



## PREFACE

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**The purpose of this paper** which serves as an introduction to the special edition of the quarterly of “Finanse i Prawo Finansowe. Journal of Finance and Financial Law” under the title of *Current Challenges for National Tax Policies and International Tax Coordination – Selected Issues from the Polish, Spanish and International Perspectives*, is to outline major issues and challenges in shaping national and international tax policies. **The research hypothesis** is that, to a large extent, the economic consequences of the COVID-19 pandemic, but also the changing economic reality associated with the progressive internationalization and digitalization of business activity, pose numerous and significant challenges in the field of shaping tax policies, both at the national and international level. The research was carried out using a dogmatic-legal and legal-comparative method, taking into account the provisions of law, the body of literature as well as some economic data. **The result of the research** is to establish a starting point for further analysis of selected topics that reflect the major current challenges for national tax policies and international tax coordination. They include the question of legitimacy of taxes, the issues of correct realisation of the fiscal function of taxes while at the same time implementing the basic tax principles, the matter of tax compliance and the question of tax policy-shaping within the framework of the democratic law-governed state. Those issues presented from the Polish and Spanish perspectives, hopefully may provide an interesting contribution and make a valuable input to further discussions on the issue of shaping tax policies, both at the national and international levels.

## INTRODUCTION

We proudly present a special edition of the quarterly of “Finanse i Prawo Finansowe. Journal of Finance and Financial Law” under the title of *Current Challenges for National Tax Policies and International Tax Coordination – Selected Issues from the Polish, Spanish and International Perspectives*. The aim of this edition is to present selected problematic issues constituting current challenges in shaping national tax policies, while taking into account the international context from the perspectives of two EU countries: Poland and Spain. The selection of these countries was dictated by the results of research activities and the exchange of experiences and viewpoints between Polish and Spanish representatives of law and economic sciences, initiated and conducted

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under the direction of the author within activities carried out in the Spanish and European Law Centre at University of Warsaw. Simultaneously, these experiences and the resulting lessons are part of a broader context of current challenges and concerns in the field of tax policies.

## LEGITIMACY OF TAXES

A fundamental issue regarding the shaping of tax policies and tax systems is the question of their objectives, or in other words, their functions, in the context of which the sources for the legitimacy of taxes should be sought. In the Spanish legal system, the starting point for consideration in this regard is first and foremost Article 31 Paragraph 1 of the 1978 Spanish Constitution<sup>1</sup>, according to which “everyone shall contribute to covering public expenditure in accordance with their economic capacity under a fair tax system inspired by the principles of equality and progressiveness, which shall not under any circumstances extend to confiscation”<sup>2</sup>. As regards the Polish law, reference should be made to Article 84 of the Constitution of the Republic of Poland of 1997<sup>3</sup> which states that “everyone is obliged to bear public burdens and contributions, including taxes, specified in the Act”<sup>4</sup>. It should be noted here that the Polish Constitution, unlike the Spanish Constitution, does not formulate a catalogue of tax principles, nor is there in the Polish tax system an equivalent of Article 2 Paragraph 1 Sentence 2 of the Spanish General Tax Act<sup>5</sup> (in Poland *Tax Ordinance Act*<sup>6</sup>), which provides not only for fiscal, but also allows for certain non-fiscal uses of taxes, stipulating that “public duties, apart from being an instrument for obtaining the necessary means for covering public expenses, may serve as instruments of general economic policy and for achieving principles and objectives set forth in the Constitution”<sup>7</sup>. On the contrary, the non-fiscal use of taxes is criticised in the Polish financial law doctrine (Modzelewski, 2005, 24–27; Wójtowicz, 1999: 409), emphasising that

<sup>1</sup> Constitución Española de 1978, B.O.E. No. 311, of 29.12.1978, as amended.

<sup>2</sup> In the original: “Todos contribuirán al sostenimiento de los gastos públicos de acuerdo con su capacidad económica mediante un sistema tributario justo inspirado en los principios de igualdad y progresividad que, en ningún caso, tendrá alcance confiscatorio”.

<sup>3</sup> Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. No. 78, item 483, as amended.

<sup>4</sup> In the original: “Każdy jest obowiązany do ponoszenia ciężarów i świadczeń publicznych, w tym podatków, określonych w ustawie”.

<sup>5</sup> Law No. 58/2003, of 17 December, General Tax (Ley 58/2003, de 17 de diciembre, General Tributaria, B. O. E. No. 302, of 18.12.2003, as amended).

<sup>6</sup> Act of 29 August 1997 – Tax Ordinance (Ustawa z 29 sierpnia 1997 r. – Ordynacja Podatkowa, Dz.U. of 2021, item 1540, as amended).

<sup>7</sup> In the original: “Los tributos, además de ser medios para obtener los recursos necesarios para el sostenimiento de los gastos públicos, podrán servir como instrumentos de la política económica general y atender a la realización de los principios y fines contenidos en la Constitución”.

the fiscal function is the primary function of taxes (Bitner et al., 2017: 274; Gomułowicz and Małecki, 2013: 259; Modzelewski, 2005: 24–27; Wójtowicz, 1999: 408). Regardless of this, in each of these tax systems – both Polish and Spanish – the basic purpose of the tax system and taxes is to contribute to sustaining public expenditure and public expenditure should contribute to achieving the objectives of the State set out in Constitutions. Therefore and as presented in the paper *The Purpose of the Tax System that Gives Meaning and Legitimacy to Taxes* (by J. L. Muñoz López) the purpose of the tax system, which gives meaning to and legitimises taxes, is finally none other than to achieve the welfare of citizens and to realize some other constitutional objectives.

### **TAX CAPACITY CONCEPT AND ITS DETERMINATION**

A further fundamental issue regarding the shaping of tax policies and tax systems is the tax capacity concept and principles and rules for its determination. In this context, subsequently, in particular to allow for some legal and comparative analysis in terms of the Spanish and Polish tax systems, the most important assumptions and novelties in the Spanish tax policy are presented in the paper entitled: *The Spanish Tax System and Tax Policy in Spain in the Context of the COVID-19 Pandemic Framework* (by M. Supera-Markowska). The Spanish tax policy has been strongly influenced by the current situation of public finances and fiscal consequences of the pandemic period but also by the constitutional principles of taxation, especially the principle of economic capacity (Spanish *capacidad económica*), also referred to in the Polish literature as “financial capacity to pay” (Polish *zdolność płatnicza*), “taxation endurance” (Polish *wytrzymałość podatkowa*), “capacity to bear tax” (Polish *zdolność do poniesienia podatku*) “economic capacity of the taxpayer” (Polish *zdolność ekonomiczna podatnika*), “capacity to provide contributions” (Polish *zdolność świadczenia*) or “tax capacity” (Polish *zdolność podatkowa*) (Gomułowicz, 2001: 36). This principle means, in particular, that the increase in public burdens (that may be inevitably necessary for the implementation of the fiscal function) should affect carefully selected entities – those with the greatest tax capacity (for example taxpayers with the highest incomes or the largest assets). On the other hand, it may serve important non-fiscal objectives (such as changing unfavourable dietary habits or countering speculative transactions). At the same time, for these assumptions to have a positive effect, it is necessary to combat tax avoidance at its roots by building up the conviction among taxpayers that the tax system is fair, transparent and friendly, and for this purpose, it is necessary to be honest in the messages addressed to taxpayers about the foundations and assumptions of that system and to facilitate its practical operation in contacts with the tax administration.

Within the concept of tax capacity it is essential to specify proper indicators reflecting the ability to bear the tax burden (the identification of economic sources of taxation). In case of income taxes, the indicator is to be income, which in turn, requires the establishment of rules for its measurement. At the same time, we may observe nowadays that within the framework of income taxes, the measurement of tax capacity through calculation of income is more and more often abandoned in favour of other indicators; in particular revenue, and in tax systems – as a specific supplement of taxation of entrepreneurs with income taxes – other taxes are introduced, e.g. the so-called digital tax, adopted among other countries in Spain (Supera-Markowska, 2021); in Poland, no analogous levy has been implemented. Related issues, i.e. the establishment of rules for determining the tax capacity of entrepreneurs with respect to income taxes, constitute the subject of consideration in the successive paper entitled *Principles and Rules for Determining the Tax Capacity of Entrepreneurs in Income Taxes* (by M. Supera-Markowska). These rules currently in force, in particular, are no longer relevant in the context of nowadays, when not only cross-border trade but also the provision of services without a physical presence is possible, and often the main value for businesses (henceforth referred to as digital businesses) lies in the content digitally generated by their users and the collection of data. This latter phenomenon is part of the broader issue of a new way of creating value within the digital economy and the lack of commensurability of taxation with the value so created. This is a consequence of the fact that the traditional approach to income tax assessment is to determine income on the basis of the taxpayer's revenues and costs generated in transactions. However, in the digital economy, the value created (e.g. digital content created by users) is not always reflected in the form of transactions, and a correct allocation of tax to a particular country is often not even possible under the current rules. What is more, the issue of determining this capacity applies not only to digital companies, but also to other taxpayers, both those operating domestically and internationally. In Poland, this is related, inter alia, to progressing differentiation of rules for determining the tax capacity of entrepreneurs with regard to income taxes: determining income for tax purposes independently of the financial result, in some cases (the so-called Estonian CIT) – as the adjusted financial result (a solution applied in turn in Spain as the basic solution for determining the income of entrepreneurs), with a progressing abandoning of determining income in income taxation at all in favour of taxation of revenue (the so-called flat-rate income tax on registered revenues). A distinction should be made between the situations where the abandoning of the determination of income as part of the implementation of the principle of tax capacity in income taxes in favour of another criterion is justified by the pursuit of a fair distribution of the tax burden (as, for example, in a digital tax) and the situations where this is to be justified by non-fiscal arguments. In such a case, any

variation in those rules must be assessed on a case-by-case basis as to whether it is justified; although that potential justification may be the desire to achieve, in the context of the intervention function, a certain economic (or other) policy objective, which requires an in-depth analysis in view of the potential infringement of the principle of neutrality of taxation which may result from that differentiation. Finally, in the international context, these issues are related to the concept of a common consolidated corporate tax base (CCCTB) (Supera-Markowska, 2010) – to be replaced by the project of *Business in Europe: Framework for Income Taxation* (BEFIT), and activities within the Organisation for Economic Co-operation and Development (OECD) under the *Base Erosion and Profit Shifting* (BEPS) project and a two-pillar multilateral agreement on new principles of income taxation in the international aspect worked out within its framework. In view of these issues and also of the increasing development of general and specific substantive tax law norms aimed at minimising the phenomena of tax avoidance and optimisation, it seems increasingly possible to adopt as a principle that the tax capacity of entrepreneurs should be determined by its natural measure, i.e. the financial result (with some necessary adjustments for tax purposes) of their business activity.

## **TAX COMPLIANCE**

The issue of preventing the loss of tax revenue is another of the most important tax challenges nowadays, both at national and international level – the problem of tax compliance should be analysed in this context. Its system encourages the adoption of a series of voluntary mechanisms for cooperation between taxpayers and the tax administration and minimizes the uncertainty. By building better relations between the creditor and the tax debtor and thus providing the stability of the tax system – tax compliance is worth analysing, especially in the context of facilitating the implementation of the aforementioned fiscal function and taking into account the correct fulfilment of basic tax principles (among others, the fairness and transparency principles).

The tax compliance problems in this regard are presented in the following two papers: the paper entitled *Factors Explaining Tax Compliance* (by M.G. Lagos Rodríguez) in the context of factors explaining it, and in the paper entitled *Trust in Institutions and Tax Compliance. A multilevel analysis with Spanish regions* (by J. Cantero-Galiano) first and foremost in the context of the principle of trust in relations between taxpayers and the tax administration.

It is worth emphasising that in case of Spain, this question also extends to the regional (and potentially, also the local) level, whereas, in Poland, tax competence is exercised at the State level and, beyond that, only to a very limited extent at the

level of municipalities. As noted in the previous paper (*The Spanish Tax System and Tax Policy in Spain in the Context of the COVID-19 Pandemic Framework* by M. Supera-Markowska) special attention should be paid to the aspect of regional and local extensive tax authority in the Spanish system, which allows to “neutralize” tax decisions of the national legislator that may threaten the financial independence of regional and local self-government units, or create excessive tax burden for their citizens (the phenomenon that may be unfortunately observed currently in the Polish tax system, in which the fiscally negative consequences of the so-called Polish Deal are largely borne by local governments).

### **THE TAX POLICY IN THE DEMOCRATIC LAW-GOVERNED STATE**

Finally, returning to the issue of the axiological foundations of tax policies, it is worth considering them in a broader context of the concepts of a democratic law-governed state, economic development policies and support for religious communities, as discussed in the last paper entitled *Democracy, Economy, Progress and the Rule of Law. Special Reference to the Tax Regime for Religious Denominations* (by S. Catalá Rubio). The work shows that democracies need effective control mechanisms if they are not to degenerate into corrupt and ineffective systems. These issues are extremely important in the context of shaping tax policies so that they do not become an easy tool for implementation of populist slogans in order to obtain political support or for other individual goals, and not with attention to constitutional values and proper legitimacy of tax systems, which should be the starting point for all considerations on tax policies.

### **CONCLUSIONS**

A fundamental issue regarding the shaping of tax policies and tax systems is the question of their objectives, or in other words, their functions, in the context of which the sources for the legitimacy of taxes should be sought. The tax system and taxation are delimited as a tool for raising revenue to cover the needs of the public budgets (basic, fiscal function of taxes) and thus guaranteeing the sustainability of the public finances system. Within this system public expenditure should contribute to achieving the objectives of the State set out in Constitutions and within their framework.

A further fundamental issue regarding the shaping of tax policies and tax systems is the tax capacity concept and principles and rules for its determination. These matters are related to one of the most significant tax challenges of contemporary times, namely the inadequacy of existing income tax rules to conducting a business activity in conditions of a globalised digital economy. However, the question of determining the tax capacity applies not only to digital

companies, but also to other taxpayers, both those operating domestically and internationally. In Poland, this is related, *inter alia*, to progressing differentiation of rules for determining the tax capacity of entrepreneurs with regard to income taxes. A distinction should be made between situations where the abandoning of the determination of income as part of the implementation of the principle of tax capacity in income taxes in favour of another criterion is justified by the pursuit of a fair distribution of the tax burden (as, for example, in a digital tax) and situations where this is to be justified by non-fiscal arguments. In such a case, any variation in those rules must be assessed on a case-by-case basis as to whether it is justified; although that potential justification may be the desire to achieve, in the context of the intervention function, a certain economic (or other) policy objective that requires an in-depth analysis in view of the potential infringement of the principle of neutrality of taxation which may result from that differentiation. In view of these issues and measurement of tax capacity of entrepreneurs in income taxes, taking into account the increasing development of general and specific substantive tax law norms aimed at minimising the phenomena of tax avoidance and optimisation, it seems more and more possible to adopt as a principle that the tax capacity of entrepreneurs should be determined by its natural measure, *i.e.* the financial result (with some necessary adjustments for tax purposes) of their business activity.

The issue of preventing the loss of tax revenue is another of the most important tax challenges nowadays, both at the national and international level. The tax compliance system is one of concepts that are seen as a directional solution to problems in this regard. By building better relations between the creditor and the tax debtor, and thus providing the stability of the tax system – tax compliance is worth analysing especially in the context of facilitating the implementation of the fiscal function and taking into account the correct fulfilment of basic tax principles (among others, the fairness and transparency principles).

Finally the axiological foundations of tax policies should be taken into account considering the issues of tax policy in the broader context of, among others, a democratic law-governed state and economic development policies. Democracies need effective control mechanisms if they are not to degenerate into corrupt and ineffective systems, in which, among other things, tax policies can be shaped to implement populist slogans in order to obtain political support or for individual goals, and not with attention to constitutional values and proper legitimacy of tax systems.

I hope that this selection of topics, presented from the Polish and Spanish perspectives, may provide an interesting contribution and make a valuable input to further discussions on the issue of shaping tax policies, both at the national and international levels.

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