

## **Tax avoidance and tax planning within the Polish legal order**

1. The main subject of this work are the two methods for reducing tax burdens in the Polish legal order, and more specifically, tax avoidance and tax planning. A method for reducing the tax burden can be defined as some behaviour or a set of behaviours on the part of the taxpayer and other entities, resulting in gaining a tax advantage. Such advantage can take the form of a lack of tax liability or reduction in the tax amount due from a tax liability. Other forms of tax advantage are tax overpayment, tax refund right, overstatement of overpayment, and tax refund.

The literature mentions a dozen or so terms defining the methods for reducing tax burdens. However, their meanings are not well established, so these terms are often used interchangeably and inconsistently. The most common and simplest classification of the methods for reducing tax burdens originates from the Anglo-Saxon tax law literature. It has been basically adopted by the Polish tax law theory. This classification differentiates between tax avoidance, tax evasion and tax planning. Taking it as a starting point, it should be noted that the literature does not discuss the notion of tax evasion as the one causing difficulties in determining its range and distinguishing it from tax avoidance and tax planning.

On the other hand, tax planning is defined as lawful behaviour, demonstrated by reduction of the tax burden by means of legal measures available for this purpose. Therefore, this is not only about a penalty or punitive measure as the specific legal measures being the response of the state to some behaviour prohibited by penal law. This type of legal measure, intended for tax planning, should be interpreted as a set of legal standards reconstructed from provisions of tax law which can be observed by the taxpayer to gain a tax advantage. Its essential feature is to give the taxpayer the right to benefit from it. However, the doctrine sometimes provides an additional explanation that tax planning also means obtaining a tax advantage as a result of shaping of factual circumstances, the results of which are included in the scope of the application of a tax law standard. It is supposed to demand the payment of the tax in a amount which is lower than provided for in some other tax law standard. Therefore,

in this respect, it is relatively close to tax avoidance. Given the above, the literature and case law raise the most doubts as to the scope of tax avoidance and tax planning, as the relationship between them highlights the problem of setting the limit of the capacity to shape the actual situation to achieve a tax advantage by the taxpayer.

In the currently applicable legal framework, the concepts of tax avoidance and tax planning belong to the legal language. As one of the elements of the scope in which the competence standard in the form of the clause against tax avoidance is applied, the notion of tax avoidance was defined in the provisions of the Act of 29 August 1997 –Tax Ordinance (Journal of Laws of 2020, item 1325 as amended). The assumption of the normative nature of the legal definitions means that the standard defining tax avoidance provides the requested, specific interpretation of this term within the Polish legal system. On the other hand, the notion of tax planning has not been defined using legal language. Nevertheless, in the light of the European Union law and the majority of the national and foreign literature, it is an admissible method for reducing tax burdens. However, the mutual interpenetration of the national and the EU legal systems allows us to assume that tax planning is an admissible method for reducing tax burdens in the Polish law too.

The subject of analysis discussed in the work, namely, tax planning and tax avoidance as the methods for reducing tax burdens, fits within the framework of a broader issue of ensuring the stability of public finances. However, the precise definition of tax planning as an admissible method for reducing tax burdens, and tax avoidance as an inadmissible method for reducing tax burdens, helps effectively perform tax obligations and ensure stable public finances. This makes it possible to set the limit for the admissible shaping of the actual circumstances designed to achieve tax advantage by the taxpayer. The deliberations presented in this work relate to behaviours in the form of tax avoidance and tax planning found only within the Polish tax jurisdiction.

2. This paper is to argue that the general and abstract boundary of tax planning in the Polish law order is set by the defining standard originating from the legal definition of tax avoidance. This boundary is made more specific by reference to a specific factual situation. On the other hand, the criterion of compliance of the taxpayer's behaviour, designed to gain a tax advantage, with legal standards is

useless from the point of view of establishing the meaning of tax avoidance and tax planning. The significant differences between these two methods for reducing tax burdens are limited to the characteristics and nature of the behaviour engaged in to gain a tax advantage. Therefore, the claims arguing that it is impossible to clearly distinguish between tax avoidance and tax planning are unsubstantiated. Their correct definitions contribute toward setting the precise limits of these terms for naming the methods for reducing tax burdens in the Polish legal system.

The claim formulated above will be proved in course of the research process. This is facilitated by defining the main purpose of research as well as its specific goals. The main purpose of this work is to discuss the normative approach to tax avoidance in detail, and to formulate the definition of tax planning as well as analyse such definition thoroughly. This will make it possible to determine the important characteristics of these methods for reducing tax burdens. This, in turn, will create conditions for the development of a consistent conceptual framework designed to describe the behaviours of taxpayers intended to achieve tax advantage. Finally, the research will help us answer the question of whether the terms used by the literature in discussions on the methods for reducing tax burdens should be redefined or rather they should no longer be used.

In order to accomplish the main purpose of the work, its specific goals need to be achieved first. As far as the legal definition of tax avoidance is concerned, the correctness of the legislative solutions formulating it will be analysed. This will allow us to formulate conclusions on the enforcement of the principle of fair taxation and the principles of correct legislation derived from the rule of democratic state of law as well as the principle of citizens' trust in the state and its laws. The main purpose of the paper also calls for examining the impact of the legal definition of tax avoidance implemented in the Polish legal system on how this term is explained and how it is defined in the national literature and case law. Another specific goal is to examine previous opinions formulated in foreign national tax law literature, as well as judicature on tax avoidance and tax planning.

3. To achieve the goals of work, it was necessary to use the method of dogmatic analysis of the sources of the applicable law. Therefore, the sources of tax law, such as Tax Ordinance and specific tax laws, were the basic normative material. However, the examination of the legislative correctness of the provisions of Tax

Ordinance, allowing formulation of the standard defining tax avoidance would not be possible without consideration of the standards resulting from the European Union law. Therefore, the provisions of the Council Directive (EU) 2016/1164 of 12 July 2016 laying down the rules against tax avoidance practices that directly affect the functioning of the internal market (Official Journal of the European Union L 193, p. 1 as amended, hereunder referred to as the "ATA Directive") and the Commission Recommendation of 6 December 2012 on aggressive tax planning (Official Journal of the European Union L 338, p. 41) were also included in the dogmatic analysis to the necessary extent. Other, at least as important, research material, were the judgements of the Supreme Court, Constitutional Court, administrative courts as well as the Court of Justice of the European Union. Moreover, the security opinions published by the Director of the National Revenue Administration, or refusals to express such opinions, constituted valuable sources of the examples of tax avoidance and tax planning.

Considering the number of the current studies on methods for reducing tax burdens, including tax avoidance and tax planning, the use of critical analysis of the literature was also necessary. Therefore, the achievements of the Polish tax law theory were also examined. And the analysis of selected items of foreign literature was used to capture the important characteristics of tax avoidance and tax planning.

4. The work consists of a list of abbreviations, an introduction, five chapters, a conclusion, a bibliography and the lists of case law, legal acts, and other sources. The first four chapters of the work encompass the dogmatic analysis of the normative definition of tax avoidance and discussion on the definition of tax planning presented in the work. The first chapter introduces topics concerning tax avoidance and tax planning within the Polish legal order. The general definitions of tax avoidance that have been formulated in the literature so far, discussion of the nature of the legal definition and the legal nature of tax avoidance are presented therein. Considering the fact that the legal definition of tax avoidance is the effect of the implementation of the provisions of the ATA Directive in the Polish legal system, the differences between them were identified. Moreover, the opinions on tax planning and its legal nature were described, and the definition of this method for reducing tax burdens was formulated and briefly discussed.



The next three chapters of the work focus on the examination of the premises resulting from the legal definition of tax avoidance and from the definition of tax planning suggested in the work. Therefore, the forms of behaviour leading to tax avoidance or tax planning are discussed in the second chapter, and the third chapter discusses the characteristics of such behaviour in relation to specific ways of reducing tax burdens. The fourth chapter addresses the problem concerning the classification of behaviour related to tax avoidance and tax planning based on legal standards, and describes the nature of tax advantage as a result of such behaviour.

The internal structure of the work's chapters, focusing on the examination of the premises resulting from the legal definition of tax avoidance and the definition of tax planning suggested in the work, is based on a uniform division of the topics. Each chapter starts with a presentation of the opinions formulated in the tax law literature and concerning a specific premise of tax avoidance or tax planning. The moment of the introduction of the provision encompassing the legal definition of tax avoidance was adopted as a convention for the presentation of the subject opinions. Next, the issues behind a specific premise of tax avoidance or tax planning are analysed. Each of these chapters also includes an assessment of the correct implementation of the ATA Directive provisions within the Polish legal system in the aspect of the discussed element of the legal definition of tax avoidance discussed therein.

The last chapter addresses the problem of the legitimacy of using in the literature and judicature the terms that, according to the formulated opinions, are supposed to form a conceptual framework intended to describe the methods for reducing tax burdens in order to characterise tax avoidance and tax planning. Some of these terms are derived from the language of the law, while others only belong to the legal language. However, the fact of using them as the synonyms of tax avoidance or tax planning or the concepts having narrower or broader meanings as compared to them, is their common feature. Therefore, the deliberations presented in the chapter are intended to determine whether the use of these terms makes redefining of the meaning of tax avoidance and tax planning necessary. In the light of this, these issues need to be discussed last.

The work ends with the conclusions drawn from the analyses conducted in this study, and particularly those concerning the legislative correctness of the provisions facilitating the reconstruction of the norm defining tax avoidance. It also presents

some proposals regarding amendments to these provisions to help protect both the public interest and the individual taxpayer's interest fully and effectively.

A handwritten signature in blue ink, appearing to read "Krystof Pich". The signature is written in a cursive style with a large initial "K" and a stylized "P".