragraph 1 of this Act, which expands the scope of tax on services not listed in the classifications, to which Article 4 refers, but gives no indication of the meaning of the concept „services." Therefore, when issuing this regulation, the legislator recognised that – unlike against the background of Article 2 and 4 – this concept requires no definition. I also consider the challenged regulation to be in breach of Article 217 of the Constitution, for I assume this constitutional provision requires not just the inclusion of a „description" of the subject of tax in a statute, and not any other substantive law, but also requires that the statutory regulation be suitably specific. This question was raised many times by the Constitutional Tribunal, lately in a judgement passed by the Tribunal's full bench, on one of the provisions of the Act on Industrial Property. The bench deemed the provision in question to be not in conformity to the Constitution because it was not sufficiently specific (*judgement of 21 March 2001, Ref. No. K. 24/00*). Although until now the Constitutional Tribunal has associated the requirement of „exclusivity" with Article 2 of the Constitution, I think this also is immanently the result of Article 217, all the more so because this provision is a repetition of the general principle expressed in Article 84 of the Constitution. On account of the association of the regulations envisaged in both provisions, it is justified to regard Article 217 of the Constitution not just as an element of the regulation of public finances, but also as an element of the guarantees of constitutional rights and duties. As has correctly been said in legal writings – this dual emphasis on the requirement to lay down tax obligations in the form of a statute „leads to a symbolical elaboration of this guarantee, which is a ban, established in the traditions of democratic statehood, on imposing burdens on citizens in separation from a representative mechanism" (J. Jaskiernia, *Odesłania do ustawy w Konstytucji Rzeczypospolitej Polskiej [References to the act of parliament in the Constitution of the Republic of Poland]* [in]: *Konstytucja-Wybory-Parlament, Studia ofiarowane Zdzisławowi Jaroszowi [Constitution – Election – Parliament, Studies dedicated to Zdzisław*

Jarosz], ed. by L. Garlicki, Warszawa 2000, p. 94). It is worth remembering that this principle, known in several countries (such as Sweden), was also included in the two Polish constitutions between the wars, but is characteristically missing in the constitutional principles in force in post-war Poland prior to the adoption of the Constitution of the Republic of Poland of 1997.

The provisions of Article 217 of the Constitution requiring that certain issues be regulated by statute, and not outsider a statute, possesses an important informative and guarantee function. The point is for the taxpayer to be able to determine on the basis of the statute whether his activity is subject to tax and, if so, at what rate. It is true that any provision, even the most carefully formulated one, can cause doubts about interpretation, especially as a result of the development of the subject matter regulated in it, one is generally aware of this fact and one cannot harbour the naive thought that a mere listing of goods will facilitate the application of regulations and prevent misunderstandings about the law in force.

In the light of 84 i Article 217 of the constitution, one must accept that anything which cannot be adequately defined in the Act cannot be subject to tax. The situation here is similar to that of criminal responsibility which, in a state governed by law, is strictly connected to a deed that is set forth „by an act," whereby one must emphasise that the requirements in Article 217 vis-à-vis the tax duty were formulated more precisely than in the case of the criminal responsibility envisaged in Article 42 paragraph 1 of the Constitution.

In my opinion, the provisions challenged by the Commissioner for Citizens' Rights are in breach of not just Article 217 and Article 87 of the Constitution, but are also irreconcilable with the concept, an expression of which is the whole of Chapter III of the Constitution, based on a distinction between statutes that are sources of universally binding law and statutes which are only binding upon the bodies controlled by the authority which issued them.

I do not agree with the view held by some of the parties to the case whereby the referral envisaged in Article 4 subparagraph 2 of the Act on tax on goods and services possesses only an informative, technical or subsidiary function vis-à-vis the statutory regulation. Referring to the opinions, contained in the case files, of two distinguished experts on tax law, Professors Cezary Kosikowski and Ryszard Mastalski, I think the Constitutional Tribunal's judgement erases the guarantee function of Article 217 of the Constitution and – as Prof. Kosikowski has warned – leads to the mistaken conviction that „taxes can also be established and collected on the basis of legal instruments that are not sources of universally binding law ".

My reservations are also aroused by Article 54 paragraph 3 of the Act on tax on goods and services. The authority emanating form this provision exceeds the scope of the promulgation of the „uniform text" of the appendix to the Act, taking into account the earlier changes. After all, this authority, clarifying an extremely ambiguous situation, concerns the introduction by a non-legislative body of changes to a text that is part of an act of parliament.

For these reasons, I have considered it necessary to submit a dissenting opinion.

Dissenting opinion
of Judge Janusz Trzciński
to the Constitutional Tribunal's judgement of 3 April 2001
case Ref. No. K. 32/99

1. I am submitting a separate opinion on the Constitutional Tribunal's judgement to the extent that it considers Article 54 paragraph 4 in connection with Article 2 paragraph 1 and Article 4 subparagraph 1 and 2 of the Act on Tax on Goods and Services and Excise Duty

(„Act on tax on goods and services") of 8 January 1993 to be in conformity to the Constitution. Unlike the Constitutional Tribunal, I consider the abovementioned article 54 paragraph 4 of the Act to be in breach of Article 87 of the Constitution, and hence indirectly also in breach of Article 217 of the Constitution.

My primary doubts are aroused by the fact that regulations governing state statistics are introduced to legislation governing the subject and rates of tax on goods and services in such a way that the classifications therein must be used to define the goods that are subject to a specific rate of tax. This remark applies also, and perhaps primarily, to those goods on which a 22% rate of tax is levied, for the 22% rate is levied on all those goods that are not listed in the appendix on the subject of reduced rates of tax, and this appendix was formulated on the basis of the rules governing state statistics. Thus in fact, it is the rules governing state statistics which have determined which goods will be burdened with what rate of tax. This reasoning is illustrated by art 54 paragraph 1, from which it transpires that a product not mentioned in the classification is subject to a 22% rate of tax. A mere reference to the concept of „product" or „service" does not satisfy the requirement of clarity. If that were the case, I would see no sense in trying to define the concept of commodity or service in Article 4 subparagraph 1 and 2. By the way, Article 4 subparagraph 1 and 2 in their current wording contain a *idem per idem* error because the concept of commodity or service to a certain extent, i.e. the extent of 22% tax, is simply taken to mean a commodity or service.

The second remark is closely linked to the first, and this is the main source of my doubts about the Tribunal's judgement. It concerns the nature of the regulations governing state statistics, discussed in, among other places, Article 54 paragraph 4 of the Act. Article 54 paragraph 4 reads: „For the purpose of collecting tax on goods and services and excise duty, the statistical classifications that were in force prior to 1 July 1997 shall continue to be applied until 31 December 2000." The rules governing state statistics, cited in Article 54 paragraph 4 and possessing significance for the rights of citizens, take the form of a directive by the Chairman of the Central Statistical Office of 22 February 1990, therefore from the point of view of Article 87 of the Constitution they are no doubt not a part of universally binding law. Only provisions of universally binding law can set forth citizens' duties, and as far as tax obligations are concerned, only a statute can do so. Article 217 of the Constitution says, among other things, that the subject of tax and the rates thereof are set forth in a statute. An attempt to prove that Article 54 paragraph 1 of the Act, saying that „until 31 December 2002 any goods and services not mentioned in the classifications that were issued on the basis of the rules governing state statistics were subject to the tax are discussed in Article 18 paragraph 1 (in other words 22%). – sanctions the rules on statistics in such a way that listing them in the Act is not convincing. The fact that regulations on statistics are quoted, to be more exact regulations containing classifications of goods in the Act, does not make these provisions statutory, universally binding ones.

Secondly, the scope of some goods, those subject to 22% tax, is determined by means of an exclusion in the form of a directive by the Chairman of the Central Statistical Office. A change to the classification or an admission that a commodity is not the one described in the classification automatically attracts a 22% rate of tax on the commodity.

Thirdly, a reference in the Act to the regulations on the classification of goods means that when a legal norm from imposing the duty to pay tax is constructed, this is done from more than one kind of substantive material, i.e. from statutes and directives, therefore in a manner that breaches the basic rules on decoding legal norms.

2. Finally, when assessing the constitutional conformity of Article 54 paragraph 4, one cannot lose sight of the fact that a rather odd legislative technique from the point of view of the certainty of law was applied. In Article 54 paragraph 4, which also applies to other

provisions of the Act, we are dealing with an obligation to apply a statistical classification that was in force prior to 1 July 1997, in other words this classification is revived and rules that are already formally repealed are allowed to be applied, rules which possess fundamental importance for the measurement of tax („for the purposes of collecting tax ") and whose validity, something which the Act does not forbid, may be extended after the 31 December 2002 deadline.

3. I also consider Article 54 paragraph 3 to be unconstitutional because I doubt whether the interpretative judgement vis-a-vis Article 54 paragraph 3 is sufficient to recognise its conformity to the Constitution. This provision says: „If new classifications of goods and services are introduced, the minister responsible for public finances, in conjunction with the Chairman of the Central Statistical Office, shall promulgate appendices to the Act, taking into account the terminology stemming from the new classifications." Therefore this provision may be interpreted, as already interpreted by the Constitutional Tribunal, that in the adopted appendix to the Act the minister will take into account the new terminology, i.e. he will participate in formulating the appendix adopted by the Act, constituting an integral part of the Act. Such an interpretation was adopted not only by the Constitutional Tribunal, but also by the Sejm representative at the hearing, which means that Article 54 paragraph 3 also does not conform to the Constitution.