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TAX ABOLITION RELIEF VS. TAX FAIRNESS

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Abstract. This article relates to the personal income tax relief, hereinafter referred to as the tax abolition relief, which has been applicable since 2008. On its implementation as well as during its further application, the tax abolition relief gave rise to numerous difficulties of interpretation. Consistently, the point of reference throughout the legislation process and the application of law has been the principle of tax fairness. This aspect has also been raised during the recent implementation of the amendments to this tax relief. The author analyses the origin justifying the tax abolition relief and its substance, considering the amendments that became binding since the beginning of 2021. The study material was based on the Polish legislation and doctrine and expanded by the aspects of international tax law.

Keywords: personal income tax, tax abolition relief, avoidance of double taxation methods, avoidance of double taxation contracts

GENERAL REMARKS

The issue of tax fairness constitutes a complex, multi-layered aspect that has been subject to specific evolution. Although the principle has not been formulated explicitly in the law, the definition of tax fairness is broadly analyzed in the doctrine of the tax law [Gomułowicz 2001; Idem 2013; Famulska 1996, Głuchowski 1999; Kurowski 1996]. It is worth mentioning that, despite different approaches of scholars, the doctrine of tax law has developed a specific formula of the tax fairness [Oniszczuk 2001]. It is based on two directives: a statutory formulation of the tax structure as a guarantee for its stability that provides legal security of the taxpayer, and an imperative for fair tax imposition on the taxpayers [Nita 2013]. The former is derived from Article 217 of the Constitution of the Republic of Poland and it has already been subject of the Constitutional Tribunal's consideration [Oniszczuk 2001; Gomułowicz 2003]. Nowadays, this concept should not raise any doubts in the doctrine. The latter, however, even though it is firmly established in the doctrine [Gomułowicz 1989; Idem 1995; Idem 2001; Szołno–Koguc 2016], it continues to generate the justified concerns due to the fact that, on one hand, it impacts the boundaries of the tax imposing process [Łączkowski 1992] and, on the other hand, it has to be related to the ability to pay that is grounded in the Constitutional principle of social justice.[1] Taking the above into considera-

[1] Article 2 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of No. 78, item 483 [hereinafter: the Constitution of Poland].

tion, the principle of tax fairness often becomes the point of reference for the establishment and evaluation of the several tax institutions[2] and, in this sense, constantly constitutes a current issue in the doctrine [Gomułowicz 2013]. It is, therefore, justifiable to mention it in the context of the so-called "tax abolition relief."[3]

The introduction of the "tax abolition relief" to Polish personal income tax was justified by the notions of tax equality and tax fairness.[4] The reasoning behind this legal concept was to counterbalance the discrepancies in both the means and results of the calculation of the foreign income tax in accordance with the different methods of elimination of double taxation. The essence of the tax abolition relief was to eliminate the financial outcome of the proportional deduction method in regard to the selected sources of income and to equalize the effective taxation with the financial outcome that is caused by the application of the exemption-with-progression method. Despite several obstacles at the preliminary stage of its implementation, the tax abolition relief has proved to be a beneficial solution for the taxpayers. After twelve years of enforcing this preference in personal income tax, the attempt to tighten the tax system along with the process of counteracting the aggressive tax optimization has led to the changes in the concept of the relief. Despite the initial plans, the tax abolition relief was not eliminated but instead a mechanism that limits its application has been introduced to the legal system. Not only the introduction of the tax abolition relief, but also the process of adjudicating the concerns that appeared during the years of its application along with its substantial changes were consistently justified by raising the notions of tax equality and tax fairness. The aim of this article is to present the origin and the substance of the relief, as well as practical problems connected with it, in light of interpretation of the recent amendments to the discussed issue. Consequently, it is crucial to state that, despite the fact that introduction of the tax abolition relief and its amendments to the legal system was justified by the concept of tax equality, the process of executing the law, including the application of inconsistent interpretation of the relief, can lead, in fact, to violation of this principle, especially in the aspect of tax equality.

[2] The principle of justice is the subject of doctrine work *inter alia* in regard to the tax reliefs and exemptions [Marusik 2018].

[3] The term "tax relief" within the meaning of this article shall be understood in accordance with the doctrine of tax law as one of the forms of tax preference which results in reduction of the due tax [Nykiel 2002]. The abolition relief is applied in the construction of the personal income tax as a form of reduction of the tax calculated pursuant to Article 27g of the Personal Income Tax Act of 26 July 1991, Journal of Laws of 2020, item 1426 [hereinafter: The PIT Act].

[4] Explanatory memorandum to the governmental draft amendment to the act on special solutions for the taxpayers obtaining certain revenues on the territory of the Republic of Poland (Sejm document no. 550, 6th term of Sejm) [hereinafter: Explanatory of the abolition act of 2008], http://orka.sejm.gov.pl/proc6.nsf/0/2C03FCA1A46CB3A0C12577D1004F574B?OpenDocument [accessed: 28.12.2020].

1. ORIGIN OF AND REASONS FOR IMPLEMENTATION OF THE TAX ABOLITION RELIEF

The 27 July 2008 Act on the Special Resolutions for the Taxpayers with Certain Sources of Income Obtained Outside the Territory of the Republic of Poland[5] implemented not only the possibility of the short-term application of the general tax abolition in the form of remission of personal income tax for the years 2002–2007 in relation to foreign income, but also introduced permanent abolition relief (Article 14–16 of the Abolition Act; Article 27g of the PIT Act). Considering the meaning of the term "tax abolition"[6] the concept "abolition relief" does not reflect precisely the merit of the relief itself and should be rather viewed through the lenses of the generally applicable so-called abolition act. The main reasoning behind the amendment was to minimize or even counteract the effects of "injustice" that were caused by implementation of the elimination of the double taxation method, namely foreign tax credit method (tax credits) specified in various treaties on avoidance of double taxation. The application of this method was not a new solution, however, its financial burden suffered by Polish residents emigrating in particular to the UK after Poland's accession to the EU was regarded as over excessive in comparison to the credit method and therefore constituted injustice [Bartosiewicz and Kubacki 2008a].

It is also worth underlining that counteracting the abovementioned results did not aim at eliminating the reasons for the status quo. Those reasons have originated from the legal concept of international double taxation that results in the fiscal jurisdiction based on the principle of residency and the principle of source by the individual states [Radu 2012]. In accordance with the principle of residency, a state shall impose income tax and tax on entities with place of residence or place of establishment within its territory, irrespective of which state territory the income was generated on (regardless of the place of origin of the income) or of which state territory the assets are located in (in Polish income taxes: so-called unlimited tax obligation). The source principle, on the other hand, requires imposing taxes on income or assets generated or located on the territory of a particular state, irrespective of the entities' place of residence or place of establishment. In this situation the legally significant criterion is based on the place of generating

[5] Act of 27 July 2008 on the Special Resolutions for the Taxpayers with Certain Sources of Income Obtained Outside the Territory of the Republic of Poland, Journal of Laws No. 143, item 894 as amended [hereinafter: Abolition Act].

[6] Tax abolition tends to be equivalent to tax amnesty defined as a period during which taxpayers (amnesty participants) may voluntarily disclose to the tax authorities their failure to comply with certain tax obligations. Simultaneously, the amnesty participants are not subject to any administrative, civil or criminal responsibility provided by the law of a given country [Kuchciak and Witczak 2011]. Tax amnesty may be defined as an agenda which stipulates legal requirements for actual reduction of declared or undeclared tax obligations and refers to a specific period [Purnomolastu 2017; Manziti 2005]. The reasons for and the scope of tax amnesty can be different. In some countries it relates to foreign income [Sayidah and Assagaf 2019].

the income or on the place of location of the assets being taxed (in Polish income taxes: so-called limited tax obligation). In their tax systems, most of the states adopt the synthesis of those two principles which results in conflicts of laws caused by double taxation on international level [Vogel and Fiszer 1989; Jamroży and Cloer 2006; Castagnède 2015]. This unfavourable phenomenon is eliminated by implementing mechanisms for income tax calculation referred to as the methods of avoiding double taxation. Most frequently, obligation for those mechanisms derives from the bilateral treaties entered by the states that are usually modeled on the agreement developed by OECD. The two most commonly used methods of avoiding double taxation are: the exemption method and the credit method (tax credits) [Gordon 1992; Dickescheid 2004; Lang 2021]. The application of an appropriate method depends on the provisions of the binding bilateral treaties on the avoidance of double taxation [Davies 2003; Kucia–Guściora 2019].

The credit method (tax credits) means that the tax paid in the state of source of the income (foreign income) is credited towards the tax due in the state of residence. The main premise of the method is that it obliges the state of residency to recognize the tax imposed in the state of the source of income as the tax due in the state of residency. Presently, the amount of tax credits is limited, therefore, it is impossible to deduct the full amount of the tax paid in the state of the source of income from the tax due in the state of residency. The foreign tax subtraction from the tax due in the state of residency cannot exceed a certain amount which is calculated as that part of the national tax in relation to the income generated in the state of its source. Thus, the state of residency applies the rules on taxation in accordance with its domestic law to the taxpayer's total income (foreign and domestic), and then allows to deduct the tax paid abroad but only within the limit of the part of the own tax related to the foreign income. The credit method may cause a so-called complementary effect. This means that the state of residency collects the tax that is the difference between the tax due and the tax paid abroad. Hence, the taxpayer who benefits from tax reliefs and other tax preferences in the state of the source of income which results in lowering that tax at the same time reduces the amount to be credited in the state of residency. It is also the result of lower taxation imposed in the state of the source of income in comparison to the taxes in the state of residency [Szafoni 2011]. Therefore, any privileges granted to taxpayers abroad do not have the desired result as the amount of the national tax is increased – the amount of the granted reliefs in the state of the source of income is added to it [Dickescheid 2004]. Furthermore, differences in the amount of the tax in the state of residency and the state of the source of income may affect in a negative sense the amount of the deduction which can lead to the need to "complement, supplement" income tax in the state of residency [Kucia–Guściora 2019].

The other method of avoiding double taxation, apart from the credit method, is the exemption method (exclusion). Its essence is based on the exclusion from the taxable base that part of the taxpayer's income which was generated as the source of income outside the state of residency. In this sense the state of residency

waives its tax claims within its own tax jurisdiction. The exemption method can be established as full exemption (exclusion) or exemption (exclusion) with progression. In the former case, the income from the foreign sources is not calculated in the taxable base of the state at all. In the latter case, an exemption of the foreign income applies; however, the state of the residency reserves the right to factor in the amount of foreign income for the purpose of calculating the tax rate that shall be applicable to the remaining amount of income included in the taxable base of the state of residency [Fiszer and Panek 2010]. In practice, this method may not completely eliminate double taxation either. However, the exclusion of the foreign income (oftentimes relatively high) constitutes a more favorable legal solution in comparison to the tax credit method. It is worth mentioning that the exemption-with-progression method can cause tax resistance as well and further on can trigger a sense of injustice in those taxpayers whose income is generated exclusively in the state of residence as it may be subjected to more severe tax obligations [Witak 2016]. Both methods are included not only in the Polish personal income tax law[7] but also in the treaties on elimination of double taxation that Poland is party to.

Considering the inequalities in the levels of tax obligations for taxpayers obtaining the income from the sources outside the territory of Republic of Poland, the principle of equality before the law enshrined in the Article 32 of the Constitution was invoked in the process of introduction the abolition solutions to the legal system. It was pointed out that, even though the principle does not have an absolute character, admissibility of the different treatment of the subjects identified within the same class (category) requires an identification of the significant common factual or legal aspect that would justify the differentiation of the specific class from the general population. In reference to jurisprudence of the Constitutional Tribunal,[8] it was raised that "with such an approach to equality, the assessment of its application is shifted to the criteria of differentiation of the particular groups of citizens whose legal affairs have been resolved in a different manner. The issue of whether or not the principle of equality before law was violated may be determined by selecting specific differentiating criterion; the criterion itself has to be adopted, however, in accordance with the remaining constitutional principles."

While applying these considerations to the taxpayers with the place of residence in Poland and with total or partial income obtained outside its territory (a relevant condition determining the selection of a particular category of taxpayers), the aforementioned criterion of differentiating the legal situation of those subjects was, in fact, the location (state) of obtaining the income. At this point it is crucial to agree with the doctrine's statement that, in the analyzed scope, the assessment of the abovementioned criterion in respect to its legal importance justifying diffe-

[7] Article 27(8) of the PIT Act: the exemption method, Article 27(9) and Article 27(9a) of the PIT Act: the credit method.

[8] Judgment of the Constitutional Tribunal of 20 November 2002, ref. no. K 41/02, M.P. 2002, No. 56, item 763.

rent treatment of the same subjects and derived from the interpretation of the jurisprudence of the Constitutional Tribunal leads to the conclusion that this criterion cannot constitute the relevant aspect [Dobaczewska 2010].

Therefore, the solutions of the 2008 Abolition Act were aimed at equalizing the tax obligations of Polish residents obtaining income from the sources located outside Poland that resulted from application of different methods of avoidance of double taxation, and that were drastically noticeable when foreign income constituted the only income of the taxpayer.[9] The main purpose of introducing the so-called abolition relief was to lead to situation when, regardless of the international agreements on avoidance of double taxation that Poland entered into with the state of source of income, each taxpayer had equal tax obligations. Moreover, it was clearly indicated that the abolition relief shall apply also to relations not regulated by international agreements, namely to those cases in which income is generated in states with which Poland has not signed a treaty on avoidance of double taxation. According to the supporting documentation of the draft Abolition Act, those solutions were introduced based on the tax fairness principle that is implemented through universality and equality of taxation, and, at the same time, there was no assumption of complete "exemption" of the taxpayer from obligation to pay tax in Poland on the income obtained outside of its territory.[10] However, it turned out that this solution did not stand the test of time, nor was it a remedy for the problems revealed in its execution [Bartosiewicz and Kubacki 2008b].

2. THE SCOPE OF ABOLITION RELIEF

The scope of the abolition relief needs to be analyzed in several aspects: subjective, objective, technical and formal. The subjective scope of the abolition relief identifies the recipients of the relief. In order to apply the relief three criteria need to be fulfilled cumulatively. The first criterion relates to the tax status of the taxpayer. The relief is applicable exclusively to Polish tax residents, i.e. taxpayers with the residence status in Poland,[11] which results in unlimited obligation in respect to personal income tax. The second criterion relates to the issue of obtaining income by the residents from criterion 1 strictly from the sources located outside the territory of Poland in the tax year. What is more, such foreign income must be taxed in accordance with the proportional credit method – tax credits (Article

[9] In a situation that the taxpayer's income is solely foreign (there is no domestic income), under the exemption method no tax obligation in Poland is evoked, while under the credit method tax obligation is invoked.

[10] Judgment of the Constitutional Tribunal of 26 September 1989, ref. no. K 3/89, OTK 1989, No. 1, item 5 and the Explanatory of the Abolition Act of 2008.

[11] For tax purposes, Article 3(1) of the PIT Act considers a natural person to be a person residing on the territory of the Republic of Poland, who: 1) has a center of personal or economic interests on the territory of the Republic of Poland (center of life interests) or 2) resides in the territory of the Republic of Poland for more than 183 days in a tax year.

27(9) or Article 27(9a) of the PIT Act). It should be stressed that the application of the tax credit method results directly from the binding bilateral treaty on avoidance of double taxation[12] or refers to relations not regulated by international agreements where no bilateral treaty was entered into.[13]

Since 2019 as a result of so-called MLI Convention that amends the treaties on avoidance of double taxation that Poland is party to, taxation is shifted from the exemption-with-progression method to the tax credit method (tax credits).[14] Therefore, the abolition relief also applies in these cases.[15] The third criterion excludes foreign income located in the state or on the territories indicated in the Regulation of the Minister of Finance and defined as applying harmful tax competition.[16] That is why, the objective scope of the relief does not concern all taxpayers but only those who fulfilled cumulatively the indicated conditions.

In regard to the subjective scope of the relief, it should be pointed out that its application is limited to specific sources of revenue that include employment of the governmental officials, employment based on work contracts, home work contracts and cooperative employment contracts (Article 12(1) of the PIT Act), revenue from economic activity carried out personally,[17] non-agricultural economic activity (Article 14 of the PIT Act). Moreover, the abolition relief covers revenues from copyright and related rights within the meaning of separated regulations, from artistic, literary, scientific, educational and journalistic activities performed outside the territory of the Republic of Poland, except for the income (revenue) obtained from the use of disposal of such rights. The enumerated list of foreign revenue sources that are covered by the relief has its significance in the sense that it does not apply to all foreign sources of income. Apart from the abovementioned ones, the relief is not applicable to other non-listed revenues, such as pensions

[12] Treaties with the USA, Russia, the Netherlands, Iceland, Australia.
[13] E.g., agreements with Brazil, Peru, Ecuador, Colombia, Nicaragua, Cuba.
[14] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting signed in Paris on 24 November 2016, Journal of Laws of 2018, item 1369.
[15] It concerns from 2019 Slovenia and Austria, from 2020 the United Kingdom, Ireland, Finland, Israel, Japan, Lithuania, New Zealand, Slovakia, from 2021 Norway, Belgium, Canada, Denmark.
[16] Regulation of the Minister of Finance of 28 March 2019 on the definition of countries and territories applying harmful tax competition in the field of personal income tax, Journal of Laws item 599.
[17] Income from activities performed personally includes, pursuant to Article 13 of the PIT act, among others: income from personal artistic, literary, scientific, coaching, educational and journalistic activities, including participation in competitions in the fields of science, culture and art and journalism, as well as income from practising sports, sports scholarships granted under separate regulations and income of judges from conducting sports competitions; income from the activities of clergy, income from the activities of Polish arbitrators participating in arbitration proceedings with foreign partners; revenue received by persons performing activities related to the performance of social or civic duties, revenue of persons to whom a state or local government authority or administration body, court or prosecutor, pursuant to relevant regulations, has commissioned the performance of specific activities, revenue received by persons, irrespective of the method of their appointment, who are members of management boards, supervisory boards, committees or other bodies constituting legal persons; revenue from the performance of services under a contract of mandate or a contract for specific work, revenue received under business management contracts, managerial contracts or contracts of similar nature.

and social security payments, rent and lease, money capitals, or disposal of real estate or parts of it. According to the binding legal regulations until the end of 2020, the amount of foreign income is not taken into consideration at all.

The technical and formal scope determines the method of calculating the amount of the relief, and then the rules for its deduction from income tax. A taxpayer is allowed to deduct from income tax the amount that is the difference between the tax calculated using the credit method (pursuant to Article 27(9) or Article 27(9a) of the PIT Act) and the amount of hypothetical tax calculated using the exemption-with-progression method (Article 27(8) of the PIT Act). Thus, the taxpayer is obliged to calculate the tax on foreign (and domestic) income according to two applicable methods. As a result of this computation, the differences in the amount of Polish tax on the same amount of foreign income but calculated according to different methods can be revealed. At the core of the abolition relief lies the concept of levelling this particular difference, since it is the amount of the difference that is deducted from the tax in order to "equalize" the inequality and injustice of the credit method in relation to the exemption method.

In the process of implementing the regulations on the abolition relief, the question has been raised if the application of the relief depends on paying the income tax abroad, that is in a state of source of income, or on the territory where income was generated. As mentioned above, no such condition is invoked *expressis verbis* in the language of the Act. Unfortunately, this issue seems to be disputable in the process of implementing the relief by the tax authorities and administrative courts. During the 12 years of implementation of the relief, two opposite interpretations have been formed.

According to the first one, whenever the credit method is applicable, either directly pursuant to the provisions of bilateral treaty or if there is no bilateral agreement (in accordance with Article 27(9a) of the PIT Act), the payment of foreign income does not constitute the condition for applying the abolition relief. The case law of the courts indicates that in the language of the personal income tax law it is impossible to indicate the norm that conditions the applicability of the proportional deduction method on the payment of the tax in other state.[18] What is more, according to the uniform jurisprudence, the interpretation of the tax authorities stating that the payment of the tax abroad is one of the most crucial conditions for applying the abolition relief is, in fact, in conflict with the unambiguous language of the personal income tax law,[19] and it is unfounded in this particular case

[18] Judgment of the Supreme Administrative Court in Warsaw of 13 June 2018, ref. no. II FSK 1160/17, Lex no. 252385; judgment of the Provincial Administrative Court in Wroclaw of 16 March 2017, ref. no. I SA/Wr 1166/16, Lex no. 2328883; judgment of the Supreme Administrative Court in Warsaw of 18 January 2017, ref. no. II FSK 2273/15, Lex no. 2220977; judgment of the Provincial Administrative Court in Gdańsk of 18 September 2018, ref. no. I SA/Gd 749/18, Lex no. 2548477; judgment of the Provincial Administrative Court in Gdansk of 31 January 2018, ref. no. I SA/Gd 1621/17, Lex no. 2461140.

[19] Judgment of the Supreme Administrative Court in Warsaw of 2 December 2015, ref. no. II FSK 2406/15, Lex no. 2067908.

to use the purpose method against the plain language rule of interpretation as it only leads to increase of the tax obligations.[20]

The second approach, represented often by the tax authorities as well as part of the jurisprudence, states that the payment of the tax abroad is prerequisite in order for the abolition relief to be applicable. The arguments in this case are based on the purpose rule of interpretation that is used in situations in which the bilateral treaties are in force, as well as in those in which the bilateral agreements were not established at all. The courts' interpretation is based on the reasoning that if there is no double taxation by the state of source of income and the state of residency, then there are no legal grounds to apply the abolition relief.[21] The payment of the tax abroad is one of the most crucial conditions for the abolition relief to be applicable.[22] While interpreting the legitimacy of the abolition, the courts highlight the fact that the purpose of this institution is not to abolish the tax obligation completely but to counteract the heavy double taxation.[23] If a taxpayer has not paid tax abroad and Poland has not entered into a treaty on avoidance of double taxation with the country concerned, there should be no difference between the amount of tax calculated according to the credit method and the exemption method. Since there is no foreign tax paid to be deducted, the relief is not applicable to the taxpayer, as the tax cannot be calculated according to the credit method, which is a component of the abolition relief.[24] The jurisprudence stresses that all tax exemptions and reductions are exceptions and deviations from the principle of tax fairness, therefore, their application cannot be based on an expansive or restrictive rules of interpretation.[25] In general, the provisions introducing the tax privileges are interpreted in a strict manner.[26] Unfortunately, the analysis of the implementation of the abolition relief leads to a conclusion that there are significant differentiations between the taxpayers obtaining foreign income. This concerns not only differentiation of the methods of tax settlement in Poland (credit method vs exemption method), but also the differentiation of the situation of the taxpayers

[20] Judgment of the Provincial Administrative Court in Gdansk of 13 March 2018, ref. no. I SA/Gd 1756/17, Lex no. 2470914.

[21] Judgment of the Supreme Administrative Court in Warsaw of 11 April 2018, ref. no. II FSK 818/16, Lex no. 2494637; judgment of the Supreme Administrative Court in Warsaw of 20 September 2016, ref. no. II FSK 1898/16, Lex no. 2111168.

[22] Judgment of the Supreme Administrative Court in Warsaw of 14 October 2016, ref. no. II FSK 2133/15, Lex no. 2168319.

[23] Judgment of the Supreme Administrative Court in Warsaw of 20 October 2015, ref. no. II FSK 2272/15, Lex no. 1986416.

[24] Judgment of the Supreme Administrative Court in Warsaw of 23 February 2018, ref. no. II FSK 396/16, Lex no. 2449453; judgment of the Supreme Administrative Court in Warsaw of 29 October 2017, ref. no. II FSK 3163/15, Lex no. 2408626; judgment of the Supreme Administrative Court in Warsaw of 4 December 2015, ref. no. II FSK 2688/15, Lex no. 1988567; judgment of the Supreme Administrative Court in Warsaw of 8 March 2018, ref. no. II FSK 596/16, Lex no. 2495643.

[25] Judgment of the Supreme Administrative Court of 13 September 2000, ref. no. I SA/Wr 2611/98, Lex no. 44726

[26] Judgment of the Supreme Court of 7 May 1997, ref. no. III RN 22/97, OSNAPU 1998, No. 5, item 142.

that obliges them to apply the credit method (tax credit) in the context of their right to abolition relief. This dichotomy in the treatment of taxpayers is not counterbalanced by the standpoint of the Minister of Finance expressed in two different general interpretations.

In the general interpretation of 31 October 2016,[27] the Minister of Finance confirmed the possibility to apply the abolition relief regardless of whether the condition of payment of the tax abroad was fulfilled or not. It was pointed out that the premise that the tax payment in another state is the crucial condition for application of the proportional credit method is unacceptable. In addition, not a single element of this method requires that the tax payment constitute a prerequisite for its application. Failure to pay tax in the state of the source of income means only that the taxpayer is not able to deduct the foreign tax whilst applying the proportional credit method, since he/she has not paid any tax obligations in this respect. The issue under consideration, in connection with which the Minister's interpretation of the tax law provisions was issued, concerned especially seafarers with residence status in Poland who received income based on the contract work on boards of vessels operating in the international transport. In this case, within the meaning of the treaties on avoidance of double taxation, the seafarer's income is exempt from taxation in the state of the source of income based on tax exemptions regulated by the domestic law of that state of source of income (e.g. Norway). It is important to stress that this interpretation relates to Polish residents obtaining income in those states with which Poland has entered into treaties on avoidance of double taxation.

On the other hand, the second general interpretation of 31 October 2019 issued by the Minister of Finance[28] considers the possibility of applying the abolition relief by the seafarers with residence status in Poland who received income based on the contract work on boards of vessels operating in the international transport registered by the state with which Poland has not entered into treaties on avoidance of double taxation (as is the case with no bilateral agreement with Brazil). In such cases, though, the Minister has taken a completely different stance, pointing out the differentiation of the taxpayers' situations when the treaty on avoidance of double taxation with the state has been reached and the situation of the taxpayers where the said treaty has not been entered into. Consequently, it was concluded that the taxpayer who obtains income in the state with which Poland has signed a treaty on avoidance of double taxation and in a situation when the income tax has not been paid abroad, the taxpayer is not allow to settle the tax obligation in Poland in accordance with Article 27(9) and (9a) of the Act. Therefore, the abolition relief is not applicable in this case. Unfortunately, the argumen-

[27] General Interpretation of the Minister of Finance of 31 October 2016, No. DD10.8201.1.2016. GOJ, Official Journal of the Minister of Development and Finance, item 12.

[28] General Interpretation of the Minister of Finance, Investments and Development of 31 October 2019, No. Dd4.8201.1.2019, Official Journal of the Minister of Finance, Investments and Development of 17 November 2019, item 21.

tation set out in the interpretation is not fully convincing and raises doubts of both dogmatic and axiological nature in the context of the principle of tax fairness. It is necessary to agree with the statement that the abolition relief is not conditioned on the tax payment in the state of the source of income whether or not there is a binding treaty on avoidance of double taxation with the state where the foreign income is generated. Legal provisions of the Act do not invoke this condition for the purpose of applying the relief. Nevertheless, it is worth noticing that within the general interpretation the Minister of Finance attempts to "inscribe" additional conditions previously not included on the list of conditions for application of the proportional credit method. Based on the literal meaning of the language of the Polish act it is evident that there is a possibility to calculate the tax according to the credit method also in a situation when the foreign tax was not paid in the state of source of income. It seems that in regard to the abolition relief a rule of interpretation has been used that violates the principle of justice. It can be concluded that the Minister of Finance has conducted faulty legal interpretation that focuses on the inaccurate understanding of the language and meaning of the provisions. Furthermore, it needs to be highlighted that as a result of incorrect application of the expansive rules of interpretation, new language of the said provision has emerged, the language that was not invoked in it before. Consequently, such action violates the binding constitutional standards that are fundamental to the doctrine of the principle of justice. It is worth mentioning that applying the expansive or restrictive rules of interpretation is unacceptable, unlawful and constitutes a symptom of overinterpretation of the conditions for allowing the taxpayers to apply the abolition relief.

Moreover, it should be noticed that in practice the instances with the most doubts for applying the abolition relief were the cases of the seafarers obtaining income based on the contract work on boards of vessels operating in international transport.[29] In addition, this aspect is vital in regard to the direction of the amendment of the abolition relief.

3. CHANGES IN THE CONSTRUCTION OF THE ABOLITION RELIEF SINCE 2021

After twelve years of generally stable, although questionable, legislation on abolition relief a decision to change them has been reached.[30] The initiators of the amendment emphasised that the change aims to limit the application of the relief, which is to tighten the collection of the personal income tax. The explanatory me-

[29] Individual interpretations of: the Head of Tax Chamber in Bydgoszcz of 14 April 2015, No. ITPB2/4511-31/15-2/ENB; the Head of Tax Chamber in Katowice of 15 July 2015, No. ITPB2/4511-39/15/MCZ; the Head of Tax Chamber in Warsaw of 11 February 2016, No. ITPB4/4511-4/16-2/JK.

[30] Act of 28 November 2020 amending the personal income tax act, the corporate income tax act, the lump sum income tax act on certain incomes earned by natural persons and certain other acts, Journal of Laws of item 2123 [hereinafter: Amendment 2020].

morandum to the amendment indicates that since the introduction of the abolition relief into the Polish tax system, the conditions justifying its application have undergone significant changes.[31] Furthermore, in the memorandum several important arguments for limiting the scope of application of the abolition relief have been identified.

Firstly, it is assumed that there has been an increase in the awareness regarding the tax consequences of earning income in another country and the effects of using methods to eliminate double taxation of taxpayers who earn income abroad. Taxpayers with this knowledge are able to consciously contrive their tax status, avoiding negative tax consequences.

Secondly, international relations have emphasised that there has been a kind of evolution of the methods of double taxation avoidance in the international agreements since the so-called MLI convention was signed and entered into force [Franczak 2018; Kucia–Guściora 2020]. The continuing tendency after 2004 to move away from the credit method to the exclusion method in the provisions of the treaties on the avoidance of double taxation has been changed or even reversed. Generally speaking, to counteract aggressive tax optimisation, both Poland and other European and non-European countries have decided that the priority method of avoiding double taxation should be the credit method. This approach is the result of the OECD BEPS (Base Erosion and Profit Shifting) project aiming to identify and counteract the erosion of the tax base and profit shifting. It shows that the exemption with the progression method that entails exemption from taxation on income in the state of residence in a situation when in the second state the income benefits from a tax exemption under the domestic law of that state may result in double non-taxation of the income (in the state where the income was obtained based on the exemptions under the law of the state of source of the income and in the state of residence due to the progressive exemption method based on the provisions of biding international agreement). Such malpractices are prevented by the proportional deduction method, according to which income that can be taxed in the second state should also be settled in the state of residence, whereas tax paid abroad is proportionally deducted from tax in the state of residence [Jamroży 2018; Witak 2016]. Due to the ratification of the MLI convention, without the need to amend individual agreements on avoiding double taxation, the exemption method is replaced by the credit method. It is worth noting that even this argumentation can lead to the undermining of the legitimacy of functioning of the abolition relief.

Thirdly, negative consequences have been reported in relation to the application of the relief for aggressive tax policy, using the provisions of the treaties on the avoidance of double taxation, particularly in regard to so-called fiscally

[31] Explanatory memorandum to the government draft act amending the personal income tax act, the corporate income tax act, the lump sum income tax act on certain incomes earned by natural persons and certain other acts (Sejm Document No. 642, 9th term of Sejm) [hereinafter: explanatory memorandum to Amendment 2020].

transparent companies. In this case, the effect of the application of the abolition relief is incompatible with its original objective, since, regardless of the amount of income earned based on the economic activity, the relief results in the double non-taxation of all income, even very high income, both in the state of obtaining income and in the state of residence.

Fourthly, the explanatory memorandum to the draft amendment makes an axiological argument – relating to the principle of universality and tax fairness. Pursuant to Article 84 of the Constitution of the Republic of Poland, it was indicated that the construction of the Polish tax system was based on the principles of tax justice and universality of taxation. The principle of fiscal justice is a particularization of the principle of social justice in the context of the fairness of citizens' fiscal obligations, but it does not grant equal rights and obligations to all citizens. An expression of this subjectively defined justice is the implementation of tax policies by the country through a system of tax preferences, aimed, among others, at supporting socially justified objectives, such as for example, people facing a difficult life, family, health or material situation. The data presented in the explanatory memorandum show that the income of taxpayers benefiting from the abolition relief is significantly higher than the average salary. Therefore, in the opinion of the project providers, this relief does not serve people facing their most difficult life situations. That is why, they do not see the relief as serving any purpose for the taxpayers under the most severe life circumstance. Thus, it is not justified to favour the situation of persons generating high income abroad over persons who achieve income on the territory of the Republic of Poland. The explanatory memorandum to the act indicates that in the process of settlement of income tax the latter group of taxpayers may only benefit from the statutory tax exemptions and reliefs, which also apply to income earned abroad. However, due to the abolition relief foreign revenues benefit from a further reduction in the tax obligation, which gives an unjustified privilege to the group of taxpayers who earn abroad.

Other considerations, defined as the behavioural function of tax law, were also the reason for the changes in the construction of the abolition relief. The initiators of the changes indicate that the abolition relief was an incentive to undertake economic activity outside the territory of the Republic of Poland, which often constitutes the first stage of permanent relocation of the place of residence abroad (changing tax residence). The new approach to the construction of tax law aims at gradual elimination of solutions favouring the relocation of residence or place of generating income outside of the country (e.g., abolition relief) and simultaneously at creating mechanisms encouraging people to stay in the country. And here, more clearly than it has been so far, the abolition relief takes the form of "relief for return to homeland."

For the abovementioned reasons, since 2021 Article 27g of the PIT Act has been amended for the purpose of establishing a limit for the abolition relief. Taxpayers may deduct the amount of the relief from income tax, but the amount of

the relief shall not exceed 1360 PLN (Article 27g(2) of the PIT Act). Therefore, the existing objective of the abolition relief will be maintained: the tax obligations on the group of taxpayers who need it most will be reduced, while at the same time the abuses that occur when taxpayers with high foreign revenues benefit from the abolition relief will be eliminated. Some doubts in the interpretation of these limitations have appeared in the doctrine. A. Mariański and Ł. Porada point out that the language of the provisions introduced is erroneous, due to imprecise reference to the maximum amount of the deduction [Mariański and Porada 2019]. Hopefully, the process of application of those provisions in practice will resolve the doubts that have been raised.

The second change in the construction of the abolition relief allows an exception of restriction on the deduction based on the abolition relief, as stated earlier. The abovementioned limit for the deduction of the abolition relief shall not apply to income earned outside the territory of the Republic of Poland based on work or services (contract of mandate, a specific-task contract and managerial contracts), performed outside the land territory of the states. Taxpayers accounting for this income in Poland will, therefore, be entitled to deduct the full amount of the abolition relief. The scope of this exception is clearly addressed to the taxpayers who obtain income from sea and air transport. Nevertheless, this amendment, presumably beneficial to this group of taxpayers, raises doubts in terms of the principle of equality. It is necessary to note that quite an inaccurate term "work outside of land territory of states" was used. Based on the plain language rule of interpretation it may be concluded that this relates to contract work of the seafarer that is performed at sea and not on the land. However, after closer consideration of the provisions of the public international law in regard to the term "land territory" some doubts may be raised as to the work performed on the territorial waters, in ports and internal waters in general, in the exclusive economic zones and on the continental shelves as those zones constitute the part of the territory of the states (are either part of the territory of the states or are subject to special jurisdiction of the states) [Barcik and Srogosz 2019]. The meticulous analysis of those provisions may result in yet another differentiation of the tax status within this already privileged group of seafarers.

CONCLUSIONS

It seems that the considerations on the issue of abolition relief in the context of the principle of fiscal justice are fully legitimate. This is because at every stage of its functioning: from its the introduction into the Polish tax system, through the doubts raised in the process of interpretation and its application by taxpayers, to the stage of recent changes, reference is made to the principles of fairness, equality and universality of taxation. However, the use of this argumentation by the legislator, the tax authorities or the judiciary shows that application of the terms is very unstable. Exactly opposite assumptions are supported based on the crite-

rion of equity. The evaluation of the abolition relief in regard to fulfilling the criteria of justice is not unequivocal. Firstly, given the uniqueness and extraordinariness of the tax preferences in the doctrinal construction of the tax, it may be stated that every relief in its essence may be regarded as exception from the universality of taxation. Secondly, at the same time there is a well established position in doctrine of tax law that it is due to the reliefs and exemptions in the tax system that it is possible to apply the subjective approach toward tax obligations that works for the fulfilment of the principle of tax equality which includes the taxpayers' ability to pay and in this sense results in executing the principle of justice [Marusik 2018]. This concept is fully compatible with the present analysis of the special regulations in regard to taxation of the foreign income. In consequence, it seems that in this particular case some kind of mechanism to reduce "injustice" in the distribution of the tax obligations is necessary.

Both construction of the abolition relief that had been binding until the end of 2020 as well as its new version raise doubts. Unfortunately, the introduced amendments only provoke new questions rather than provide answers to the old ones. These doubts require a thorough analysis not only of Polish legislation, but also of the principles of international tax law. There is no doubt that the tendency to apply the credit method more extensively, without reducing its negative effects by providing full access to the abolition relief, has been confirmed.

As expected, the changes in the construction of the abolition relief binding since January 2021 have triggered emotional reactions of taxpayers. In most cases, these are indeed negative emotions based on criticism of new solutions. The taxpayers' arguments are based on a sense of subjective injustice due to the loss of current tax privileges. This, in turn, raises doubts in context of the principle of equality that constitutes the part of the tax justice. The taxpayers' reflections supported by the tax calculation may lead to the conclusion that limiting the scope of application of the abolition relief for many of them will mean *de facto* the elimination of this privilege. However, the problem is far deeper as new solutions encourage taxpayers to change their tax residence rather return from emigration to their homeland. The conclusion that the changes to seal the tax system are a global trend provides little comfort.

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