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The Polish GAAR is Just a GAAR! Why the Head of the National Revenue Administration Thinks Differently?

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Inspiration, purpose and the context of this contribution

In the article "The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR!", Professor Robert Danon convincingly demonstrated that "while the PPT certainly permits a purposive interpretation, it may not be used to build into tax treaty law additional requirements that were never intended". He also wittingly proposes a PPT to regulate the conduct of Contracting States, which, from a tax policy perspective, "could encourage States to act within their treaty obligations and to properly renegotiate the latter when necessary rather than following the easy but dangerous path of trying to circumvent them".

Professor Danon's thought-provoking observations, to which I largely subscribe, inspired me to write a comment on the recent refusal of the Head of the National Revenue Administration (NRA) (Pol. *Szef Krajowej Administracji Skarbowej*) of 28 May 2020 (DKP3.8011.8.2019) to issue a safeguarding opinion related to the disposal of shares of a foreign subsidiary (SubCo 1) by its Polish parent company (ParCo) to a newly established subsidiary (SubCo 2), i.e. the parent sold the majority of shares in one subsidiary to another one. Because the market value of shares of SubCo 1 dropped by 92% between the day of their purchase by ParCo and the day of their disposal to SubCo 2 (a time laps of several years), ParCo realised a multimillion tax loss in 2017, which was considered as a tax advantage under the Polish GAAR.

The refusal means that the mentioned transaction in the view of the Head of NRA constitutes tax avoidance under the Polish GAAR. And that would be nothing peculiar with it, if not the way to achieve such a conclusion by the Head of NRA.

Tax controversy arising from the refusal of the Head of NRA

The Head of NRA stated that the transaction in question contains/passes all three elements/tests of tax avoidance under the Polish GAAR.

Tax intention test and the artificiality test are met despite the existence of a set of non-tax business reasons and the lack of deliberative actions aimed at artificially causing a tax loss

The tax intention test under the Polish GAAR is met when the main or one of the main purposes of the arrangement or a series thereof is to obtain a tax advantage (Article 119a of the Tax Ordinance Act, TOA).

The Head of NRA considered that the disposal of shares was essentially aimed to generate a huge tax loss and therefore the tax intention test was met. This conclusion was reached despite that the ParCo provided the Head of NRA with six non-tax business reasons to sell the shares: (i) ensuring a clear separation of functions between companies in the group; (ii) a significant reduction of the economic risk of the SubCo 1 by transferring its shares to SubCo 2, a profitable company; (iii) a diversification of the risk level enabling effective management of operational and investment risk; (iv) a separation of the holding management from operational management; (v) increasing the possibilities of external financing of new projects and reducing limitations in the use of financial collateral; (vi) obtaining funds that allow the settlement of current liabilities.

It is also worth noting that ParCo was for many years financially involved in SubCo 1. As investment of SubCo 1 turned out to be unsuccessful, the market value of its shares at the time of their sale was only about 8% of the value for which the ParCo acquired them several years earlier. Thus, the economic parameters of the transaction (the current market value of the shares of SubCo1 versus its valued at time of their acquisition), completely independent of ParCo, led to a tax advantage (tax loss). The tax loss was a reflection of the 92% decrease in the market value of the shares of SubCo 1 rather than ParCo's deliberative actions aimed at artificially causing a loss.

The Head of NRA dismissed all of the non-tax business reasons submitted by the ParCo, since in its view all of them were negligible and such reasons cannot rule out the tax intention according to Article 119d TOA. Strikingly, the reference of the Head of NRA to negligible non-tax business reasons could not be based on Article 119d TOA, as they were included only in the project to that provision (preliminary works), which has never been implemented.

The project made an "ambitious" attempt to give words in the Polish language a new meaning; namely, the proposed art. 119d TOA stated that "gaining a tax advantage is to be considered *the main or one of the main purposes* of the action, if, taking into account the other economic purposes of the actions indicated by the party, it should be considered that *this purpose was not negligible*".[1] [the emphases are mine]

As for the artificiality test, the Head of NRA observed that ParCo could dispose the shares of SubCo 1 in a simpler way than by establishing SubCo 2 and selling the shares of SubCo 1 to SubCo2; namely, it could have been done via a division by separation under Article 529 § 1 pkt 4 of the Code of Commercial Companies. This is quite an astonishing observation, because a division by separation can hardly be seen as a "simpler" alternative to the transaction conducted by ParCo from a perspective of a group's restructuration. Moreover, the Head of NRA in its refusal to issue the safeguarding opinion on 21 January 2020 (DKP3.8011.19.2019), that is just four months before the currently discussed refusal, stated that a division by separation was an element of an artificial arrangement. This shows a clear contradiction in the line of reasoning of the Head of NRA in cases regarding an application of the Polish GAAR – in one case a division by separation is a part of an artificial arrangement whilst in the other it would rule out the artificiality.

Still, the biggest surprise in the reasoning the Head of NRA in respect of an application of the Polish GAAR can be found in its considerations concerning the contradiction test.

The Head of NRA says that the contradiction test is immune to standard methods of legal interpretation

An extra dimension of confusion in the analysed refusal stems from the observation of the Head of

NRA according to which the assessment of the contradiction of a tax advantage with the object and purpose of a tax provision must, as a rule, "**depart from traditional methods of legal interpretation, as they are useless for the purpose of applying the GAAR**". Accordingly, the Head of NRA created a new rule in an application of the Polish GAAR: the immunity of the contradiction test to the standard methods of legal interpretation such as literal, systemic and purposive.

One should note that the Head of NRA based its observation on the following quote from the publication of Hanna Filipczyk:[2]

"The necessity to adopt it [the Polish GAAR] is a testimony to the ineffectiveness of legal interpretation, i.e. the fact that it is not possible to use its means (therefore also means of purposive or functional interpretation) to apply the law in such a way that it would frustrate a tax advantage resulting from tax avoidance. (…) Although the GAAR allows to maintain the traditional conviction, established by the Polish doctrine of tax law, about the respect to the so-called linguistic boundary of interpretation, such a victory is in a sense apparent [not real/sham]. It [the apparent victory of the linguistic boundary of interpretation] is so due to the fact that **the GAAR allows to go beyond the conservative boundaries of legal interpretation, admittedly not in terms of legal interpretation, but in applying the law**."[3] [the text in square brackets and emphasis added by me]

The observation of Filipczyk is too far reaching and ambiguous (almost philosophical) and therefore misled the Head of NRA. The way I see it, I believe the most of doctrine is as follows.

The Polish GAAR, as every GAAR, indeed requires to closely examine the purpose of the relevant tax provisions and by doing so it gives a special significance to the object and purpose of the tax law, a different one than that existing under ordinary interpretation of the tax law. Under the ordinary interpretation, the object and purpose is one of many elements that has to be taken into account and not one of the more significant (compared to wording and context). By comparison, their significance under a GAAR is much greater insofar as it authorizes the tax authorities to recharacterize the private law transactions to which the tax law should be adopted, or authorizes some degree of analogical interpretation.[4] Moreover, a GAAR goes further compared to normal legal interpretation, yet not with regard to the question if an arrangement or a series thereof is in accordance with the object and purpose of tax provisions, but due to the fact that an interpreter has to take the subjective intention (yet objectified, i.e. based on relevant facts and circumstances) into account.[5]

Had the Polish GAAR permitted to go beyond standard methods of interpretation to determine whether or not an arrangement or a series thereof is in accordance with the object and purpose of tax provisions, the question would be then, what methods can be used to apply the contradiction test? The Head of the NRA, supported by the quoted controversial observation from the representative of the Polish tax law doctrine, appears to say that an arbitral approach to determine the contradiction test within the discretionary power of tax authorities in order to maximise levying taxes is not only justified, but seemingly the only *right way* to apply the Polish GAAR.

To clearly understand that the above observation indeed follows from the reasoning of the Head of the NRA and to draw legal consequences stemming from it, one should look into the wording of Article 16(1) point 8 of the Corporate Income Tax Act (CITA), which was the legal norm under which the contradiction test was examined. It says that *the expenses on an acquisition (purchase)*

of shares are a tax deductible cost from the disposal of these shares. ParCo met that requirement, as it deemed the expenses on an acquisition (purchase) of shares of SubCo 1 as a tax deductible cost from the disposal of these shares to SubCo 2. Article 16(1) point 8 CITA did not require any additional condition to be met by a taxpayer to consider that the expenses on an acquisition (purchase) of shares constitute a tax deductible cost from the disposal of these shares by the taxpayer.

Consequently, it is difficult to see how the transaction in question led to a tax advantage contrary to the object and purpose of Article 16(1) point 8 CITA. The Head of NRA admitted that ParCo correctly assumed a tax advantage under Article 16(1) point 8 CITA. Yet this assumption followed from the standard methods of interpretation of Article 16(1) point 8 CITA, which, as we now understand, are irrelevant in an application of the contradiction test under the Polish GAAR. In fact, the Head of NRA added new conditions to Article 16(1) point 8 CITA by means of an application of the Polish GAAR and concluded that the transaction conducted by ParCo was in contradiction with Article 16(1) point 8 CITA, as if that article included such new conditions in its wording.

The Polish GAAR, as every GAAR, is just a GAAR!

To paraphrase Professor Danon observations *per analogiam* to the PPT and tax treaty law, while the Polish GAAR certainly permits a purposive interpretation, it may not be used to build into tax law (e.g. Article 16(1) point 8 CITA) additional requirements that were never intended. This is because the way to achieve the purpose of tax provisions is reflected in their wording. The mere application of the Polish GAAR, in turn, cannot rectify the wording of other tax provisions just as the mere purposive interpretation cannot bend their wording to achieve the ultimate (most often fiscal) purpose of a tax regime. In other words, although the Polish GAAR aims to prevent tax avoidance in general, it does not and cannot play the role of an automatic quasi-legislator who changes the meaning of tax law terms without changing their wording. This reveals the importance of SAARs such as the CFC rules, anti-hybrids, TP rules and other SAARs as included in the ATAD I, ATAD II and MLI.[6]

The necessity to use the standard interpretative methods to determine the conditions of an application of any GAAR is a prerequisite of the rule of law. The Polish GAAR, including the contradiction test, is not immune to standard interpretative methods. As neatly pointed out by the Canadian Supreme Court in the judgment of 16 December 2011 in the *Copthorne Holdings Ltd. v. Canada* case:

‘In a GAAR analysis the textual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision. Here the meaning of the words of the statute may be clear enough. The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.’

It seems that determining the contradiction of a tax advantage with the object and purpose of a tax provision under the Polish GAAR will continue to be conflated with a value judgment of what is right or wrong or with theories about what tax law ought to be or ought to do, unless such practice of tax authorities will be precluded either via a GAAR aimed against abuse of tax law by the tax authorities, or by administrative courts. The former is not very likely, at least not in the foreseeable

future, but the latter is, especially in the light of the recent judgments of the Supreme Administrative Court of 30 July 2020 (I FSK 42/20 and I FSK 128/20), upholding the bold, wise and important judgments of the Voivodeship Administrative Court in Wroc?aw (SA/Wr 365/19 and SA/366/19). In those judgments, it was confirmed that the administrative courts have the power to examine whether the tax authority reasonably relies on the suspension of the limitation period by initiating fiscal penal proceedings. The judgments are beneficial for taxpayers and give hope that in the future, unjustified and instrumental fiscal criminal proceedings initiated by the authorities will be discontinued, and more importantly, they will not have the effect of suspending the limitation period for tax liabilities.

Likewise, there is hope that the administrative courts will pour a cold bucket of water over the Head of NRA by confirming the necessity to use the standard interpretative methods to determine the conditions of an application of the Polish GAAR, including the contradiction test. There is no place for a quasi-legislative application of GAARs in democratic countries which respect the rule of law. *GAARs are just GAARs.*

[1] *See* W. Nykiel, 'Nowe przepisy dotycz?ce klauzuli przeciw unikaniu opodatkowania – wybrane aspekty legislacyjne' ['New provisions regarding general anti-avoidance rule – selected legislative aspect'], in J. G?uchowski (red.), *Wspó?czesne problemy prawa podatkowego – teoria i praktyka. Ksi?ga jubileuszowa dedykowana Profesorowi Bogumi?owi Brzezi?skiemu (tom I)*, Warsaw: Wolters Kluwer Polska (2019), Lex online, sec. 3.

[2] „Sprzeczno?? z przedmiotem lub celem ustawy podatkowej lub jej przepisu" jako klauzulowa przes?anka unikania opodatkowania, Przegl?d Podatkowy 3/2020, pp. 35-36.

[3] Originally: „Konieczno?? jej przyj?cia jest ?wiadectwem niewydolno?ci wyk?adni, tj. tego, ?e przy u?yciu jej ?rodków (zatem tak?e ?rodków wyk?adni celowo?ciowej czy funkcjonalnej) nie jest mo?liwe dokonanie takiego aktu stosowania prawa, który udaremni?by korzy?? podatkow? wynikaj?c? z unikania opodatkowania. (…) Jakkolwiek wi?c klauzula pozwala zachowa? tradycyjne, utrwalone w polskiej doktrynie prawa podatkowego przekonanie o konieczno?ci respektowania tzw. j?zykowej granicy wyk?adni, to jednak jego zwyci?stwo jest w pewnym sensie pozorne. Klauzula bowiem pozwala wykroczy? – wprawdzie nie w wyk?adni, ale w stosowaniu prawa – poza te konserwatywne granice".

[4] *See* F. Zimmer, *In Defence of General Anti-Avoidance Rule*s, 72 Bulletin for International Taxation 2019, No. 4, Published online: 11 March 2019, sec. 7.

[5] *See* D. Weber, *The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, 44 Intertax 2/2016, p. 114.

[6] Cf. B. Ku?niacki, *Chapter 6: The GAAR (Article 6 ATAD)*, in W. Haslehner, G. W. Koefler, A. Rust (eds.), *A Guide to the Anti-Tax Avoidance Directive*, Edward Elgar Tax Practice Series, sec. E.2.

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