

CONCORDANCE OF GENERAL CLAUSES IN TAX LAW

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Abstract. Pursuant to their constitutional model, general clauses protect, in the most general terms, the interest: general, universal or the interest or good of an individual. Unfortunately, this clear and evident categorisation of general clauses is absent in the tax law regulations. The aim of this article is to present an exhaustive catalogue of such indeterminate expressions, encoded in the specific provisions of the general and particular tax law. The study also aims to demonstrate the problems related to the interpretation of such expressions in the process of applying the law. It should be stressed that the diversity of tax law general clauses results in problems with their unambiguous interpretation. A correct interpretation of the scope of meaning of the given general clause requires advanced knowledge on the part of the interpreter, since in tax law, the same-sounding clauses, which operate in different legal acts, refer to distinct extra-legal domains. For these reasons the interpretation of such indeterminate expressions should never be limited only to a superficial, semantic (dictionary-level) explanation of the meaning of particular words.

Keywords: general clause, major taxpayer's interest, public interest, tax

1. PRELIMINARY REMARKS

Current tax regulations create numerous interpretation problems to all entities interpreting them. The reasons for that are not only complex constructions and legal institutions, but first of all less understandable wording of tax legislation. In tax literature and case-law the rule of linguistic interpretation priority tends to be dominant. It seems that the gradual degradation of tax legislation jargon is determined by three tendencies: law inflation, dominance of law in social and economic life as well as commercialisation of law.

The dogma of tax law did not provide for separate interpretation directives. This means that we should apply linguistic and non-linguistic interpretation directives: systemic, functional and purposive. In tax literature and case-law the rule of linguistic interpretation priority tends to be dominant. However, the opinions for its restriction in favour of non-linguistic interpretation become more visible, especially in relation to the purposive interpretation with an emphasis put on economic interpretation. These changes stem from the increased

practical importance of the Court of Justice resolutions which consider the results of linguistic interpretation of very limited use due to the linguistic diversity of tax law among EU member states. This trend of diminishing the role of linguistic interpretation is especially visible in relation to general clause interpretation which requires the application of non-legal criteria.¹ As the interpretation of indeterminate phrases tends to be creative (constructive) and dynamic, it is crucial to specify the entities authorised to tax law application and operational interpretation. The specificity of tax law makes natural persons such as taxpayers and their representatives included in the list of entities [Mastalski 2008, 41].

Undoubtedly, the most difficult is the interpretation of general clauses referring tax authorities and courts to different types of axiological, political and economic values, functioning outside the law. The interpretation of non-legal criteria increases temptations to consult individual, thus subjective, opinions of moral, social, political and economic character. As stated in the literature, general clauses are accompanied by relative perception of values.² This feature is of particular importance when the interpreting tax authorities are engaged in protection of public finance and collection of taxes. Due to the above, it should be emphasised that in the case of general clauses, which are the natural means of transfer of non-legal values to tax law regulations, both the constitutional principle of two-instance proceeding and the judicial review of administrative decisions are of particular importance. Thus, the final authorities setting boundaries to the linguistic meaning of general phrases should be the courts.

General clauses, irrespective of the type of legislation in which they are laid down, whether in public or private law, are considered to be legal categories whose main purpose is to protect a specific good, interest or value identified in the legislation [Stelmachowski 1969, 290–91]. From a legal-theoretical point of view, these terms belong to the area of indeterminate evaluative expressions. The most important distinguishing feature of general clauses from other such forms is that in the course of their interpretation, the entity interpreting them should take into account the assessments and norms belonging to an axiological, economic, social and sometimes even the political system of a given legal regime.³

¹ See para. 155 of the Regulation of the Prime Minister of Poland of 20 June 2002 on “Principles of Legislative Methodology,” *Journal of Laws* of 2016, item 283 as amended [hereinafter: Principles].

² See Grzybowski 1965, 38; Wójcik 1981, 91; Safjan 1990, 55; Leszczyński 1995, 296–98; Hanusz 2016, 5–6; Borszowski 2017, 71–72.

³ The literature of the subject shows novel views on the nature of general clauses as legal categories referring to intra-system regulations, see Wilejczyk 2019, 3–15.

A condition on the effectiveness of a general clause is that it must be properly drafted in terms of language. If the clause is poorly worded, for instance, when it contains too many indeterminate terms, it is impossible to interpret it correctly. This means that the clause does not fulfil the function entrusted to it, i.e., it does not protect the good or interest for which it was created. Thus, a clause of that kind threatens the security and legal certainty of the regime to which it belongs.

As pointed out already, the general clauses follow the constitution to protect in general measures the public interest, or the interest or good of an individual. Unfortunately, the provisions of Poland's tax law lack such clear and evident classification of clauses. First of all, it should be stressed that for many reasons this legal category has been extremely rare in tax law since the inter-war Poland [Münnich 2019, 165–84]. The legislator's interest in these technical-legislative legal instruments has begun to grow over the last decade and the tendency seems to be irreversible now.

The main objective of the article is to classify indeterminate evaluation phrases used in tax law regulations, to ascertain the reasons for their use in the tax standards as well as to analyse the legal effects these types of legal categories may produce during tax law application. By way of introduction, it should be explained that the essential distinctive feature of indeterminate evaluation phrases, such as indeterminate comparative phrases as well as general clauses, is their specific linguistic construction. Comparative phrases or general clauses usually consist of at least (or more) words both of which are vague. This feature of evaluation phrases is often used by legislators while constructing economic and business factual circumstances included in hypothesis of tax norms.

2. GENERAL CLAUSES PROTECTING THE PUBLIC INTEREST AND IMPORTANT TAXPAYERS' INTERESTS

General clauses protecting the public interest and the important interests of the taxpayer are traditional and typical of public law, a branch of which is tax law. The general clauses regulated in tax law to protect the public interest include the following: a) protecting the interests of the State Treasury;⁴ b) protecting an important state interest;⁵ c) protecting the public interest/a major

⁴ See Article 1(2) of the Act of 16 November 2016 on the National Revenue Administration, Journal of Laws of 2020, item 505 as amended [hereinafter: the National Revenue Administration Act or the NRA].

⁵ See Article 119(1)(1) of the Act of 6 December 2008 on Excise Duty, Journal of Laws of 2020, item 722 as amended [hereinafter: the Excise Act]. Pursuant to these regulations, Minister of Finance may, through a regulation, exempt certain excise goods from the obligation to mark them with excise tax marks.

public interest (under the Tax Code)⁶ and the major public interest (under the Excise Act – Article 52(1)(2)); the public interest (under the Gambling Law – Article 33(4)).

These clauses have a similar linguistic formulation, and their main focus is on protecting the interest or major interest of the Treasury, the State or simply the public. Yet, any effort at the interpretation of these clauses is thwarted – despite the obvious semantic similarities between them – since when approached individually, these general clauses have divergent scopes of meaning under specific tax regulations, as their semantic deconstruction requires reference to extra-legal norms and values.

A major state interest or the public interest as coded in the Gambling Law tax is always interpreted, due to the nature of these taxes, in terms of the economic or fiscal interest of the state. These tax regulations do not contain any provisions obliging the interpreting entities to allow for the equivalent interests of the taxpayer.

This a line of interpretation of public interest clauses is absolutely unacceptable when interpreting the provisions of the Tax Code. As a rule, the public interest clause in this law appears in the same articles in which an important taxpayer's interest or an important party's interest is regulated. Firstly, interpreters – tax authorities or courts – are obliged to treat both interests protected by the general clauses on a par. Secondly, in the course of interpretation, the entities must objectively balance both interests, relying on the extra-legal values to which the clauses refer.

Consequently, a general clause formulated linguistically in the same or similar way may be interpreted distinctly at the stage of application. The proper scope of meaning of the clause, in line with the rationale of the legislator, is to be determined by the interpreter. Thus, a clause will serve as an instrument of safeguarding security and certainty in tax law, provided that it is correctly interpreted in relation to the relevant factual and legal situation.

In tax law, the traditional general clauses discussed above are increasingly being juxtaposed with clauses of administrative roots pertinent to the protection of state interest and public order. This results in the occurrence of legal acts containing double or triple general clauses, which, for the sake of their semantic complexity, e.g. use of conjunctions, demand interpretations dependent on a given factual situation. These include clauses protecting: 1) a major state interest relating to public security, state defence, state fuel security or environmental protection;⁷ 2) public security, a major economic or financial

⁶ See Article 20, 22(1), 48(1), 67a, 160, 169(3)(1), 179(1), 208(2), 234, 240(2), 253(1), 253a(1), 270, 299b(2) of the Act of 29 August 1997, the Tax Code, Journal of Laws of 2020, item 1325 as amended [hereinafter: the Tax Code].

⁷ These clauses are prerequisites for the Minister of Finance to grant exemptions from excise duty, see Article 39(1)(1) of the Excise Act.

interest of the Republic of Poland or the European Union (Article 47(1)(1) of the NRA); 3) state security, public order or the economic interests of the state.⁸

One of the unique general clauses of this type is a clause regulated in only one legal act: public order of the Republic of Poland.⁹

As mentioned above, general clauses such as those referring to state security and public order are rooted in administrative law and, until recently, were not recognized within tax law. It should be emphasized that the legislator is increasingly using them in two contexts. The first one concerns the state systemic norms regulating the organisation and scope of activities of the bodies under the National Revenue Administration (KAS). This case uses protective clauses in order to build and emphasise the importance of these bodies in the context of state functioning. A similar function is performed by the clauses protecting national security and order contained in the Gambling Law or Excise Act. In addition to the public or economic interest of the state, these are additional premises that allow the tax authorities to exercise their power towards taxpayers, for instance, to grant excise duty exemptions or to refuse the granting of a licence to conduct business activity in the field of organised gambling and betting.¹⁰

Conclusion: these types of general clauses are very rarely used, and their main purpose is to ensure the safety and certainty of tax legislation.

Clauses protecting the interests of the individual have a completely different role as instruments of safeguarding security and certainty in tax law. It should be emphasised at the outset that there are far fewer such clauses in tax law, and the vast majority of them have been standardised in general tax law provisions.

Clauses safeguarding a major interest of the individual, as laid down in the Tax Code, include: 1) major taxpayer's interest – the supreme clause (Article 22(1); 22(2)(1); 48(1); 67a; 77a; 253(1) of the Tax Code), 2) major party's interest (Article 20; 169(3)(1); 253a(1) of the Tax Code), 3) major interest of the entity concerned (Article 160(1) of the Tax Code), 4) major interest of the obliged entity (Article 270(1) of the Tax Code).

A general clause protecting individuals' interests is also laid down in the Gambling Law, and concerns a major interest of the gambler (Article 23d of the Gambling Law) or participants in gambling (Article 21(3) of the Gambling

⁸ See Article 11(1)(1) and (2) and Article 28(3)(3)(3) of the Gambling Law of 19 November 2009, Journal of Laws of 2019, item 847 as amended [hereinafter: the Gambling Law].

⁹ See Article 13(5) of the Act of 9 March 2017 on exchange of tax information with other countries, Journal of Laws of 2020, item 343 as amended.

¹⁰ The Constitutional Tribunal stated that the provisions of the Gambling Act are consistent with the Constitution and do not restrict economic freedom, Judgment of the Constitutional Tribunal of 11 March 2015, ref. no. P/14, Journal of Laws item 369.

Law)¹¹ or betting (Article 22(4) of the Gambling Law), or the financial interest of participants in gambling (Article 63(1) and 67 of the Gambling Law).

Conclusions: the function of clauses protecting the interests of a particular entity is clear and legible. Undeniably, the meaning of an individual clause depends on the specific factual situation. In tax law, such a clause may concern protecting personal, family or social values. Nonetheless, the fundamental aim of the aforementioned clauses under the Gambling Law is to protect the player and to reduce the risk of their becoming addicted to gambling, which is treated as a type of disorder with a detrimental impact on a particular addict, his or her financial situation and sometimes on his or her family [Wilk 2010, 7–8].

In addition to these two types of general “traditional” clauses, there are new clauses in tax legislation which have an impact on national tax law. They are European tax law clauses. First and foremost, these are general anti-abuse clauses, which have been implemented into national law on the basis of the relevant EU directives: 1) large anti-evasion clause – Tax Code (Articles 119a–119f of the GATA Directive); 2) small anti-evasion clause (CIT Act).¹²

Thus, the two Polish statutory acts represent the EU legal tax provisions in a literal manner.

Conclusions: The premise behind the anti-abuse clauses is to protect the state budget and, at the same time, the reliable taxpayers from fraudulent taxpayers and contractors who use counterfeit accountancy constructions to evade tax [Brzeziński 2013, 168; Mastalski 2016, 158]. An analysis of the Polish solutions, either in their original or amended version, does not confirm such a direction in interpreting the provisions of the Tax Code.

The Polish language versions of the anti-abuse clauses, and especially in the case of the so-called large anti-evasion clause are extremely extensive and constantly amended provisions of the tax law. To make matters worse, because of their unclear and abundant use of economic and legally indeterminate phrases, the content of the provisions is essentially a dead letter. At the same

¹¹ Pursuant to this provision, the Minister of Finance shall determine, through a regulation, the procedure for lodging claims by participants. This clause also appears in Article 23(4) of the Law. The Minister of Finance may issue a regulation to specify detailed requirements for the operation of a gaming device enabling the accumulation of winnings referred to in section 1c, taking into account, in particular, a need to protect the interests of game participants, and to ensure the settlement of tax duties towards the state budget.

¹² See Article 22c of the Corporate Income Tax Act of 15 February 1992, Journal of Laws of 2020, item 1406 as amended [hereinafter: the CIT Act]. This article is effective as of 1 January 2016. This provision was introduced in order to implement Articles 4 and 5 of Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJEU L 345). The aim of the regulation is to prevent the risk of double non-taxation of profits from dividends in the legal-economic sense.

time, it must be observed that some clauses have been successfully defined, such as tax benefit.

Controlled foreign corporations/companies (CFC) regulations are generally controversial, as they affect the freedom of enterprise and the free movement of capital between states [Karwat 2016, 12–20]. This is particularly the case when CFC regulations are designed in such a way that they can be regarded as restrictions on these freedoms within the framework of the European Union, which includes both territories that practically do not collect income tax (e.g. Gibraltar) and those that apply extremely attractive principles of income taxation (e.g. Cyprus, Malta and Luxembourg). Worth noting in this context is the judgment of the European Court of Justice of 12 September 2006 in Cadbury Schweppes case (C–196/04). This judgment implied that many European countries may have exceeded the limits of tax measures that can be taken against the taxpayer, while retaining the principle of free movement of capital and freedom of economic activity.¹³

Therefore, the anti-evasion clauses fail to fulfil the function of an instrument of safeguarding security and certainty in tax law, despite the timespan of their being in force.

In addition to anti-abuse clauses, a specific type of general clause introduced into national legal system, and operating primarily in the VAT framework, is the clause of the good faith of the taxpayer. Its specificity lies in the fact that it is not explicitly expressed either in the VAT Directive or in the provisions of Poland's VAT Act, as is the case in the Civil Code.¹⁴ As a matter of fact, the clause has been introduced into the legal reality by the CJEU case-law.

In contrast, transposed by the CJEU into the VAT framework, the civil law clause of *bona fides* reaches beyond the traditional understanding of good faith, as EU case law indicates. In the VAT framework, a taxpayer meets the requirement of good faith not only on his or her being not actively involved in the fraud, but also on condition that he or she does not even know and cannot know about this involvement. In order to determine whether or not the taxpayer was guided by good or bad faith, the CJEU has ordered so-called abuse tests.

Taxpayers are therefore required not only to be honest but, if necessary, to take precautions to ensure that transactions are legal. Indeed, if a transaction is fraudulent, the exercise of the right for tax reduction is conditional on the taxpayer's ensuring due diligence in checking all information relating to the transaction in order to ensure that he or she is not involved in the fraud. The

¹³ See <https://kancelaria-skarbiec.pl/publikacje/spolki-kontrolowane.html> [accessed: 29.10.2021].

¹⁴ See Article 7 of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2020, item 1740 as amended [hereinafter: the Civil Code].

requirement of good faith is not a requirement as to the result, but the extent of the action taken by the taxable person in the course of the transaction.¹⁵

The taxpayer's good faith clause appeared for a while among the general principles to be included in the draft Tax Code¹⁶ and is also included in the current edition of the Tax Code, in a new Chapter 6a: Additional tax liability, in Section III of the Tax Code (Article 58a(3) and (4) of the Tax Code).

The reasonableness clause is also an equity clause and represents, in the light of dogmatic and theoretical research in civil law, an alternative to *bona fides*. However, it derives from a completely different tradition of making and applying law: the Anglo-Saxon model of case law and the Dutch (post-Protestant) legal culture, rejecting the Roman clause as archaic.

The general clause of reasonableness makes it possible to determine whether or not the taxpayer has acted reasonably on the basis of the reasonable person test. In simple terms, the test is to assess whether or not a person in a particular situation has acted as a reasonable person should. The basic standard of assessment, when interpreting statements of intent and other behaviour, is the model of a reasonable and at the same time honest person whose trust or expectations should be protected.

In view of the interpretations of the equitable clauses that coincide with those of the general anti-abuse clauses, it can be said, in principle, that their purpose is not predominantly to safeguard particular types of interest: public or individual, but that, because of their multi-faceted interpretation, clauses of this type can be instruments that guarantee security and certainty of tax law.

In tax law, unfortunately, there is another method of introducing general clauses into the legal reality, namely the judicial application of tax law by administrative courts. The court, functioning as an interpreter of the law, cannot create any new normative constructions not contained in legal regulations, let alone general clauses, as these are technical and legislative tools reserved exclusively for the legislator (para. 155 of the Principles). The court, a tax authority or a taxpayer can only infer conclusions within the scope of meaning of a specific general clause contained in tax legislation, taking into account the relevant extra-legal domain behind a given assessment.

An example of such an inappropriate enforcement of a general clause into legal circulation by rulings of administrative courts is the clause of "tax deductible costs." The provisions that standardise this notion contain a typical substantive legal definition.

¹⁵ Opinion of the Advocate General delivered on 11 September 2014 in the joined cases of *Staatssecretaris van Financiën v. Schoenimport "Italmoda" Mariano Prevetoli vof*, C 131/13 and *Turbo.com BV*, C 164/13.

¹⁶ Article 19 of the draft Tax Code Act of 4 July 2018 includes the following principle: "The good faith of the obliged person shall be presumed, unless there is a good reason to believe otherwise."

CONCLUSIONS

The numerous general clauses functioning in tax law do not allow for an unambiguous assessment. The vast majority of the general clauses laid down in tax law fulfil their function and protect a specific good of the state or an individual. Such clauses can be said to serve as instruments used in safeguarding security and certainty of tax law.

There are, however, also such evaluative expressions in tax legislation which, due to their indeterminate wording, or the manner in which they are introduced into legal circulation, do not fulfil their function.

Normative analysis of tax provisions contain general clauses indicate that these expressions because of the open scope of meaning, are a special category of law, therefore their introduction to the content of the tax legislation should be done in a reasonable manner compatible with the legislative technique. For each type of general clause, the legislator should take into account adequate standards and requirements formulated in the case-law as well as in the literature, concerning the theology and the philosophy of law. Only the evaluation phrases and the general clauses which are implemented accurately are able to perform their essential function on the grounds of tax law, namely to make tax law flexible and simultaneously ensure the proper protection of the taxpayer's individual interest as well as of the public interest.

Therefore, general clauses should have such a normative and linguistic construction, so that it would be obvious for each interpreting entity that an individual provision regulate this particular legal category. Such clarity of a legal text can be obtained either by implementing a specific name of the clause, e.g. the public interest, or by using the term general clause. The latter solution may be helpful, if one general clause is regulated by a few provisions. The lack of clear indication of the assets protected by the general clause entails interpretation doubts concerning the legislator's intentions, and thus, the interpretation may not provide for an explicit meaning of the clause.

The legislator should understand and remember that it is not the number of general clauses, but their substantive and formal quality that is decisive in whether or not they become instrumental in safeguarding the security and certainty of tax law.

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