

PRINCIPLES AND RULES FOR DETERMINING THE TAX CAPACITY OF ENTREPRENEURS IN INCOME TAXES

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Abstract

The purpose of this paper is a multifaceted theoretical and legal analysis of the issue of determining the tax capacity of entrepreneurs in income taxes so as to be able to assess the adequacy of the rules in this area for the proper implementation of this concept. **The research hypothesis** assumes that these rules currently in force, to a large extent, do not ensure proper implementation of the concept of tax capacity, especially in the conditions of the digitalized and globalized economy, but also in times of progressive development of instruments to counteract not only tax evasion but also tax avoidance. Therefore, it is necessary to change them in many aspects. The research was carried out using a **dogmatic and comparative legal method**, taking into account in particular the provisions of domestic, foreign and EU laws, the body of domestic and foreign tax law literature, court rulings and proposals for new tax and legal solutions put forward on the EU and international forum. The analysis took into account the essence of the tax capacity concept and closely related tax principles, as well as the functions of taxes, both in the national and international context. **The results of the research** is the formulation of some conclusions as to the desirable guidelines for determining the rules for measuring the tax capacity of entrepreneurs in income taxes, which should be related to the fundamental concept of tax capacity and the principles of equity and neutrality of taxation. Currently, these principles are violated in many national, as well as international aspects, i.a. by deviating from the criteria of income as an indicator of tax capacity. In this context a very important distinction should be made between situations where the abandoning of the determination of income of entrepreneurs is justified by the pursuit of a fair distribution of the tax burden (as, e.g., in case of so-called digital tax) and situations when it results from the desire to achieve certain non-fiscal goals. In such a case, any variation in those rules must be assessed on a case-by-case basis as to whether it is justified. On the other hand, in the former case, even temporarily – especially in the international aspect – until international solutions are worked out, it may even be indispensable to differentiate the rules for determining the tax capacity of entrepreneurs (e.g. abandoning the criterion of income in favor of revenue in digital tax) precisely in order to ensure fair and neutral taxation. In this context, it is worth noting that some of the problems underlying these different approaches may be solved by a comprehensive reform of the rules for determining the tax capacity of entrepreneurs, to be developed both internationally within the OECD and in the EU within BEFIT. It should also not be underestimated that in these projects the fundamental categories and concepts are those of balance sheet law, including in particular the proposed adoption of the concept of adjusted financial result for the purposes of determining the tax result. Taking into account this issue and also in a view of the increasing development of general tax law norms aimed at minimizing the phenomena of tax avoidance and optimization, it seems worth considering an increasing possibility that the tax capacity of entrepreneurs should be determined by its natural measure, i.e. the financial result of their business activity.

Keywords: taxes, tax capacity, income taxes and entrepreneurs, tax principles.

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INTRODUCTION

One of the fundamental concepts in the science of tax law, as well as in the practical dimension of constructing the tax system, is tax capacity, also referred to in the literature as “the capacity to pay”, “tax endurance”, “capacity to bear tax”, “economic capacity of the taxpayer” or “capacity to provide contributions” (Gomułowicz, 2001: 36). The discussion as to the meaning and essence of this concept has been going on for at least a couple of centuries; it has been the subject of considerations conducted, among others, by: A. Wagner, F.J. Neumann, J.S. Mill, A.E.F. Schäffle, F. Lassalle or E. Seligman (Gomułowicz, 2001: 26; Drozdowski, 2018: 25–42). The concept of tax capacity began to replace the theory of equivalence, according to which the tax was supposed to be a price or an insurance premium for the State (Drozdowski, 2018: 21–25, 41 and 180). In contrast, the concept of tax capacity does not make the receipt of benefits from the State conditional on the payment of tax, and the tax itself is to be appropriate to the capacity to bear it. The literature points to two dimensions of tax capacity: *sensu largo* – the tax must refer to manifestations of tax capacity, i.e. to economic sources of taxation, and *sensu stricto* – bearing the tax burden should be individualised (Drozdowski, 2018: 109, 144 and 182–183).

Within the concept of tax capacity (more on this concept: Drozdowski, 2018; Gomułowicz, 1998: 85–91; Gomułowicz and Małecki, 2013: 74–75, 245–246) it is essential to identify appropriate indicators reflecting the ability to bear the tax burden. Such an indicator (economic source of taxation) may be revenue, income, property (its status or increase) or consumption (see e.g., Drozdowski, 2018: 109, 121 and 145; Bitner et al., 2017: 278–279) or in slightly different terms: income, turnover and wealth, which underlies one of the basic divisions of taxes into income, turnover and wealth taxes (Modzelewski and Bielawny, 2005: 10). In case of income taxes, the indicator is to be income, which in turn requires the establishment of rules for its calculation (measurement). The issue of income measurement is the first of the problematic aspects analysed in the paper.

At the same time, we may observe nowadays that within the framework of income taxes, the assessment of tax capacity by determining income is more and more often abandoned in favour of other indicators, including, in particular, revenue. Moreover, in tax systems – as a kind of supplement to income taxation of entrepreneurs – other taxes are introduced; formally not on income, but actually – to some extent – replacing or supplementing income taxation. This is the nature of the so-called digital tax adopted in many countries, in an attempt to provide some solution to the disproportionality of currently in force income tax rules to the economic activities carried out in the globalised digital economy (see more in: Supera-Markowska, 2021b: 293–314). The presented issue of abandoning income in favour of other indicators of tax capacity in income taxes of entrepreneurs is

the second problem area analysed in the paper. Considerations in this respect will be focused on the issues of digital tax and taxation of entrepreneurs with a flat-rate tax on revenues in the Polish tax system. These two manifestations of the departure from determining income in favour of revenue taxation were chosen due to the fact that they clearly exemplify fundamentally different motivating premises, which in turn results in their diametrically different assessment.

Finally, the third problem area analysed in the paper is the issue of further (after determining the indicator itself and the method of its measurement) implementation of the principles of determining the tax capacity of entrepreneurs in income taxes. They include in particular the assignment of the right to tax to individual countries in cross-border situations, questions of the elimination of double taxation and counteracting international tax avoidance, tax evasion and so-called aggressive tax optimisation; issues relating to these phenomena are also relevant in the national context.

1. TAX CAPACITY MEASUREMENT IN INCOME TAXES – INCOME AS A TAX RESULT VERSUS A FINANCIAL RESULT

In case of income taxes, tax capacity is determined, in principle and as the name implies, by the income – tax result ratio. However, this result does not always correspond to the financial result of the entrepreneur for whom, as a profit-driven entity, the category of financial result is the most important one.

The question of the possibility of approximating these two categories, i.e. tax result and financial result, or using financial result for income tax purposes, has been the subject of consideration, discussion and some proposals since the last century. The 1992 Ruding Committee Report¹ proposed the use of financial accounting as a starting point for calculating the corporate tax bases in Member States and recommended that steps be taken to bring about an approximation of the principles for determining tax income and profit in financial accounting. Subsequently, the possibility of using international accounting standards, currently, international financial reporting standards (IAS/IFRS), to determine the tax base was explored in a public consultation process in 2003 (Summary Report on the results of the DG Taxation...); it was also analysed in the literature and discussed at international conferences (Bielen, 2006; Schön, 2004). This question has become particularly important following the adoption in the EU of the regulation on the application of international accounting standards², which introduced the obligation to apply IAS/IFRS to the preparation of consolidated

¹ Commission of the European Communities, Conclusions and recommendations of the Committee of independent experts on company taxation, Luxembourg 1992.

² Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

financial statements by issuers whose securities are admitted to trading on regulated markets of the member states of the European Economic Area. The issue was further explored in the context of the work undertaken at the EU forum in 2004 to develop a common consolidated corporate tax base (CCCTB) concept (see more in: Supera-Markowska, 2010). At that time, consideration was given to the possibility of using the IAS/IFRS rules for determining tax income in the CCCTB, but it was finally agreed that “although work on the CCCTB might be more straightforward if all companies, in all Member States, were permitted to use IAS/IFRS and therefore there were a single starting point for all companies, the Commission accepts that currently this is not the case”³ and IAS/IFRS could at most provide a starting point for determining the tax base, rather than the base itself⁴. It was accepted that the main role of IAS/IFRS was to provide a common language to develop the concept of the CCCTB and that the standards themselves could provide a starting point for determining tax income for the CCCTB, but only as a tool for developing that concept⁵. The developed concept was presented in the draft CCCTB Directive of 2011⁶, however, it was not adopted. A further, amended, draft⁷ was published in 2016, providing that the tax base would be determined as adjusted financial result⁸. Subsequently, the European Commission’s 2021 Communication *Business Taxation for the 21st Century*⁹ indicated that the CCCTB proposal was to be replaced by the BEFIT (*Business in Europe: Framework for Income Taxation*) project. It provides, inter alia, for the

³ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Implementing the Community Lisbon Programme: Progress to date and next steps towards a Common Consolidated Corporate Tax Base (CCCTB), COM (2006) 157 final, Brussels, 5.4.2006, p. 7.

⁴ Communication From the Commission to the Council, the European Parliament and the European Economic and Social Committee, An Internal Market without company tax obstacles: achievements, ongoing initiatives and remaining challenges, COM (2003) 726 final, Brussels, 24.11.2003, p. 17.

⁵ European Commission, Summary Record of the Meeting of the Common Consolidated Corporate Tax Base Working Group, CCCTB/WP/005/doc/en, Brussels, 21.01.2005, p. 7.

⁶ European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final/2, Brussels, 3.10.2011. For more on the draft directive and its significance for the Polish taxpayer, see: M. Supera-Markowska, Projekt dyrektywy w sprawie wspólnej skonsolidowanej podstawy opodatkowania osób prawnych (CCCTB) – analiza zaproponowanych regulacji i ich znaczenie dla polskiego podatnika, v. 1–5, “Przegląd Podatkowy” 2011/9, 2011/11, 2012/2, 2012/5, 2012/10.

⁷ European Commission, Proposal for a Council Directive on a Common Corporate Tax Base, COM (2016) 685 final, Strasbourg, 25.10.2016, hereinafter: COM (2016) 685 final.

⁸ Article 6 item 5 of the Directive of the draft contained in the document of the Presidency of the EU Council of 6 June 2019 Proposal for a Council Directive on a Common Corporate Tax Base (CCTB) – State of play, 9676/19, FISC 278 ECOFIN 518.

⁹ Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century, COM (2021) 251 final, Brussels, 18.5.2021, hereinafter: COM (2021) 251 final.

establishment of common rules for calculating the corporate tax base in all Member States for international companies¹⁰, which corresponds to the basic assumptions of the CCCTB. It is therefore possible that the solution adopted in this regard (which is expected to be in 2023¹¹) will be analogous to that proposed for the CCTTB, i.e. the determination of the tax base would be as the adjusted financial result. Such a solution is already used in some countries, e.g. Spain (Supera-Markowska, 2019: 489–490 and literature cited therein), and in Poland a certain manifestation of its application is the so-called Estonian CIT (flat-rate income tax on income of capital companies¹²). However, in other cases and as a general rule, the determination of tax base in income taxes in Poland is formally independent from the determination of the financial result; the rules for determining tax result are set out in the tax law regulations and there are no references in this respect to the financial result. At the same time, taxpayers keeping books of account are obliged to keep them in accordance with the provisions of the Accounting Act¹³, but in a manner ensuring determination of the tax result, the tax base and the amount of tax due for the tax year¹⁴. However, the relationship arising from these provisions is of a formal nature, as confirmed by extensive judicial case law¹⁵ (see more in: Supera-Markowska, 2022: 364–369). This is due to the fact that taxpayers use separate legal acts to determine their tax and financial result, and the result determined in accordance with the provisions of the Accounting Act often differs from the result determined for tax purposes (for more on these differences, see Wyrzykowski, 2003: 24–30 and 31–170). Meanwhile, in case of entrepreneurs – by their very nature profit-oriented – the natural economic source of the tax seems to be positive financial result from their activity (however, in case of a natural person it may be necessary to still take into account their personal situation). The economic source of taxation thus established is to serve the concept of tax capacity, which is closely related to the tax principle of equity.

¹⁰ COM (2021) 251 final, pp. 11–13.

¹¹ COM (2021) 251 final, p. 13.

¹² See art. 28m of Act of 15 February 1992 on Corporate Income Tax (ustawa z 15 lutego 1992 r. o podatku dochodowym od osób prawnych, Dz.U. of 2021, item 1800, as amended), hereinafter: u.p.d.o.p.

¹³ Act of 29 September 1994 on Accounting (Ustawa z 29 września 1994 r. o rachunkowości, Dz.U. 2021, item 217, as amended), hereinafter: u.r.

¹⁴ See art. 9 paragraph 1 of u.p.d.o.p. and art. 24a paragraph 1 of Act of 26 July 1991 on Personal Income Tax (ustawa z 26 lipca 1991 r. o podatku dochodowym od osób fizycznych, Dz.U. 2021, item 1128, as amended).

¹⁵ Inter alia, rulings under the following reference symbols: III SA 245/91, SA/Lu 666/94, SA/Po 3730/94, SA/Lu 1456/94, SA/Ka 1405/95, III SA 11/03, III SA/Wa 2431/06, I SA/Bd 625/10, I SA/Łd 915/10, I SA/Gl 1137/10.

2. PRINCIPLE OF EQUITY IN TAXATION

The tax equity principle is seen from both vertical and horizontal perspectives. From a vertical point of view, it requires that the tax burden be shared among taxpayers according to their ability to pay. Horizontally, it means that entities in the same situation should be treated in the same way (European Commission 2004: 3–4) and it is violated by discriminatory regulation (Bielen, 2006: 16). Horizontal equity is concretised by the principle of universality and the principle of equality (Gomułowicz, 2001: 27). In case of entrepreneurs, it is also quite closely related to the principle of neutrality, according to which tax regulations should not influence entrepreneurs' decisions – these should be made on the basis of economic premises (European Commission 2004: 4; in more detail: Desai and Hines, 2003).

In international tax law, the principle of horizontal equity is linked to the prevention of double taxation (elimination of double taxation), on the one hand, and tax avoidance and evasion, on the other hand. The combination of the residence principle and the source principle with unlimited and limited tax liability respectively, as well as appropriate methods to eliminate double taxation, are intended to ensure that tax is paid once. On the other hand, regulations aimed at preventing tax avoidance and evasion are intended to prevent situations of non-taxation or too low taxation in relation to the taxpayer's economic capacity. For entrepreneurs, both double taxation and non-taxation, by favouring some taxpayers over others, not only violates the principle of equity but also distorts equal competition.

The issue of counteracting, or at least limiting, such privileged treatment of certain entrepreneurs has given rise to work at the international levels on legal solutions aimed at counteracting certain types of entrepreneurs' activities, referred to as "tax optimisation", whereby they unjustifiably reduce their tax burden and thus obtain a privileged position in relation to entrepreneurs who do not engage in such activities, and the resulting inequalities undermine the principle of tax justice. The term "tax optimisation", often used with the addition of "aggressive", should be distinguished from "tax evasion". While tax evasion involves taking unlawful actions (cf. Bitner et al., 2017: 299), the concept of "tax optimisation" can be defined as the choice of such a form of taxation and planned transaction within the framework and limits of the applicable tax law to legally reduce the level of tax burden (Kudert and Jamroży, 2007: 22). Extensive literature is devoted to this issue (see Supera-Markowska, 2020: 544–545 and the literature cited therein), which proposes, among other measures, the assumption that tax optimisation includes activities undertaken within the framework of tax planning (understood as the use of the allowed and legitimate possibilities of tax reduction, without significant changes in lifestyle or business activity) and tax avoidance

(understood as all activities undertaken by a given entity, which remain in compliance with the provisions invoked by this entity and which are undertaken by this entity exclusively or mainly in order to obtain a broadly understood tax advantage). Tax optimisation understood in this way may lead to a breach of the principle of tax equity by allowing certain entities to gain a privileged position by reducing their tax burden, not being justified by their tax capacity and thus gaining a competitive advantage over entities unable or unwilling to make use of tax optimisation. This phenomenon, as has already been pointed out, undermines the principle of tax equity when real income is taxed under different rules or at different levels without being justified by objective factors. In this context, the Base Erosion and Profit Shifting (BEPS) initiative was undertaken at the OECD forum. Its assumptions were formulated in the 2013 report (OECD, 2013), and preliminary conclusions in the 2015 reports (www1). Fifteen main problem areas – actions – were identified. These include Action 12 on mandatory reporting of tax schemes (OECD, 2015), which recommends, inter alia, that Member States introduce mandatory disclosure rules (MDRs) in order to prevent tax abuse. Within the EU, this issue is related to the issuance of Council Directive (EU) 2018/822 of 25.5.2018 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation with regard to reportable cross-border arrangements¹⁶. The implementation of the relevant regulations in the Polish system took place in 2019¹⁷, except that the scope of mandatory reporting was extended to not only cross-border situations. The introduction of MDRs obligations is just one of many examples of increasing tax information obligations for entrepreneurs¹⁸, justified by the desire to ensure a fair taxation system in which not only illegal tax evasion but also so-called optimisation measures are hindered or prevented. The activities undertaken in this area give rise to a renewed reflection on the possibility of using the financial result for tax purposes. In view of these increased obligations and other instruments aimed at preventing tax avoidance under general¹⁹ or specific substantive tax law²⁰, the financial and tax results could be – at least potentially – more closely linked.

¹⁶ OJ EU No. L 139, 5.6.2018, p.1.

¹⁷ Act of 23 October 2018 amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance and certain other acts (Ustawa z 23 października 2018 r. o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych, ustawy – Ordynacja podatkowa oraz niektórych innych ustaw, Journal of Laws 2018, item 2193, as amended).

¹⁸ Apart from the MDRs, among others, it is worth mentioning the uniform control files, e-financial reporting or transfer pricing obligations.

¹⁹ In particular, the introduction of a general clause on counteracting tax avoidance.

²⁰ E.g. legislation on foreign controlled companies, thin capitalisation, exit tax and others.

3. THE POSSIBILITY OF DETERMINING THE TAX CAPACITY OF ENTREPRENEURS IN RELATION TO THEIR FINANCIAL RESULTS

Until now, one of the key arguments against such a solution has been the risk that the basic function of taxes, i.e. the fiscal function, would not be correctly performed, in case of reliance on the principles of financial accounting for tax purposes, which may give excessive discretion to entrepreneurs and, serving a purpose other than a fiscal one, lead to an underestimation of the result and, consequently, to an understatement of the tax base and the amount of tax (see more in: Supera-Markowska, 2010: 124–130 and the literature cited therein and Supera-Markowska, 2019: 487–492 and the literature cited therein). Today, however, in view of the increasing range of instruments aimed at counteracting tax avoidance and optimisation, this risk could be reduced by these instruments. It is also important to note that in the EU and international projects on income taxation, there are references to the category of the financial result.

As already indicated, in the CCCTB proposal²¹, now to be replaced by the BEFIT²², the tax base was to be determined in accordance with the accounting rules applied in Member States, which provided that they were compliant with the rules laid down in the Directive. Therefore, the concept of determining tax income as an adjusted financial result was adopted. These adjustments would relate primarily to the exclusion of exempted revenues and of certain expenses from the categories of taxable revenues and deductible expenses. This is a methodology that is already being used in some countries, e.g. in Spain. Pursuant to art. 10 paragraph 3 of the Spanish law on corporate taxation²³ and art. 28 paragraph 1 of the law on personal income taxation²⁴, the tax result is determined as the financial result adjusted in accordance with the provisions of the tax law, except that the categories of exempt revenues and costs not constituting tax deductible costs are few. What makes this system effective is the universality of the obligation to keep accounts. Meanwhile, in Poland, many categories of taxpayers are exempted from the obligation to keep accounting books, and one can observe the progressive phenomenon of replacing accounting books with tax records, and replacing the financial result with the tax result, or even completely abandoning the determination of the result (see more in: Supera-Markowska, 2022: 379–383).

²¹ COM (2016) 685 final.

²² COM (2021) 251 final.

²³ Law No. 27/2014, of November 27, on Tax on Companies (*Ley 27/2014, de 27 de noviembre, del Impuesto sobre Sociedades*, B.O.E. No 288, of 28.11.2014, as amended), hereinafter: LIS.

²⁴ Law No. 35/2006, of November 28, on Tax on Personal Income and Partially Amending the Laws on Tax on Companies, Non-Resident Income and Wealth (*Ley 35/2006, de 28 de noviembre, del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio*, B.O.E. No 285, of 29.11.2006, as amended).

Recently, the group of entrepreneurs who are exempt from the obligation to determine their income in a situation where they use taxation in a form of a flat-rate income tax on registered revenues²⁵ has been significantly expanded; this expansion took place by increasing the revenue threshold up to which such taxation is possible (from EUR 250,000 to EUR 2 million) and by allowing more types of activity to be subject to such taxation²⁶. The amount of EUR 2 million (previously EUR 1.2 million) is also the revenue threshold below which many entities do not have to keep accounts²⁷.

Such a development would be a significant obstacle to the implementation of a uniform and universal methodology of determining tax income as an adjusted balance sheet result. At the same time, however, for certain taxpayers who are subject to flat-rate income taxation on the income of capital companies (so-called Estonian CIT)²⁸, a method of determining the tax result as, in essence, their adjusted financial result has just been introduced. In order to extend the application of this methodology to all entrepreneurs, it would first be necessary to introduce a general obligation for taxpayers to keep accounting books (although certain simplifications in the Accounting Act should be maintained for small entities). In such a case, many tax provisions (e.g. most of the depreciation regulations²⁹) could be removed from tax laws, resulting in their considerable simplification and increased transparency. Tax legislation could refer to the financial result as the starting point for determining the tax result, focusing only on adjustments necessary due to different tax and financial reporting objectives and principles (both in view of the risk of potential tax abuse by taxpayers and of over-taxation). In addition, the need to maintain the very broad catalogues of non-deductible costs and exempt revenues currently contained in u.p.d.o.p. and u.p.d.o.f should be reviewed. Certain reduction of them could also result in some approximation of the tax result and the financial result. Such a solution, i.e. to rely more closely on the financial result when determining the tax capacity of entrepreneurs, would serve the implementation of the principle of vertical equity

²⁵ See Act of 20 November 1998 on Flat-rate Income tax on Certain Revenues Earned by Natural Persons (ustawa z 20 listopada 1998 r. o zryczałtowanym podatku dochodowym od niektórych przychodów osiąganych przez osoby fizyczne, Dz.U. 2021, item 1993, as amended).

²⁶ Amendments were introduced by Act of 28 November 2020 amending the Personal Income Tax Act, the Corporate Income Tax Act, the Act on Flat-rate Income Tax on Certain Revenues Earned by Natural Persons and certain other acts (ustawa z 28 listopada 2020 r. o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych, ustawy o zryczałtowanym podatku dochodowym od niektórych przychodów osiąganych przez osoby fizyczne oraz niektórych innych ustaw, Dz.U. item 2123, as amended).

²⁷ See art. 2 of u.r.

²⁸ See art. 28m of u.p.d.o.p.

²⁹ This is the case in the Spanish system (see art. 12 of LIS), where the tax rules on depreciation mainly address the determination of its maximum periods. The regulation of other issues in tax law is superfluous due to the aforementioned reference to balance sheet law.

better, while the harmonisation of the methodology of its measurement would serve the principle of horizontal equity. Nevertheless, as it has already been mentioned, in the Polish tax system, there is a phenomenon of abandoning income determination for the purpose of taxing entrepreneurs with income taxes by extending the scope of implementing the concept of the so-called grossed-up income tax imposed on revenues (in the form of a flat-rate income tax on registered revenues), while revenue taxes are usually introduced in countries with a low level of economic development, in a situation where entities' profits are at a marginal level and the tax administration has limited possibilities of verifying tax-deductible costs (Gomułowicz and Małecki, 2013: 121).

4. ABANDONING THE DETERMINATION OF TAX CAPACITY IN INCOME TAXES IN THE PRISM OF SHIFTING FOCUS FROM INCOME TO REVENUE

Taxation of revenue in income taxes may also occur in an international context³⁰. Such taxation of foreign entities without a permanent establishment in a given country is generally not perceived as discriminatory – although it does not meet the criteria of the principle of tax capacity, it is intended to simplify the settlement of foreign taxpayers; it is also justified by the intention to reduce tax abuse, often difficult to capture, e.g. in case of income earned in connection with the provision of services of an intangible nature (Drozdowski, 2018: 68, 89–90 and 96 and the literature cited therein). In contrast, it is much more problematic to shift from determining income in favour of taxing revenue with income tax in case of domestic entities and in situations without a cross-border element. Such regulations exclude the concretisation of the assumptions of the principle of tax capacity and thus of the principle of vertical equity. Moreover, where they are available only to certain entrepreneurs, such differentiation of the resulting principles of taxation of taxpayers of the same tax may give rise to doubts as to compliance with the principles of tax neutrality, equality and horizontal equity.

It is also possible, however, that it is the determination of different – than general – rules that is necessary for the proper implementation of the concepts of tax capacity and fair and neutral taxation, since general rules do not guarantee the fulfilment of these assumptions. This latter aspect is particularly evident in case of entrepreneurs referred to as “digital entrepreneurs”, especially those operating internationally (read more: Kofler, Mayr and Schlager, 2018: 126). The digital economy has changed in many ways the manner of conducting business and consumption, whereas existing rules on taxation of entrepreneurs have lagged behind (Álamo Cerrillo, 2020: 177–180, 182–184; Kofler, Mayr and Schlager,

³⁰ See e.g. art. 21 of u.p.d.o.p.

2017: 523–524; Olbert and Spengel, 2017: 3; Schön, 2018: 1–6). In particular, these rules are not suited to the context, in which not only cross-border trade but also the provision of services of this kind is possible without a physical presence, and often the main value for digital entrepreneurs is the content digitally generated by their users and the collection of data. The latter phenomenon is part of a broader issue – the new way of creating value within the digital economy and the lack of commensurability of taxation with the value so created (Calabrese, 2019: 71 et seq.). This is a consequence of the fact that the traditional approach to the assessment of income for taxation purposes is to determine the tax result on the basis of the taxpayer’s revenues and costs generated by the transactions. However, in the digital economy, the value created (e.g. digital content generated by users) is not always reflected in the form of revenue-costs transactions.

Digital entrepreneurs often participate in a given national market without having any real presence there, only a virtual presence, as physical presence is no longer necessary to ensure the sale of their products there. As a result, under currently in force tax rules, taxable income cannot be assigned to the state of a given market. In fact, income tax regulations were designed for the traditional economy and the resulting tax rules are based on the principle of assigning the right to tax income largely on the basis of physical presence in the country. Thus, the State in whose market a digital entrepreneur operates, often on a very large scale, may not have any taxing rights on the profits of that entrepreneur if it is not resident or does not have a permanent establishment on its territory. However, even in case of a physical presence of the entrepreneur in the country concerned enabling the entrepreneur to be taxed, the rules on the distribution of profits attributable to a permanent establishment may lead to the determination of a very low amount of taxable income in that country. This may be due to the fact that existing tax rules do not take into account other specificities of digital activities, such as, in particular, the importance of the users’ contribution to the creation of value. This poses a double challenge from a tax point of view. Firstly, data acquired by the entrepreneur from users, which is an important element of value creation, may originate in a tax jurisdiction where the digital entrepreneur does not have a physical presence, so the income from such activities is not taxable in that jurisdiction. Secondly, even if the entrepreneur has a permanent establishment in the jurisdiction where users are located, the value generated by users is not taken into account in determining the taxable income there. In this context, the significant disparity in the real level of taxation between traditional and digital businesses is striking: the effective tax rate of the former is 23.2%, while that of the latter is 9.5%³¹. This distorts competition (by favouring digital entrepreneurs

³¹ Communication from the Commission to the European Parliament and the Council, Time to establish a modern, fair and efficient taxation standard for the digital economy, COM (2018) 146 final, Brussels, 21.3.2018, p. 4.

over other taxpayers) and thus infringes the principle of tax equity. Both at the EU and OECD fora, work was therefore carried out on a new concept of taxation of entrepreneurs in the globalised digital economy, but in the absence of tangible results in the expected timeframe, some countries decided to introduce certain solutions in this area unilaterally, adopting in their tax systems taxes referred to as “digital” (read more: Supera-Markowska, 2021b: 293–314 and the literature cited therein). Recently, among others, such a tax has been adopted in Spain (Supera-Markowska, 2021a: 44–51 and the literature cited therein). Although formally it is an indirect tax on the revenue of digital entrepreneurs with a turnover above certain thresholds, in its essence it is a direct tax, addressing (albeit rather only temporarily and to an incomplete extent) the problem of the incommensurability of existing income tax rules with the challenges of the digital economy. In this case, the taxation of revenues with digital tax is precisely to ensure the correct implementation of the concept of tax capacity and the neutrality principle. It is to ensure the systemic fairness of the tax law, according to which tax capacity cannot be treated in an isolated manner, but precisely in a systemic manner. This was also the justification for the Spanish solution, pointing out that a tax on certain digital services (Spanish *impuesto sobre determinados servicios digitales*) was introduced because of the long period of time that has elapsed since international debates on the matter began without the adoption of practical solutions, taking into account social pressure, the principle of tax justice and the postulate of sustainability of the tax system, and in view of the adoption of unilateral *ad hoc* tax measures initiated by other countries³².

On the other hand, other reasons underlie the extension of the scope of application of taxation of income in the form of a flat-rate revenue tax in Poland. In the explanatory memorandum to the amending act³³ they were justified by the objective to “increase the attractiveness of taxation in this form and expand the group of taxpayers who will be able to exercise it”³⁴. “Overruling” the principle of tax capacity in this case needs to be justified by a possible non-fiscal function and an intervening application of tax rules.

³² See the preamble to the law introducing this tax: Law 4/2020, of 15 October, on the Tax on Certain Digital Services (Ley 4/2020, de 15 de octubre, del Impuesto sobre Determinados Servicios Digitales, B.O.E. No. 274, of 16.10.2020).

³³ Document No. 642 of 30.9.2020, Rządowy projekt ustawy o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych, ustawy o zryczałtowanym podatku dochodowym od niektórych przychodów osiąganych przez osoby fizyczne oraz niektórych innych ustaw. Uzasadnienie, p. 19.

³⁴ In original: (Zmiany w ustawie o ryczałcie mają) na celu zwiększenie atrakcyjności opodatkowania w tej formie oraz poszerzenie grupy podatników, którzy będą mogli z niej skorzystać.

5. TAX CAPACITY AND THE INTERVENTION EFFECT OF THE TAX

In principle, the effect of tax can be divided into a burdening effect, which is subordinate to the fiscal function, and an intervention effect, where the tax rule induces the taxpayer to act or not to act in a certain way by reducing or abolishing or imposing or increasing the tax burden (whereby more than one intervention effect may be associated with a tax rule). The fiscal function, or income function, is the basic function of taxes and is associated with the need to cover the demand of public budgets for financial resources (Gomułowicz and Małecki, 2013: 259). In this function, the principle of tax capacity is intended to ensure the proper allocation of the tax burden. This principle is so fundamental that in some countries it is explicitly expressed in the Constitution – this is the case, for example, in the Spanish Constitution³⁵, as well as in the constitutions of France, Greece, Italy or Turkey, among others (Drozdowski, 2018: 44–49 and the literature cited therein). However, even if it has not been explicitly articulated in the Constitution, it can nevertheless be derived from other constitutional norms (Drozdowski, 2018: 52). Still, in each of these options, three basic functions of the tax capacity concept can be distinguished. First of all, it justifies taxation itself in general, the imposition of a tax burden on the premise that sources of taxation should be sought where resources are present. Secondly, tax capacity defines the limits of taxation that the legislator should respect. This involves issues such as the tax rate, tax free amounts or various reliefs related to the individual situation of the taxpayer. Finally, thirdly, tax capacity is a way of determining the individual and sum of tax burdens, with the aim of ensuring fair taxation (that is, not permitting both over- and under-taxation) in view of the taxpayer's economic capacity (Collado Yurrita and Moreno González, 2018: 113). When these basic functions are not fully realised in the face of an attempt to achieve a certain intervention effect, the question arises as to how justified and acceptable this is. While it is generally possible for the principle of tax capacity to give way to an interventionist function – as indicated in the literature, in market economies, tax interventionism is the norm (Gajl: 77; Orłowski, 2013: 92), it requires individualized justification, including in particular as to the rationale of the interventional objectives³⁶.

³⁵ Art. 31 of the Spanish Constitution of 1978 (Constitución Española de 1978, B.O.E. No 311, 29.12.1978, as amended).

³⁶ A detailed assessment in this area goes beyond the framework of this paper, which aims to identify the main problematic areas and determine possible directions for searching for their solutions, without conducting a detailed analysis of specific issues.

6. INTERNATIONAL PROPOSALS FOR NEW RULES ON THE DETERMINATION OF TAX CAPACITY

As already indicated, in turn, the taxation of revenues by means of a digital tax finds precisely the full justification in the context of the tax capacity principle. It is possible that this tax (and other equivalent unilateral taxes) will lose its *raison d'être* after some time following the implementation of some comprehensive solutions as a result of the agreement reached at the OECD on the changes to the rules on taxation of international entrepreneurs and the BEFIT project in EU. The agreement reached in July 2021 (OECD/G20) at the OECD forum includes two pillars. Pillar 1, which was initially primarily focused on digital entrepreneurs in discussions, aims to adapt international rules on the taxation of corporate profits to reflect the changing nature of business models, including the ability of entrepreneurs to do business without a physical presence in a country. Under it, countries will be given the right to tax a portion of the profits of certain non-resident entrepreneurs by reallocating a portion of their global profits among the jurisdictions in which the company has customers or users, using an agreed formula. The profits in question would be measured using the financial result, with a small number of adjustments. Pillar 2, on the other hand, aims to reduce excessive tax competition by ensuring a minimum level of taxation of multinational entrepreneurs on all profits by allowing jurisdictions to top up the amount of tax paid by large multinational entrepreneurs to an agreed minimum effective level. This minimum taxation on corporate profits is intended to reduce opportunities for tax avoidance.

At the EU level, both activities related to the OECD agreement and some beyond the OECD agreement are set out in the Communication *Business Taxation for the 21st century*³⁷. It indicates that the European Commission is to propose a new framework for corporate income taxation in Europe in connection with the BEFIT project. The BEFIT framework will be a single set of corporate tax rules in the EU based on two key features: a common tax base and the allocation of profits to Member States on the basis of a formula for distribution (apportionment). They are intended to be based on progress in global discussions, including at the OECD forum. The BEFIT framework is designed to ensure, *inter alia*, that companies can do business in the single market without any unjustified tax barriers, making it easier to do business and protecting Member States against tax avoidance³⁸. BEFIT and the rules it lays down for determining the tax capacity of entrepreneurs with respect to income taxes should not only contribute to the principle of fairness but also to that of tax neutrality and should make it possible to achieve a certain positive intervention effect – the development of economic activity in the EU internal market by eliminating tax obstacles to that activity.

³⁷ COM (2021) 251 final.

³⁸ COM (2021) 251 final, p. 11–14.

CONCLUSIONS

A tax levied in accordance with the principle of tax capacity should create neither an excessive burden on certain taxpayers nor an unreasonably low burden. In the international context, this is related both to the issue of avoiding double taxation and preventing tax evasion or avoidance, as well as to the so-called aggressive tax optimisation, which may create a privileged position of entrepreneurs using it in relation to other economic entities, thus violating the principle of tax capacity and the principles of equity and neutrality. These principles may also be violated in a national context, including by deviating from the criteria of the principle of tax capacity in favour of achieving a certain intervening objective or by unjustifiably varying the rules for determining the tax capacity of entrepreneurs. In case of income taxes, this issue may be related to the abandonment of the determination of tax capacity in these taxes by income (in favour of revenue) or to the differentiation of the rules for the determination of income itself (in some cases as adjusted financial result and in other cases independently of the financial result). In view of the increasing development of general 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 of their business activity. It should also not be underestimated that in certain EU and OECD projects the fundamental categories and concepts are those of balance sheet law, including in particular the proposed adoption of the concept of adjusted financial result for the purposes of determining the tax result.

A distinction should be made between situations where the abandoning of the determination of income 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 policy objective, that requires an in-depth analysis in view of the potential infringement of the principles of equity and neutrality of taxation which may result from that differentiation. On the other hand, in the former case, even temporarily – especially in the international aspect – until international solutions are worked out, it may even be indispensable to differentiate the rules for determining the tax capacity of entrepreneurs (e.g. digital entrepreneurs through their taxation with digital tax) precisely in order to ensure fair and neutral taxation. In this context, it is worth noting that some of the problems underlying these different approaches may be solved by a comprehensive reform of the rules for determining the tax capacity of entrepreneurs, to be developed both internationally within the OECD and in the EU within BEFIT.

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