

Artur Mudrecki

Kozminski University in Warsaw, Poland

amudrecki@kozminski.edu.pl

ORCID ID: <https://orcid.org/0000-0002-3731-5271>

The Contemporary Significance of the Principle of Proportionality in Tax Law

Abstract: The principle of proportionality plays a key role in shaping the principles of the tax law system, as it is an important element in the protection of taxpayer's rights. The interpretation directive related to the principle of proportionality has a doctrinal, normative, and jurisprudential character. It is an EU and constitutional standard and should become a rule used on a daily basis in the practice of tax authorities. As a general principle of tax law, it is addressed to the legislative, executive, and judicial authorities. The article analyses the case law of the CJEU, the Constitutional Tribunal and the Supreme Administrative Court, which leads to the following conclusions. The CJEU quite often refers to the principle of proportionality in its jurisprudence and has developed a jurisprudence doctrine based on the doctrine of law. The Constitutional Tribunal, although in a limited scope, also employs the principle of proportionality. In disputes between tax authorities and taxpayers, Polish administrative courts apply the principle of proportionality using a pro-EU and pro-constitutional interpretation.

Keywords: Constitutional Tribunal, jurisprudence of the Court of Justice of the European Union, normative and doctrinal approach to the principle of proportionality, principle of proportionality, Supreme Administrative Court

Introduction

Principles of law play a key role in today's rapidly changing world. They map our paths in increasingly complex legal systems. With the growing inflation of legal regulations, they bring their authors and interpreters closer to achieving the desired results.

In legal theory, there are two concepts of legal principles. The first is based on the assumption that a principle is set directly on a norm contained in positive law or

logically derived from that law. The second conception indicates that principles of law are not only norms derived from legal texts, but also principles derived from the science of law¹.

One of the most important principles in the shaping of the tax law system is the principle of proportionality. This principle is related to measuring the activities of public authorities and minimizing their interference in the sphere of individual rights and freedoms. It is not without reason that the principle of proportionality is also referred to as the principle of restraint, or of adequacy².

The article aims to present the current role of the principle of proportionality in the system of tax law, taking into account that this principle can and should be considered in its various aspects, i.e., doctrinal, normative, and jurisprudence. The main research objective is to answer the question: what is the significance of the principle of proportionality in tax law?

The research problem in the field of tax law requires continual observation when considering the rapidly evolving views on the role of proportionality in this field of law. The study uses the dogmatic legal method as well as an analytical method, analysing both domestic and foreign literature on the subject as well as the jurisprudence of the Court of Justice of the European Union, the Constitutional Tribunal, and the Supreme Administrative Court. Because of limitations resulting from the nature of the publication, its primary focus is on presenting the main conclusions resulting from the conducted investigations.

1. The Principle of Proportionality in Tax Law Scholarship Literature

The origin of the principle of proportionality in its modern sense can be traced to the teachings of German law. As early as 1791, C.G. Svarez considered “the first principle of official state law to be that the state is entitled to restrict the freedom of the individual only to the extent that is necessary to preserve the freedom and security of others”³. At the end of the 19th century, C.G. Svarez introduced this principle into the German legal system through the jurisprudence of the Prussian Higher Administrative Court⁴.

A. Barak, who considered the historical evolution of the notion of proportionality in the comparative law aspect, notes that it is commonly accepted in the doctrine,

1 B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, pp. 287–288.

2 L. Etel, P. Pietrasz, *Niekompletność świadczeń o przeznaczeniu oleju opałowego a zastosowanie sankcji podatkowej, o której mowa w art. 89 ust. 16 u.p.a.*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2012, no. 2(41), p. 27.

3 Cited after J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warsaw 2008, p. 12.

4 P. Mięka, *Obowiązki dokumentacyjne i formalne w prawie podatkowym. Granice formalizmu*, Warsaw 2019, p. 105.

that in formulating the European principle of proportionality the Court of Justice employed the achievements of German legal science. This kind of phenomenon also concerns other legal systems, both of individual states, and supranational organisations.⁵

In the theory of law, R. Alexy points out that there is a direct link between the theory of principles and the principle of proportionality. According to German doctrine, the principle of proportionality is described as the relationship of the (applied) means to the (intended) end; this relationship should correspond to three subprinciples. These criteria, which can be regarded as a kind of test, include:

- 1) the criterion of usefulness,
- 2) the criterion of necessity,
- 3) proportionality *sensu stricto*.

The criterion of usefulness is met when a given measure is useful for the realization of a given goal, i.e., by means of this measure it is possible to achieve the set goal. However, this purpose must be legitimate - i.e., it must be within the framework of legally protected values.

The criterion of necessity is met when the measure in question is necessary to achieve the goal in question, i.e., there is no such measure which could achieve the goal assigned to it with equal effectiveness and which at the same time would be more amenable to the legally protected values, principles, goals.

The criterion of proportionality *sensu stricto*, on the other hand, is fulfilled when the number of benefits of a measure exceeds the number of disadvantages; when the result of the weighing between the protected good (value) and the sacrificed good is positive; when the means used are justified by the “importance and nature” of the aim they are to serve, when there is an adequate relation between the benefits derived from achieving the aim pursued and the harm caused to the constitutional right by the fact that the aim has been achieved⁶.

It follows from the above considerations that the principle of proportionality was originally developed in the science of law.

The way the principle is defined indicates that it can and should be addressed to all three authorities, i.e., the legislature, the executive, and the judiciary.

5 A. Barak, *Proportionality. Constitutional rights and their limitations*, Cambridge University Press, 2012, pp. 175–210.

6 R. Alexy, *A Theory of Constitution Rights*, 2002, p. 66; M. Korycka-Zirk, *Teorie zasad prawa a zasada proporcjonalności*, Warsaw 2012, p. 130; P. Miłkula, *Zasada proporcjonalności w orzecznictwie TSUE dotyczącym podatku od wartości dodanej*, „Kwartalnik Prawa Podatkowego” 2014, no. 2, pp. 38–39.

2. The principle of proportionality in the normative aspect

In seeking the normative source of the principle of proportionality in tax law, one should refer to the Basic Law. It is generally accepted that the principle of proportionality is expressed in Article 31 Section 3 of the Constitution of the Republic of Poland of 2 April 1997⁷. This provision stipulates that limitations on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, or for the protection of the environment, health, or public morals, or of the freedoms and rights of others. Such limitations may not impair the essence of the freedoms and rights. The principle of proportionality adopted in the above-mentioned provision of the Constitution derives from the theory of law and from the earlier jurisprudence of the Constitutional Tribunal⁸.

Proportionality is one of the basic criteria for ensuring the proper exercise (protection) of constitutional rights. As A. Barak points out, the contemporary understanding of human rights is based on the distinction between the scope of a constitutional right (defined in the Constitution) and the legal justification for its exercise or protection (resulting from the norms contained in lower-order acts of law). Additionally, most constitutional rights are relational, in the sense that there are legal justifications that limit the scope of their exercise as defined in the Constitution⁹.

As reasonably argued by M. Klatt and M. Meister, numerous doubts about the proportionality test arise from the lack of clear identification and definition of what elements are subject to the weighting process. The authors see the reason for this state of affairs in the parallel operation of diverse theories that prioritize the concept of “rights” in relation to legal restrictions on their exercise¹⁰.

According to A. Barak, the principle of proportionality has two basic functions. First, it provides an important criterion for resolving disputes related to the conflict of norms operating at various levels of the constitutional hierarchy. In other words, this criterion provides a mechanism for assessing the validity of lower-order norms that limit the full implementation of constitutional norms establishing human rights. Second, proportionality has an interpretative function. In this function, it provides a criterion for assigning meaning to a legal norm¹¹.

This permits the assumption that tax law, by definition interfering substantially in the sphere of individual freedoms and rights, should also take into account the indicated constitutional standard. The described state of affairs, i.e., normative

7 OJ L 78, item 483, hereinafter Constitution.

8 J. Zakolska, *Zasada...*, *op. cit.*, p. 35.

9 A. Barak, *Proportionality...*, *op. cit.*, p. 131.

10 M. Klatt, M. Meister, *The Constitutional Structure of Proportionality*, Oxford University Press, 2012, pp. 15–44.

11 A. Barak, *Proportionality...*, *op. cit.*, pp. 146–147.

anchoring of the principle of proportionality in the Constitution, should be considered favourable, if we take into account the hierarchy of sources of law. This does not mean, however, that in practice this state of affairs can be considered entirely satisfactory from the perspective of realising the protection of taxpayers' rights in disputes with the tax administration, which in the course of its activities primarily refers to the provisions of ordinary acts.

The principle of proportionality in normative terms can also be found in European law. Thus, this principle has the dimension of an EU standard, which is combined with the principle of subsidiarity. It is expressed in Article 5 (4) of the Treaty on European Union¹², replacing Article 5(4) and (5) of the Treaty on European Union. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The CJEU case law on compliance with Art. 5 TEU is quite restrained. As the analysis of the judgments has shown, only in a few cases does the CJEU state that the tax authorities have violated the said principle, both when enacting legal acts addressed to the EU states and when implementing EU law.

It should also be kept in mind that the principle of proportionality is also expressed in Article 52(1) of the Charter of Fundamental Rights. This provision states that any limitations on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. It should be mentioned that the Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, was of fundamental importance for the protection of human rights in the European Union.¹³ It added Article 6 TEU, in which the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, as adapted 12.12.2007 in Strasbourg, which has the same legal value as the Treaties.

12 Consolidated version 2016, Official Journal of the European Union, OJ L C 202,2016.

13 Made in Lisbon, 13.12.2007 (OJ L 2009 no. 203, item 1569).

The principle of proportionality is also present in Article 17 of the European Convention on Human Rights (hereinafter ECHR). This provision states that nothing in this Convention shall be construed as conferring on any State, group, or person the right to take any action or perform any act aimed at nullifying or impairing the rights and freedoms set forth in this Convention to a greater extent than is provided by the Convention. The aim is to ensure that the level of protected goods is proportionate from the point of view of the legislator, judicial decision, and doctrinal assessment. The proportionality directive protects against arbitrariness of the authorities (vertical influence). It is also the duty of the authorities to protect against abuse of fundamental human rights by others (horizontal impact)¹⁴.

The implementation of Article 17 of the ECHR is complemented by the regulation contained in Article 18 of the ECHR, which provides that the limitations on the rights and freedoms permitted by this Convention shall not be applied for purposes other than those for which they were introduced. This provision sets limits on the application of restrictions on rights. This regulation protects against abuse by public authorities or their violation of the principle of good faith on which the whole structure of the Convention is based.

Recently, the European Court of Human Rights in Strasbourg has changed the direction of previous jurisprudence and increasingly acknowledges its cognition to examine tax cases. In this regard, the ECtHR in its adjudications assigns a greater role to the principle of proportionality, which it associates with “fair balance”, equated with the test of proportionality *sensu stricto*.

From the perspective of the protection of individual rights in tax law, it is particularly noticeable, for the reason mentioned above, that the principle of proportionality is missing from the provisions of the current Tax Code in Poland.

The question arises of how this state of affairs affects the functioning of the principle of proportionality in terms of case law. Below I present a selection of examples of court rulings along with my own conclusions based on the analysis of the rulings.

3. The Principle of Proportionality in the Case Law of the Court of Justice of the European Union

Member States are obliged to undertake the timely and correct implementation (implementation, transposition) of EU regulations. The literature emphasizes that the totality of implementation consists of: 1) normative implementation, 2) administrative implementation and 3) judicial implementation. Judicial implementation refers to

14 E. Łętowska, Wprowadzenie do problematyki proporcjonalności, (in:) P. Szymaniec (ed.), *Zasada proporcjonalności w ochrona praw podstawowych w państwach Europy*, Wałbrzych 2015, pp. 18–19.

the role of national courts as the EU courts that apply the principles of EU law and impose sanctions for violation or non-application of EU law by individual entities.¹⁵

The recognition by the Court of Justice of the European Union (hereinafter: CJEU) that judicial application of law is an element of national implementation of a directive allows: 1) conferring on the courts the competence to assess whether a State has properly implemented Union law, 2) achieving in the judicial application of law the objective of Union law, including of a Directive (principle of effectiveness of Union law), 3) interpreting national law in accordance with Union law, 4) uniform application of Union law in all Member States¹⁶.

The CJEU has developed a jurisprudential principle of proportionality based on the doctrinal principle of proportionality, despite the lack of normative EU regulation in this regard. It should be emphasized that in tax cases the CJEU often uses the principle of proportionality alongside other EU principles to ensure the protection of taxpayers' rights.

Particularly important decisions concerning the principle of proportionality have been made in Polish cases. This is due to the high activity of Polish administrative courts in conducting dialogue with CJEU within the institution of preliminary questions submitted to it.

In Polish cases, the most far-reaching views were expressed in the judgments C-25/07 of 10.07.2008¹⁷ and C-653/18 of 17.10.2019¹⁸, where the Court found a violation of the principle of proportionality, which led to changes in Polish legislation. In other cases, i.e., in judgments C-188/09 of 29.07.2010¹⁹, C-588/10 of 26.01.2012²⁰; C-499/13 of 26.03.2015²¹; C-418/14 of 2.06.2016²², only a partial violation of the principle of proportionality was found. An analysis of the CJEU's case law *acquis* allows us to indicate that, relatively often, the CJEU's rulings are interpretative in nature (i.e., if a certain situation occurs, only then can it be concluded that the principle of proportionality has been violated).

In addition, the in its case law CJEU repeatedly indicates that the final assessment of whether the principle in question has been violated is a matter for the national court. An analysis of numerous rulings of the CJEU concerning observance of the principle

15 A. Kunkiel-Kryńska, *Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich*, Warsaw 2013, p. 89.

16 See judgments of the CJEU of 10 April 1984, Case C 14/83, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein Westfalen* and of 9 December 2003, Case C 129/00, *Commission v. Italian Republic*.

17 *Zbiór Orzecznictwa Trybunału Sprawiedliwości i Sądu Pierwszej Instancji* 2009/3A s. I-1407

18 EU:C:2019:876

19 EU:C:2010:454

20 EU:C:2012:40

21 EU:C:2015:2001

22 EU:C:2016:400

of proportionality shows that it varies. The CJEU granted the most far-reaching protection in terms of compliance with the principle of proportionality in taxes that are subject to harmonization, i.e., value added tax and excise duty. The Court of Justice has quite often found that member states violated the principle of proportionality in cases involving these taxes. When interpreting VAT regulations, the CJEU very often refers to the principle of neutrality in addition to the principle of proportionality. Moreover, the CJEU judicature implies that the principle of proportionality is meant to prevent national legislators from applying any “automatisms” that make the tax regulations more stringent. Furthermore, the CJEU, while examining this category of cases, has indicated the necessity to take into account the so-called good faith of the taxpayer, i.e., before depriving it of the right to deduct input tax.

The CJEU reached somewhat different conclusions in the case of sanctions. In the judgments under review, the CJEU held that the regulation, and imposition, of sanctions falls within the competence of the Member States, who are free to regulate them as they see fit, provided that the regulation, and imposition, of sanctions does not infringe the principle of proportionality. In a situation where only formal conditions have not been fulfilled and taxes have not been lost, the imposition of sanctions may breach the principle of proportionality.

In cases concerning direct taxes, which are not subject to CJEU harmonization, any derogation from the freedom of the internal market, i.e., the free movement of goods, persons, services, and capital, must be justified by the interests of the Member State and must not violate the principle of proportionality.

In its case law, the CJEU examines the observance of the principle of proportionality understood as the doctrine of jurisprudence. Often, the CJEU does not directly indicate in the justification of its rulings which criteria it uses to evaluate compliance of given solutions with the principle of proportionality. Owing to the phenomenon of abuse of the law through the introduction of artificial constructions in cross-border transactions, the CJEU allows for the introduction of certain restrictions on the free flow of capital. In many cases, however, the CJEU’s rulings take the interest of the taxpayer into account only partially, leaving the assessment of a violation of the principle of proportionality to the national court that made the preliminary reference. In certain cases, the CJEU provides quite detailed guidelines as to how the principle of proportionality should be understood, and sometimes even determines on its own that the principle has been violated or that there are no grounds to believe that it has been violated. Moreover, recently the CJEU, when interpreting legal regulations, has invoked Article 52(1) of the Charter of Fundamental Rights, which requires that the principle of proportionality be taken into account when applying the law. Analysis of the CJEU jurisprudence also shows that imposing negative consequences for taxpayers in the case of violations of formal conditions while fulfilling substantive requirements may violate the principle of proportionality.

The CJEU rulings draw attention to the necessity of admitting evidence that is lawful into tax proceedings.

In conclusion, it can be concluded that the CJEU, using the principle of proportionality, gives relatively broad protection to taxpayers.

4. The Principle of Proportionality in the Jurisprudence of the Constitutional Tribunal

As indicated above, the principle of proportionality finds its normative expression primarily in Article 31, Section 3, of the Constitution. In certain situations, when it is not possible to derive the principle of proportionality from the above-mentioned provision, against the background of the circumstances of a particular case, the principle of proportionality, in accordance with the jurisprudence of the Constitutional Tribunal, is derived from Article 2 of the Constitution.

For example, in judgment SK 7/15 of 6.01.2016, ref. ²³, the Constitutional Tribunal took the position that Art. 65.1a.1 of the Excise Duty Act of 23 January 2004 (OJ L No 29, item 257 and No 68, item 623, of 2005. No. 160, item 1341, of 2006. No. 169, item 1199, of 2007. No. 99, item. 666, and 2008. No 118, item 745 and No 145, item 915) in connection with Article 2 of the Act of 28 July 2005 amending the Excise Duty Act (OJ L No 160, item 1341) to the extent in which it refers to tax obligations incurred prior to 15 September 2005, is inconsistent with Article 20, Article 22, Article 64 par. 1 and 3 in connection with Article 31 par. 3, Article 2 and Article 84 of the Constitution.

The analysis of the case law of the Constitutional Tribunal shows that it has evolved over the years. In the first period when the Constitution was in force, a violation of the principle of proportionality was ascertained on the basis of both Article 2 and Article 31 Section 3 of the Constitution. Later, only Article 31 Section 3 of the Constitution was applied, and the three-part test of proportionality, i.e., the test of usefulness, necessity, and proportionality *sensu stricto*, was carried out quite scrupulously. Subsequently, the jurisprudence of the Constitutional Tribunal evolved further still. It was assumed, that in tax cases the principle of proportionality resulting from Article 31 Section 3 of the Constitution would apply only in two cases. First, it cannot be ruled out that, under the guise of a levy regulation, the legislature will establish an instrument serving purposes other than fiscal; particularly nationalisation or repression. Secondly, it cannot be ruled out that one or both of the discussed models may be invoked with reference to other issues regulated by the provisions of tax law that do not concern the imposition of taxes, but are connected, for example, with the shaping of the conditions which must be met in order to take

23 OTK-A 2016/100.

advantage of an exemption from tax obligation or of a preferential (reduced) rate of taxation.

In recent rulings the Constitutional Tribunal has applied the principle of proportionality reconstructed from Article 2 of the Constitution, terming it the prohibition on excessive interference by the legislator. Inconsistent with this principle, is such action by the legislator that, from the point of view of the principles of rationality, is excessive in relation to the declared objectives. The principle derived from the aforementioned provision of the Constitution, places particular emphasis on the very prohibition of excessive interference on the part of the legislator, which makes it unnecessary to refer to the values indicated in Article 31 par. 3 of the Constitution. Nor can the principle of the prohibition on excessive interference on the part of the legislator be understood in such a way that ascertaining whether it is exceeded requires a rigorous test of proportionality in accordance with the principle of utility, the principle of necessity, and the principle of proportionality *sensu stricto*. In light of the foregoing, what is inconsistent with the principle of the prohibition of excessive interference will therefore be such action on the part of the legislature which, from the point of view of current knowledge, is excessive in relation to the objectives pursued.

5. The Principle of Proportionality in the Case Law of Administrative Courts

Polish administrative courts (provincial administrative courts, and the Supreme Administrative Court) also invoke the principle of proportionality when resolving disputes between tax authorities and taxpayers. In this respect, administrative courts in their rulings refer to the *acquis* developed by CJEU and the Constitutional Tribunal. In the written justifications for court decisions, one can also find clear references to the criteria of proportionality developed in legal scholarship.

Again, it is useful to cite a specific example in this regard. Specifically, in verdict II FSK 3684/18 of 31.07.2019²⁴, the Supreme Administrative Court (hereinafter: SAC) ruled on behalf of the taxpayer with regard to the possibility to take advantage of residency relief, citing, among other things, the principle of proportionality developed in the science of law, and indications concerning this principle arising from the case law of the Constitutional Tribunal.

In the justification of the cited judgment, the SAC stated that the obligation for taxpayers to submit a statement on the conditions entitling them to apply the exemption, pursuant to art. 21 sec. 1 item 126 of the Personal Income Tax Act and pursuant to art. 8 sec. 3 of the Act amending this Act of 2008, did not meet

24 Central Database of Administrative Court Decisions CBOIS www.orzeczenia.nsa.gov.pl.

the requirements of the proportionality principle expressed in art. 31 sec. 3 of the Constitution.

The research undertaken on the case law of the SAC in tax cases allows for the conclusion that the principle of proportionality significantly influences the development of jurisprudence by administrative courts in this category of cases. In many cases, the SAC invokes the doctrine developed by the CJEU as well as the views of the Constitutional Tribunal based on the interpretation of Article 31 Section 3 of the Constitution itself, or this provision of the Fundamental Law in conjunction with its Article 2. Most often the principle of proportionality constitutes the basis for adjudication in cases concerning value added tax. Often the benchmark for granting protection to taxpayers is a CJEU judgment passed in another case. This means, therefore, that the judgments of the CJEU are carefully analysed by the SAC as a national court, and the general guidelines derived from them are applied in other cases. This also confirms the view expressed earlier, that there is an ongoing dialogue between the CJEU and SAC within the institution of questions for preliminary rulings.

In its rulings, the SAC takes into account the principle of proportionality to a much lesser extent in excise duty cases. However, in a situation where two divergent rulings were issued by the courts, namely, the Constitutional Tribunal found that there were no grounds to apply the principle of proportionality, while the CJEU, based on EU law, held that Polish legislation breached the principle of proportionality; the SAC, in the name of the principles of priority and effectiveness of EU law, followed the views of the CJEU. In input tax refund cases, the NSA, following the example of the CJEU, is required to examine whether the taxpayer acted in good faith and exercised due diligence. It is also agreed that formal defects should not restrict the right to tax refunds.

The tax case law of the SAC indicates that the principle of proportionality is also applied in taxes other than harmonized taxes. It was applied in cases concerning the so-called registration relief, i.e., on the grounds of the provisions of the Personal Income Tax Act. Here the court meticulously carried out the three-part proportionality test derived from R. Alexy's theory. On this occasion, the SAC applied a pro-constitutional interpretation. In certain situations, the SAC grants protection to the taxpayer citing a violation of the principle of proportionality when the tax authorities impose procedural obligations on a party that are impossible to fulfil in the prescribed time.

In conclusion, it should be stated that the principle of proportionality is an important element employed in the interpretation of tax law by the CJEU, the Constitutional Tribunal, and the SAC. However, legislative solutions adopted in tax matters do not always meet the EU and constitutional standards of proportionality. Therefore, it is worth monitoring whether the addressees of the principle of proportionality (i.e., the legislative, executive, and judicial authorities) are compliant

with it. The principle of proportionality is an important instrument for the protection of taxpayers' rights.

6. COVID-19 and the Principle of Proportionality

The international community was not prepared for a pandemic. As a result, millions of people around the world became infected, were hospitalised, and a large number of those affected died. During the first period of its appearance, isolation was basically the only means of preventing it. Only later did the possibility of vaccination against COVID 19 emerge. However, the number of vaccinated people in Poland, which is less than 50%, does not guarantee the so-called 'herd immunity'. As a result, the authorities of individual countries, including Poland, were forced to introduce numerous restrictions with regard to their citizens.

In view of the subject matter of the article, it is worth analysing whether the introduced restrictions do not contradict the principle of proportionality, of which the scope of application has been presented in the previous arguments contained in the publication. At this point, it is worth recalling that the principle of proportionality has two functions. It provides an important means of settling disputes related to the conflict of norms functioning at different levels of the constitutional hierarchy. Moreover, it plays an important interpretative function in the interpretation of the law.

Due to the size of the article, I have chosen for analysis the restrictions introduced in the SAC, in particular concerning Article 15zzz⁴ of the Act of 2 March 2020 on special solutions related to the prevention, counteraction, and combating of Covid -19, other infectious diseases, and crisis situations caused by them (Journal of Laws 2020, item 374 as amended). At this point, it should be emphasised that this provision has evolved.

The epidemiological threat from the spread of the SARS-CoV-19 virus was not illusory. A judge of the SAC and a 34-year-old employee of the Judicial Information Department died on COVID -19. In addition, many judges and employees were hospitalised or quarantined due to the severity of the illness.

Due to the declaration, as of 14 March 2020, of a state of epidemiological emergency pursuant to the Ordinance of the Minister of Health of 13 March 2020, on the declaration of a state of epidemiological emergency in the territory of the Republic of Poland (Journal of Laws of 2020, item 433), the functioning of the Finance Chamber of the SAC dealing with the settlement of tax disputes has changed.

The cancellation of appointed hearings and the lack of possibility to appoint new ones resulted in the intensification of adjudicating in closed hearings in three-person groups. This mode of adjudication was used not only in cases in which the parties waived the hearing (Article 182 § 2 of the Law on Proceedings before Administrative

Courts), but also in cases so far awaiting the setting of a hearing, the adjudication of which in closed session was made possible by Article 15zzs⁴(1) and (3) of the Act of 2 March 2020 on special solutions to prevent, counteract, and combat COVID -19, other infectious diseases, and crisis situations caused by them (Journal of Laws 2020, item 374, as amended).

In several cases, it was decided to hold a hearing remotely, with simultaneous direct transmission of images and sound, in which the parties engaged in, while staying in the buildings of the designated voivodeship administrative courts²⁵. In a few cases, when a party objected to hearing the case in a closed session, the case was taken off the court docket and awaits hearing.

Currently, there is still a preference for deciding cases in closed session. The provision of Article 15zzs⁴(1) stipulates that during the period in which the state of epidemic emergency or the state of epidemic declared due to COVID -19 is in force and within one year from the revocation of the last one, the SAC is not bound by the party's request for a hearing. If a case to be heard is referred to a closed hearing, the SAC shall decide in a panel of three judges.

Paragraph 2 of the analysed provision provides for a hearing in a different location in proceedings before the SAC. In the period when an epidemic emergency or a state of epidemics declared due to COVID - 19 is in force, as well as within one year from the cancellation of the last of them, provincial administrative courts, and the SAC, shall hold a hearing with the use of technical equipment making it possible to hold the hearing remotely with simultaneous direct broadcast of images and sounds, provided that the persons participating in the hearing do not have to be present in the court building.

However, the presiding judge may order a closed session if he or she considers it necessary to hear the case, and it is not possible to hear the case remotely with simultaneous direct transmission of images and sound. In a closed session in these cases, the court shall decide by a panel of three judges.

As a result, remote hearings, in which professional attorneys with appropriate Internet connections participate, are increasingly frequently organised at the SAC.

However, the question arises as to whether the examination of cassation appeals in closed sessions violates the principle of proportionality in terms of the right to a court, in particular the right to an open trial?

First of all, it should be noted that the possibility of limiting the right to an open trial was introduced by law, which meets the formal condition set out in Article 31(3) of the Constitution. Since the 2015 amendment to the Law on Proceedings before Administrative Courts, the catalogue of cases which the SAC may hear in closed session (Article 182 of the Law on Proceedings before Administrative Courts) in

25 Information on the activity of administrative courts in 2020, NSA Publishing House, Warsaw 2021, p. 30.

a three-member composition has been significantly expanded, and so far, such a solution has not been questioned. Moreover, in accordance with Article 183 § 1 of the Law on Proceedings before Administrative Courts, the SAC examines the case within the limits of the cassation complaint; however, it takes into account the invalidity of the proceedings *ex officio*. The parties may only cite new grounds for the cassation appeal. It follows from the presented regulations that proceedings before the SAC are primarily written, and new arguments may only be raised within the scope of cassation grounds, which may be raised by a party in a pleading before a closed hearing.

In my opinion, the possibility of considering cassation appeals by the SAC in a closed session during the pandemic period does not violate the principle of proportionality. By providing for a wider possibility of holding closed hearings, the criterion of usefulness was met, as it protected the parties, attorneys, judges, and court employees from contracting the COVID -19 virus. The adopted solution also met the criterion of necessity, as limiting direct contact between the parties was necessary, due to the epidemiological situation. Finally, the restriction of direct hearings was intended to protect the public health of the general population at the expense of the right of the parties to participate directly in the hearings. It should also be borne in mind that the epidemiological situation in Poland was, and is, serious, as it leads to numerous infections, loss of health of many people, and the death of many people.

Conclusion

The principle of proportionality in tax law is an important element in the protection of taxpayer rights. The interpretation directive related to the principle of proportionality has a doctrinal, normative, and case law character. It is both an EU and constitutional standard and should be employed as a rule on a daily basis in the practice of tax authorities.

As a general principle of tax law, it is addressed to the legislative, executive, and judicial authorities. The CJEU quite often refers to the principle of proportionality in its rulings and has developed a case law doctrine based on the relevant legal scholarship. The Constitutional Tribunal, although only to a limited extent, has also applied the principle of proportionality.

In disputes between tax administration authorities and taxpayers, Polish administrative courts apply the principle of proportionality, applying a pro-EU and pro-constitutional interpretation.

The possibility for the SAC to hear cassation appeals in tax cases in closed session during the pandemic period does not violate the principle of proportionality.

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