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The compliance of selected Polish regulations concerning taxation of pensions with European Union law

Poland joined the European Union on 1 May 2004 and one of the conditions of integration was an implementation of European Union law. In Poland the problems occurred in the field of taxation of pensions. The aim of this article is to present respective legal actions taken before Polish administrative courts, the Constitutional Court and the European Court of Justice concerning the issue of compliance of Polish provisions regarding taxation of pensions with European Union law.

Key words: taxation of pensions, Poland in EU, European Court of Justice.

1. Introduction

Poland joined the European Union on 1 May 2004, ten years after applying for a membership and six years since starting negotiations. One of the conditions of integration was an implementation of legal regulations, which were in force within the Union and the whole *acquis communautaire*, but — as we already know — it's a complicated process. In Poland the problems occurred, *inter alia*, in the field of taxation of pensions. These regulations were not changed after Poland's accession to the European Union. The amendments were introduced only in 2008 because of the judgement of the Polish Constitutional Court. However, it did not solve all of the problems which have arisen in this area. Under Polish Personal Income Tax Act (hereinafter referred to as: the PIT Act) there were still provisions, which were not compliant with EU law. According to that, there appeared a need to refer to the European Court of Justice (hereinafter: ECJ) (currently: the Court of Justice of the European Union) for a preliminary ruling.

2. Polish legislation

Under Polish legislation before the amendment of the PIT Act, only social and health insurance contributions paid to a Polish insurance institution, but not those paid to such an insurance institution in the other Member State, may have been deducted from tax base or income tax. These regulations have been criticized for many years because of incompatibility with European Union law.

According to Art. 3(1) of PIT Act, «individuals who are residents in the territory of the Republic of Poland are liable to tax on their total income, wherever derived».

Under Art. 26 of PIT Act, the taxable base is constituted by income after deduction of, *inter alia*, contributions enumerated in the Act on Social Security System i.e. contributions:

- a) paid in a tax year directly to the retirement, disability, sickness and accident insurance of the taxpayer or his collaborators,
- b) withheld in a tax year by a withholding agent from the amounts due to the taxpayer.

Article 27b of the PIT Act provided that tax is reduced by the amount of health insurance contributions regulated by the Act on Medical Services Financed from Public Resources:

- a) paid in a tax year directly by the taxpayer in accordance with the provisions on medical services financed from public resources;
- b) withheld in a tax year by a withholding agent in accordance with the provisions on medical services financed from public resources.

Thus, deduction from the taxable base (income) or tax is possible only if contributions were paid on Polish insurance institutions.

The Polish Constitutional Court in the judgement of 7 November 2007 (K 18/06) held that Art. 26(1)(2) and Art. 27b(1) of PIT Act did not comply with Art. 32 read in conjunction with Art. 2 of the Polish Constitution, so Polish regulations excluding the possibility of deduction contributions paid on the retirement, disability, sickness and accident insurance in another Member State, were unconstitutional. As a result of that judgment, those regulations of PIT Act lost their binding force on 30 November 2008. Regulations of Art. 26 and Art. 27b were changed and now the deduction of insurance contributions paid in another Member State is possible.

Domestic courts did not know if they should have applied European Union or Polish law. Situation has changed on 23 April 2009 with the judgement of the ECJ in response to a preliminary question of the Regional Administrative Court in Wrocław.

3. *The Uwe Rüffler case (C-544/07)*

Uwe Rüffler was a retired German individual, who had permanently resided with his wife in Poland since 2005. At the material time, Mr Rüffler's only income were two pensions paid out in Germany, i.e.: an invalidity pension and an occupational pension. Those two pensions were paid in Germany into a German bank account of Mr Rüffler. The health insurance contributions were deducted in Germany. Under Article 28 of Regulation No 1408/71, Mr and Mrs Rüffler were entitled to healthcare benefits in Poland. In Poland Mr Rüffler was subject to an unlimited tax liability pursuant to Article 3(1) of the PIT Act. Under Article 18(2) of the Double Taxation Agreement concluded with Germany, the invalidity pension paid to him in Germany was taxed in that Member State. By contrast, under Article 18(1) of the Double Taxation Agreement, the occupational pension paid in Germany was taxable only in Poland.

In 2006 Mr Rüffler applied to Polish tax authorities to reduce his income tax by the amount of health insurance contributions paid in Germany. Tax authorities refused Mr Rüffler the right to reduce the tax. They were of the opinion that Article 27b of PIT Act provided for the possibility of reducing income tax only by the amount of health insurance contributions paid pursuant to the Polish Act on Social Security System. Mr Rüffler did not pay health insurance contributions in Poland.

Mr Rüffler appealed against this decision to the higher instance. He claimed that tax authorities had infringed European Union law. By the decision of 23 February 2007, the Director of Tax Chamber in Wrocław refused to change the decision of the tax authorities of 28 November 2006, an upheld the interpretation of Article 27b of PIT Act presented by tax authorities earlier.

That being so Mr. Rüffler brought an action against the decision of 23 February 2007 before the Regional Administrative Court in Wrocław. He claimed that the court should have rescinded both decisions, because they provided that it was impossible to reduce the amount of income tax due in Poland by the amount of health insurance contributions paid in another Member State — in this case in Germany. According to Mr Rüffler, such a restriction discriminated against individuals paying income tax in Poland on the base of a place where compulsory health insurance contributions were paid. He also raised the issue of incompatibility of the interpretation of the provisions of domestic tax law with the principle of free movement of persons set out in Article 39 of the Treaty Establishing the European Community (hereinafter: the TEC) (current Art. 45 of the Treaty on the Functioning of the European Union, hereinafter: the TFEU). In the court's opinion, the health insurance contributions paid by Mr Rüffler under German law were identical in nature to the contributions paid by Polish taxpayers under the Polish Law. The difference lied in the level of health insurance contribution — 14.3 % in Germany, 9 % in Poland — and in the legal basis under national law leading to the obligation to pay. The court was uncertain whether it was justified to refuse to reduce the amount of that tax by the health insurance contributions paid in Germany solely because those contributions were not paid on the basis of Polish national law and fell under the German insurance system. The court was uncertain whether that interpretation of Article 27b of PIT Act caused discrimination against taxpayers.

Under those circumstances, the Regional Administrative Court in Wrocław referred a preliminary question to the ECJ on the compatibility of the restriction of rights to a deduction from tax with European Union law.

After having ruled the case at first the ECJ highlighted, that it was essential to refer to the principle of the freedom of movement and residing freely on the territory of the European Union. Foreign nationals must have been treated in a non-discriminatory manner. That meant that a citizen of the European Union must have been treated in the same way in all Member States, no matter their citizenship provided that they remain in the same situation.

Legislation that created a difference in treatment between taxpayers because of the fact, that health insurance contributions were paid in another Member State, was unacceptable.

The Court ruled: *«The situation of a retired taxpayer, such as Mr Rüffler, resident in Poland and receiving pension benefits paid under the compulsory health insurance scheme of another Member State, and that of a Polish retired person also resident in Poland but receiving his pension under a Polish health insurance scheme, are comparable as regards taxation principles since, in Poland, both are subject to an unlimited liability to tax. Thus, the taxation of their income in that Member State should be carried out in accordance with the same principles and, consequently, on the basis of the same tax advantages, that is, in the context of the case in the main proceedings, the right to a reduction of income tax».*

The Court of Justice also underlined, that Polish regulations disadvantaged taxpayers, who exercised their right to move and reside freely within the Member States. Restraints like that could be justified only if there were objective factors irrespective of the nationality. In Mr Rüffler's case such a restraint could not have been justified, because in the Court's point of view *«on the one hand, the German compulsory insurance institution covers only costs of benefits actually provided to Mr Rüffler and, on the other hand, only when Mr Rüffler is in receipt of healthcare benefits do his contributions contribute to the Polish health insurance scheme».*

The Court of Justice ruled, that restriction and, in fact, exclusion of possibility to deduct compulsory health insurance contributions paid by taxpayer in Germany from income tax paid in Poland was unacceptable. In support of his judgement, the Court indicated, that domestic regulations which discriminated nationals of another Member State only because they exhibited their freedom of movement to another Member State, were contrary to Art. 18(1) of the TEC (current Art. 21(1) of the TFEU). The Court stated, that Polish regulations mentioned above treated in a discriminatory manner the taxpayer, who exercised the freedom of movement, left the Germany with the aim of settling in Poland.

This judgement was the first and the most crucial one, relating deductions of contributions paid within foreign insurance systems. The case is important for Polish residents who work abroad and participate in various insurance schemes in countries in which they perform employment [1]. As a consequence, since 1 May 2004 each Polish resident paid compulsory health insurance contributions to health insurance systems of another Member State, could reduce of it his tax, so he could apply for a refund of an overpayment to tax authorities [2].

ECJ jurisdiction has fundamental importance to domestic courts and helps in proper interpretation of national regulations so that they are in compliance with European Union law. However, as Polish scholars observe, it does not mean the possibility to deduct all of the contributions and in every situation, because the sentence was passed under specific circumstances and it related only to health insurance contributions. Moreover, the Court of Justice did not indicate clearly how to deduct the due tax [3]. According to that, it must be mentioned that before the ECJ ruled the Uwe Rüffler Case, the Polish Constitutional Court, by the judgement of 7 November 2007 had held that Art. 26 (1)(2) and Art. 27b(1) of PIT Act were unconstitutional, which to some extent solved the abovementioned problem.

4. *The judgement of the Constitutional Court (K 16/02)*

The issue of the incompliance of Polish regulations concerning deductions of contributions paid within foreign insurance schemes with EU law was raised in the Polish tax literature in 2005 [4]. This problem was also noticed by the Polish Ombudsman. On 5 June 2006, he filed a petition with the Constitutional Court concerning a ruling on the non-compliance of Articles 26 (1)(2) and 27b (1) of PIT Act with Art. 32 in conjunction with Art. 2 of the Constitution of the Republic of Poland. In his point of view, individuals, residing in Poland subject to unlimited tax liability in this country (Art. 3(1) of the PIT Act) were deprived of the following possibilities. They could have not deduct social security contributions from income (Art. 26(1)(2) of PIT Act) and health insurance premiums from tax (Art. 27b(1) of PIT Act) although these contributions were not deducted in a European Union Member State, in which contributions were paid. It indicated, in the Ombudsman's opinion, that working abroad was discriminated and the EU principles were not respected in Poland. It regarded particularly the principle of freedom of movement as a worker.

The Petitioner compared regulations in question to Art. 32 and Art. 2 of Polish Constitution. He emphasized that individuals, residing in Poland and receiving income in the other country had the same relevant feature as individuals residing and receiving income only in Poland. Art. 26 (1)(1)(2) and Art. 27b(1) of PIT Act differentiated these two groups of people from each other. As a consequence, the abovementioned regulations led to the violation of the principle of social justice, connected in this case with the principle of tax justice. The Ombudsman paid also attention to another problem. He mentioned that the lack of the possi-

bility of exercising the right to deduct contributions paid in the other country may have caused that individuals would have resigned from living in Poland. As a consequence, it could have been an essential factor to motivate to a permanent emigration.

The Court passed a judgment on this case on 7 November 2007. The Court ruled that abovementioned regulations were in conflict with Polish Constitution. According to that judgement, questioned provisions introduced a differentiation in the treatment of two categories of taxpayers. Under Polish constitutional jurisdiction, the differentiation of people, who are characterized by a common, essential feature, is acceptable if there is a precise criterion, justifying such a different treatment. What is more, the criterion has to fulfil conditions, established in judgements of the Constitutional Court. As a result, the differentiation should be relevant, which means that it has a rationally justified character. It must be also proportional and must be in accordance with other constitutional values, principles or norms that justify different treatment of similar subjects.

The Court decided that in the analysed case the differentiation was based on receiving income and paying contributions in Poland or in other country. According to the judgement, this criterion did not meet the abovementioned requirements. In order to justify this statement, the Court declared what follows. First of all, aforementioned criterion was not in a rational connection with the aim of the regulation, which allowed taxpayers to deduct contributions from their income or tax. The aim of these provisions was to reduce burdens of taxpayers who sacrificed part of their income paying contributions. It made the State released from the constitutional duty of ensuring everyone social security *«whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age and health protection»*.

Secondly, the social and health insurances were based on the principle of mutuality. It meant that the right to the benefits and the height of them depends on the taxpayers' financial input. Consequently, the aim of contributions was not to support one or another insurance system. Thirdly, it was not doubtful that if Polish residents deducted contributions had paid abroad from their tax base or tax, budgetary revenues would have been lower. Nevertheless, the budget balance was not a value that justified tax discrimination in the light of the principle of equality. It was also worth to remember, that under OECD Model Tax Convention pensions were in principle taxable in a state of residence. It meant that the tax on pensions paid by foreign insurance institution is due in Poland.

The Constitutional Court underlined that the differentiation, introduced by questioned provisions, was contrary to the principle of social justice and therefore to the principle of tax justice. The principle of tax justice consisted of the equality and commonness of the taxation. In analysed case, the equality was not maintained. The taxpayers, residing in Poland but working in other country had no possibility to use tax allowances regarding deduction of contributions from tax or income. As a result, they were «punished» for having a job abroad. It is worth mentioning, that the Court ruled that questioned provisions of the PIT Act did not favour the realisation of European Union fundamental freedoms. In particular, it concerned the freedom of movement because binding regulations discouraged people from searching for the job in another EU state.

On the whole, the judgement of the Constitutional Court, must be assessed positively. However, it has some weak points [5]. It is obvious that provisions, regulating the deductibility of the contributions, made that Polish residents working abroad were in a worse position than individuals who work in Poland. The regulations were not in compliance neither with constitutional nor the European Union principles. In the judgment an analysis of aforementioned regulations in the light of EU law was presented. On one hand, the Court mentioned that Art. 26(1)(2) and Art. 27b(1) of PIT Act obstructed the realisation of the European Union freedoms. On the other hand, the Court did not agree with the statement, suggested in the Polish tax literature, that these provisions were not in compliance with EU law. Despite this inconsistency, it must be mentioned that the Court should not have ruled about the collisions of Polish regulations with European Union law. In one of the judgement it was said that the Supreme Court, administrative and common courts are entitled to judge in such cases. The problem of compliance with the law is not at the Constitutional Court's discretion (P 37/05).

However, the most important problem connected with the judgment is that the Constitutional Court decided to defer the date on which the provisions held to be unconstitutional would lose binding force to 30 November 2008. It was justified that the judgment could bring unpredictable financial effects and affect the national budget. Till that time Polish government had to prepare amendments of the PIT Act taking into account the Constitutional Court' ruling. It meant that taxpayers who worked abroad in 2004–2008 could not have exercised the right to deduct the amounts of contributions from their tax base or tax [6]. Some experts thought that new provisions should have been enacted with retrospective effect. However, the legislator did

not take this opportunity. The new legislation entered into force on 1 December 2008. As a result, the judgment of the Constitutional Court did not solve all problems in this matter. Because there was no doubt that such a solution was not entirely in compliance EU law, there was a need of examining the issue by the ECJ. The ECJ settled the dispute in the *Filipiak* case.

5. *The Filipiak case (C-314/08)*

Mr Filipiak was a Polish citizen, who was pursuing an economic activity in the Netherlands as a partner in a partnership established under Dutch law, the organisational structure of which corresponded to that of a general partnership under Polish commercial companies law. He paid there the social and health contributions required by Dutch legislation. In 2006 he applied for a ruling, because he observed that provisions of Polish PIT Act did not allow him to deduct social and health contributions paid in the Netherlands from his tax base or tax in Poland. He claimed that such provisions were discriminatory and that those provisions should have been disregarded and EU law should have been applied directly. Tax authorities did not agree with that position. They decided that contributions paid under Dutch law did not satisfy the criteria laid down in Art. 26(1)(2) and Art 27b(1) of PIT Act, so they could not be deducted in Poland from the tax base and from tax.

Mr Filipiak appealed to the superior instance, but the decision of the first instance was upheld. He brought an action against those rulings before the Regional Administrative Court in Poznań. Because the Constitutional Court regarded the provisions questioned by Mr Filipiak as unconstitutional in another case, the Regional Administrative Court decided to suspend the proceedings and to refer the following preliminary questions to the ECJ. The first question was whether the first and second paragraphs of Article 43 TEC (current Art. 49 of the TFEU) were construed as precluding the provisions of Article 26(1)(2) and Art. 27b(1) under which the deduction of tax or tax base was restricted to contributions paid on the basis of provisions of national law. The second question was if the principle of the primacy of EU law was construed as taking precedence over the provisions of the Polish Constitution in so far as the entry into force of a judgment of the Polish Constitutional Court had been deferred.

The ECJ passed a judgment in this case on 19 November 2009. The Court highlighted that taxpayers who were Polish residents and carried out business activity and therefore paid contributions to insurance systems in another Member State were treated less favourably than taxpayers residing in Poland but restricting their economic activity to the Polish borders. According to the ECJ, these groups of individuals were not in objectively different situations capable of justifying such a difference in treatment according to the place in which contributions were paid. Indeed, the situation of these taxpayers was comparable as for the principles of taxation since, in Poland, both were subject to unlimited tax liability. Thus, the taxation of their income should have been carried out in accordance with the same principles and, consequently, on the basis of the same tax advantages. In those circumstances, the refusal to grant the taxpayer the right to deduct contributions paid in Member State from tax base or tax may have deterred taxpayer from taking advantage of the freedom of establishment and freedom to provide services and amounts to a restriction on these freedoms.

In association with the second question, the Court noticed that the deferral of the date on which the provisions at issue would lose their binding force made by the Constitutional Court did not prevent the referring court from respecting the principle of the primacy of EU law and from declining to apply those provisions in the legal proceedings, if the court found those provisions to be contrary to European Union law. Since the abovementioned Polish provisions of PIT Act infringed EU freedoms, the primacy of European Union law obliged the national court to apply EU law and to refuse to apply the conflicting provisions of national law. It was irrespective of the judgment of the national constitutional court which deferred the date on which those provisions, held to be unconstitutional, were to lose their binding force.

It must be mentioned, that presented ECJ's judgment was enormously important for Polish taxpayers. First of all, the Court referred to non-discrimination rules that must be obeyed by the Member States. In this case, it was connected with the freedom of establishment, which denotes that an individual is allowed to carry out continuously and steadily business activity in another EU country. Any domestic provisions cannot restrict this principle. It also showed that deferring the date of losing binding force of provisions, which were not compliant with EU law, does not mean that courts are released from the duty of interpreting Polish law in the light of EU principles [7]. In the future, courts should, instead of waiting for adjusting our law to the European Union rules by legislator, resolve the problems of incompliance on their own.

From the practical point of view, the ruling C-314/08 introduced the opportunity for taxpayers to apply for a refund of tax if they were in a similar situation to Mr Filipiak's [8]. It is worth mentioning that in 2010 favourable judgements of Polish courts have been passed. For example, the Regional Administrative Court in Poznan on 8 July 2010 (I SA/Po 370/10) [8] in the reasoning of its ruling referred to the *Filipiak* case. Ac-

ording to that, the principle of primacy of EU law was applied. As a result, the court ruled that a taxpayer was entitled to deduct social contributions from the tax base paid outside Poland from 1 May 2004 to 30 November 2008. Generally, granting finally the possibility of using such tax allowances should be assessed positively. On the other hand, it is outrageous that a taxpayer had to wait for the ECJ's judgement to exercise their rights. It seems that Polish judges should draw conclusions from the aforementioned situation. Art. 27(1)(2) and Art. 27(1) of PIT Act are not the only provisions, connected with the issue of taxation of pensions, that can be adjudged non-compliant with EU law.

6. Other provisions concerning the taxation of pensions not compliant with EU law

Art. 21(1)(58a) of PIT Act stipulates that income from savings in an individual pension accounts, derived in connection with depositing and withdrawal of funds by a saver, payment of funds to persons authorized after the death of saver and transfer of funds is exempt from tax. This exemption concerns the pensions paid on the basis of Individual Pension Accounts Act, which does provide neither a payment of funds from a foreign account nor their transfer to such an account. It suggests that tax authorities can decide that such operations are taxable [4]. This provision seems to be discriminatory. It restricts the EU freedoms, especially the freedom to provide services, the free movement of people or free movement of capital. According to it, Polish tax authorities and courts should interpret this regulation in the light of EU law and decide that benefits paid from individual pension accounts of other Member State are exempt from personal income tax.

It must be noted that in 2011 legislator adjusted Art. 21(1)(58)(a), Art. 21(1)(58)(b) and Art. 21(1)(58)(c) of PIT Act to EU law. These provisions concern exemptions of payments to and from occupational pension schemes. Currently payments provided in these provisions are exempt from tax, also when an occupational pension scheme functions in the other Member State. Taking into account this amendment it seems strange why the legislator decided to change only part of regulations concerning exemptions of pension income. There is still a need to focus on Art. 21(1)(58a) of PIT Act.

7. Summary

The interpretation of provisions regarding the taxation of pensions triggered a lot of difficulties. Tax offices and courts of many EU countries had also doubts about applying provisions concerning the taxation of pensions, which confirms the ECJ's judgements (C-80/94; C-136/00; C-520/04; C-150/04; C-422/01). National courts do not always obey the provisions of TEC (currently: TFEU). It happens that their rulings are contrary to EU law.

However, the European Court of Justice guards the fundamental freedoms and rights guaranteed by European Union law. ECJ is competent to rule incompatibility of domestic and European Union law, which consequently leads to changes in the domestic rules.

Moreover, domestic courts have the possibility to refer questions to ECJ for a preliminary ruling, when they have doubts about the compliance of domestic law with and European Union regulations. The cases mentioned in this paper are the best example of that.

To sum up, it must be underlined that Polish courts should take ECJ's judgement into consideration and rule, *inter alia*, in cases referring to the taxation of pensions in the light of EU law.

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Польша зейнетақыға салық салу туралы заңына Еуропалық одақ заңының сәйкестілігі

Мақалада Польшаның Еуропалық одаққа (ЕО) енудің бір шарты ретінде имплементациялық құқықтың болуы туралы айтылған. Бірақ Польшада зейнетақыға салық салуды реттеуге байланысты проблемалар туындады. Бұл мәселелер Одаққа енгеннен кейін де ұзақ уақыт өз шешімін таппады. Мақаланың мақсаты — ЕО соттары, конституциялық трибунал және әкімшілік соттарда істі қарастыруды зерттеу. Мұнда зейнетақыға салық салуды Еуропалық одақпен реттеу қарастырылды.

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Соответствие закона о налогообложении пенсий Польши с законом Европейского союза

В статье отмечено, что одним из условий вступления Польши в Европейский союз является имплементация права Европейского союза. Однако, как отмечает автор, со вступлением в ЕС 1 мая 2004 г. в Польше появились проблемы с регулированием налогообложения пенсии, которые не устранялись долгое время. Целью статьи является рассмотрение дел административных судов, конституционного трибунала и суда ЕС, касающихся соответствия польского регулирования налогообложения пенсии праву Европейского союза.