

Stability of Tax Burden

Dominik Mączyński

Adam Mickiewicz University in Poznań
Ul. Wieniawskiego 1, 61-712 Poznań, Poland

A stabilised tax system is a necessary element of an efficient legal system. Assurance of stability of the tax system is crucial for tax payers, who can plan their undertakings over a longer period of time, without being exposed to the danger of tax rate changes. The most visible symptom of tax law stability is the stability of tax rates. The guarantee of fixed tax rates is one of the most important incentives for investors, who take it under consideration when estimating the risk connected with starting a new enterprise in a given market.

Establishment of a stabilised tax system turns out to be very difficult in practice. There are several factors, amongst which the most important are: political background; sovereignty of lawmakers, who can almost unlimitedly define the level of tax burden; changes taking place in former socialist countries in the late 1980's and early 1990's causing radical tax system reforms; and, at last, the process of accession to the European Community, which required harmonisation of state law systems with the European one.

The above makes one ask the question whether it is possible to create a stabilised tax system with all those factors around and eventually how to outline the area of stability.

1. Postulate of Stability of Tax Burden

The postulate of stability of tax burden has been presented in tax-related literature for a long time. The postulate requires stability of basic elements of tax law construction over a reasonable period of time, as well as not imposing new taxes without fixing an adequate period allowing tax payers not only to get to know the new laws, but also to plan their activity under the new conditions.

For many years, tax law literature has treated stability of tax burden in a reasonably long period of time as one of the most basic principles of tax system. For example, it can be mentioned that when creating the principle of certainty of taxation, Adam Smith postulated that a tax payer should be assured what duties and privileges are connected with imposing and paying a tax [1]. Smith stated that the government should guarantee the date of payment, the way of payment and the sum to be paid. Certainty of tax, according to Smith, was to be ensured by legislation protecting tax payers from the abuse of state authorities. Quite similar claims were made by

Adolph Wagner, who regarded the principle of certainty as the basic principle of tax management [2]. Moreover, Fritz Neumark added the principle of tax law durability to the catalogue of principles of tax technique [3]. According to Neumerk, the principle was extremely important because it could guarantee stability of tax burden. In the author's opinion the principle is so important since fixed tax duties make it possible to plan business activity in a rational and safe way.

The principle of tax surety and the ensuing postulate of ensuring the possibility to predict the activities of state authorities were dealt with by Poland's Constitutional Tribunal [4]. In its judgement of March 02, 1993 [5] the court emphasized that "*the principles of the state of law require that changes to the law in force with negative consequences to the legal situation of individuals shall be done by using the technique of temporary provisions, or at least proper vacatio legis, thus allowing the individuals to prepare for the new legal situation.*" In the Constitutional Tribunal's opinion the lawmaker can act contrary to the above rule in particular situations only, if public

interest so requires. The principle of predictability of tax law should in particular apply to tax law making. The principle of law assurance and the principle of legal safety which is connected with the former are very important in this process. Stating the reasons for its judgement, the Constitutional Tribunal claimed that a state of stability of legislation can be difficult to achieve but assurance should be primarily understood as the possibility to predict actions of state authorities influencing citizens' behaviour. Tax payers should have a possibility to plan their activities and in this way to promote the country's development.

2. Legal Instruments Ensuring Stability of Tax Burden

When considering the stability of tax burden, it is extremely important to refer to the fact that some tax law provisions are included in the Constitution of the Republic of Poland of 1997. The Constitution, being the first act among law statutes in the hierarchy of legal acts, is fundamental for direct tax provisions. First of all, tax provisions in the Constitution of Poland oblige the lawmakers to treat the state as common good of all citizens, which should be reflected in the substance of established law rules. Moreover, constitutional provisions prevent lawlessness of state authorities in establishing tax obligations and prevent lawlessness of administration in enforcement of these duties [6].

The principle of exclusive competence of a statute in creating the content of tax duty is quite important from the point of view of stabilising of tax duties. According to article 217 of the Constitution of Republic of Poland *"The imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax relieves and remissions, along with categories of taxpayers exempt of taxation, shall be by means of statute."* It means that basic elements of tax law construction have to origin directly from a tax statute. The principle embraces also establishment of tax rates which can be changed only by virtue of a statute [7]. Although the principle of exclusive competence in creating the content of tax duties is directly stipulated only in the Constitution of Republic of Poland of 1997, the principle had been expressed in jurisdiction of Constitutional Tribunal [8] and financial law literature [9] long before the Constitution came into force. In several judgments Constitutional

Tribunal emphasized that tax statutes cannot transfer issues related to the substance of tax duty to secondary legislation. The substance of tax duty, in Constitutional Tribunal's opinion is limited by basic elements of the legal construction, such as the taxable person, taxable event, tax basis and tax rates. These elements deciding of the substance of tax duties can be specified exclusively in a statute.

Another institution established to ensure the stability of tax burden and to avoid surprising tax payers with new legal acts is a provision included in article 123 of the Constitution of Republic of Poland. According to the article *"The Council of Ministers may classify statutes adopted by itself as urgent"*. In purpose of speeding up legislation processes, article 123 of the Constitution of Republic of Poland shortens the periods normally available to the Parliament and the President. Such shorter periods do not apply in the case of tax law which can be passed uniquely in the regular mode provided for in the Constitution. Such a provision is established to avoid situation in which legislative works concerning such important sphere of social relationships as taxes would proceed in a hurry. It is also important to give taxpayers more time to become acquainted with the proposed changes in taxes at an early stage of parliamentary works.

Including tax matters in the Constitution creates also possibility for Constitutional Tribunal to control the Parliament in passing tax law. Earlier decisions of the Constitutional Tribunal allowed to formulate a few principles which should be taken under consideration by lawmakers in passing tax laws. The most important are the principle of exclusive competence of a statute in creating the substance of tax duty, the principle preventing retroactivity of tax law (*lex retro non agit*), the principle of confidence to the State and laws established by the State, the principle of tax justice, the principle of not changing a tax during a fiscal year, the principle of changing tax law in a mode provided for the budget statute [10].

3. Ways of Changing Tax Rates in Polish Tax Law

According to the principle of exclusive competence of statutes in creating the content of tax duty, changes of tax rates (of fundamental importance for the stability of tax burden) can be done only by virtue of changing tax statutes. It is worth emphasizing that in the jurisdiction

of Constitutional Tribunal it is impossible to find exemptions which would allow the lawmakers to waive this principle. Constitutional Tribunal does not quote any situation in which the lawmakers could avoid the order of creating tax duties in statutes or any tax or group of taxes which are not governed by the said principle. The same point of view was included also in the jurisdiction of the Supreme Court of Justice and administrative courts [11].

Considering all of the above it needs to be emphasized that there are big differences in ways of establishing the level of tax rates in the case of different tax types.

In the case of income taxes (personal income tax and corporate income tax) and value added tax (VAT – referred to as “Goods and Services tax” in the Polish legislation) there is no doubt that rates should be defined directly in tax statutes. In the personal income tax statute [12] the main provisions concerning tax rates are included in article 27. According to the article the tax rates are 19%, 30%, 40% depending on one’s income [13]. There is just one 19% tax rate in the statute provided corporate income (article 19 [14]). There are also similar provisions applying to the value added tax. According to article 41 of the statute on goods and services tax [15], tax rates are 22%, 7%, 0% [16]. In the case of all these taxes, the change of their respective levels can be done uniquely by changing a tax statute, so taxpayers are able to prepare for the changes before the changes are passed and published. Thus the stability of tax burden is guaranteed by the legislative process which give taxpayers more necessary time to prepare for changed rules of taxation.

In the case of income taxes guarantees of the stability of tax law were also confirmed by principles expressed in the body of judgements of Constitutional Tribunal. The principle of annual nature of a tax is crucially important for approving the stability of fiscal burden. The principle means that tax rates cannot be changed during the tax year. The principle is strongly connected with the social importance of taxation [17]. The principle is not provided for in the Constitution of Republic of Poland. The judgements of the Constitutional Tribunal have induced the principle of not changing tax rates during the year by using the principle of the democratic state of law. The main question which Constitutional Tribunal had to answer was as follows: if tax rates are changed just after the beginning of a new tax year, would unconstitu-

tionality of such a provision embrace just the period from 1st of January up to the publication of such a law act or the whole tax year [18].

The Tribunal’s answer to this question can be found in the judgement of March 29, 1994 [19]. The judgment concerned the personal income tax in which a taxable period equals to a calendar year, but a taxpayer has to eventually calculate the tax in the year following the year which the tax concerned. The tax is estimated by taking under consideration the whole income of a taxpayer in a given year irrespectively of when exactly the income was made. Considering the difficulties connected with dividing a year into separate tax periods subject to different tax rates, the Tribunal decided that taxes which are paid yearly cannot be changed during a tax year. Thus, all changes must be made in the preceding year. Moreover, quoting the reasons for the judgement the Constitutional Tribunal stated that changing tax rates during a year infringes on the principle of surety of law and erodes the citizens’ confidence in the State, which is crucially important in tax law. In the light of the above, surprising taxpayers with changing tax rates during a year is against the principles of a democratic state of law. A similar opinion can be found in the Constitutional Tribunal’s judgement of March 15, 1995 [20]. In this judgement the Tribunal stressed that the ban on changing taxes during a year is an extension of the *lex retro non agit* principle [21]. The judgement of January 12, 1995 [22], in which Constitutional Tribunal emphasized that establishing and putting law into practice cannot be a “trap” for citizens, which presents the same line of jurisdiction. Citizens should have the possibility to arrange their own businesses based on a belief that they will not have to face any legal consequences unpredictable at the moment of taking the decision. They must also have the right to act believing that their actions undertaken in the light of current laws will be properly recognised in a new legal order [23].

The principle presented above does not concern the Goods and Services Tax (VAT), because the tax period here is not a year but a month, so a change of tax rate can be made with respect to a period of one month.

According to article 168 of the Constitution of Republic of Poland: “*To the extent established by statute, units of local government shall have the right to set the level of local taxes and charges.*” Nonetheless, both in tax literature as well as in judgements of administrative courts there is a

controversy if one year principle exists with reference to local taxes. The opinion that authorities of local government cannot change local tax rates during a tax year is expressed in the judgement of the Supreme Administrative Court of July 24, 1996 [24]. Nonetheless, in several judgments the court admitted that in the light of the current legal system it is impossible to agree that local authorities cannot change rates of real estate tax and grant or remove tax relieves during a year [25].

There is a big difference in changing tax rates in excise tax. Contrary to article 217 of the Constitution of the Republic of Poland and doubtless theses included in tax literature, rates of excise tax are not provided for in a statute but they are provided for by the Ministry of Finance by virtue of regulations. The lawmakers creating a new statute of excise tax [26] used the same legislative technique which was used in the previous statute [27]. The maximum tax rates are specified in a statute but the Minister of Finance imposes actual tax rates being limited only by the cap specified in the statute. As a result excise tax is the only state tax in the case of which the lawmakers used the legislative method [28]. The legislative method allowing the Ministry of Finance to change tax burden relatively fast, avoiding the legislative way required when a statute is changed, contradicts the principle of assuring the stability of tax burden. The Ministry of Finance is able to change tax rates overnight. Making these changes in a way of a regulation deprives taxpayers of the possibility to prepare for the new laws. Contrary to Parliamentary debate regarding tax statutes, a regulation can be published and come into force on the day of publication, without giving taxpayers the possibility to become acquainted with the new provisions.

The situation described above causes important problems sometimes. For example, not long time ago the Ministry of Finance tried to impose new excise tax rates on heating oil. The proposed raise of tax rates, making them equal to rates on diesel oil, gave rise to protests of taxpayers, for whom higher tax rates would mean increased costs of living, especially for those who heat their houses with heating oil. Finally the Ministry of Finance withdrew the proposed regulation and Sejm passed a stop-gap statute which solved the problem only temporarily and to a limited extent. The new statute (still underway in the Parliament) [29] has to be evaluated negatively because contrary to the Constitution of Republic of Poland the tax rate on heating oil is

still not provided in the statute. The Ministry of Finance can still lower it in a regulation, which means that the Ministry of Finance still decides about the level of the rate.

5. Summary

Considering the above statements it should be said that there are insufficient legal instruments ensuring stability of the legal system in Poland. The constitutional principle of exclusive competence of a statute in creating tax duty should be of fundamental importance in shaping tax-related provisions. Although article 217 of the Constitution of Republic of Poland does not provide for any exemptions as to the taxes, the lawmakers use different standards concerning different taxes. In the case of income taxes, rates cannot be changed during a tax year. Imposition of this principle causes some differences in administrative courts' jurisdiction with respect to legal provisions concerning local taxes. Changes of rates of Goods and Services tax (VAT) can be imposed only by virtue of statutes upon one month's notice. The lowest range of stability of taxation is guaranteed in the case of excise tax. Rates of excise tax are changed by the Ministry of Finance by virtue of regulations, although it is contrary to the Constitution. As a result of the above taxpayers cannot easily plan their activity because current law provisions do not ensure that the existing tax rates will be in force in the future.

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Dominik Mączyński

Mokesčių naštos stabilumas

Santrauka

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Dominik Mączyński – Poznanės Adomo Mickevičiaus universiteto (Lenkija) Finansų teisės katedros daktaras.
Telefonas (+486 1) 8294000
Elektroninis paštas mdominik@amu.edu.pl
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