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SELECTED PROBLEMS OF THE PHENOMENON OF MINIMIZING TAX BURDENS

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Abstract

The aim of this article is to reflect upon the selected problems of the phenomenon of minimizing the tax burdens. It analyses the nature of the phenomenon, its causes and consequences.

Taxpayers increasingly more often undertake actions aimed at minimizing or even eliminating tax burdens. At the same time, it is expected that as a result of the dissemination of knowledge about the techniques of minimizing the tax burdens, the availability of professional advisory in this aspect, the phenomenon will become even more common than it is now. It bears serious consequences in the form of subsequent lowering of public income. It is therefore necessary to pay attention to this problem and to take thoughtful actions in order to limit this phenomenon.

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1. Introduction to the problem

Taxpayers increasingly more often undertake actions aimed at minimizing, or even eliminating, tax burdens. At the same time, it is expected that as a result of the dissemination of knowledge about the techniques of minimizing the tax burdens, the availability of professional advisory in this aspect, the phenomenon will become even more common than it is now. It bears serious consequences in the form of subsequent lowering of public income. The aim of this article is to reflect upon the selected problems of the phenomenon of minimizing the tax burdens. It analyses the nature of the phenomenon, its causes and consequences.

Minimizing the tax burdens is a term that encompasses both legal and illegal actions of the tax payers, taken in order to decrease the tax burdens. Tax evasion is an action contrary to the law. These are all the situations when the taxpayer does not fulfill their obligation or obtains tax benefits that are not entitled to them¹. Such activity is illegal and is a fraught with criminal sanctions. Whereas tax optimization is relating to legal actions. They consist of carrying out a prior analysis of the consequences of undertaken legal actions and selection of the form and structure of planned transaction which are permitted by law and result in reducing the tax burdens². On the other hand, tax avoidance is acting in accordance to the literary wording of the provisions, however contrary to the spirit of the law, and the intention of the legislator. It is neither prohibited by the law nor encouraged by it³.

It is worth noting that the terms tax optimization, tax planning and tax evasion are not only naming the mode of action of the tax payers, but also describe their way of thinking about tax burdens. It is an expression of the taxpayers' attitude when

¹ R. Sowiński, *Uchylenie się od opodatkowania. Przyczyny, skutki i sposoby zapobiegania zjawisku*, Poznań 2009, p. 15.

² M. Jamrózy, S. Kundert, *Optymalizacja opodatkowania dochodów przedsiębiorców*, Warszawa 2013, p. 24; A. Olesińska, *Polska klauzula ogólna zapobiegająca unikaniu opodatkowania na tle rozwiązań w innych państwach*, ed. [in:] B. Brzeziński, *Wykładnia i stosowanie prawa podatkowego. Węzłowe problemy*, Warszawa 2013, p. 232, A. Ladziński, *Prawne granice optymalizacji podatkowej*. "Przegląd Podatkowy" 2008, no. 6, p. 18 et seq.

³ A. Olesińska, *Polska klauzula ogólna ...*, p. 232.

they are not focused on fulfilling their tax obligation, but think about ways to lower the tax burden.

The reluctance to bear tax burdens is inscribed in the human nature. It is caused by the tax obligation being an interference into the property of the tax payer, it enforces giving up a part of it for the sake of institutions under public law. Each tax burden results in decrease of the state of possession of an individual therefore it is difficult to fully accept such a state, more so because in that way it decreases the possibility to fulfill the taxpayer's consumer needs⁴. Taxpayers are acting rationally, making choices by using the criteria of maximizing the wealth, they strive to gain a maximal benefit⁵. At the same time, due to the free of charge nature of taxes, the taxpayer is not entitled to mutual claims from the institutions under public law. The taxpayers understand the necessity of paying taxes, however such a situation is met with a natural resistance⁶. It is, therefore, hardly surprising that the taxpayers undertake various kinds of actions that are aimed at decreasing tax burdens.

Nowadays a trend to utilize various forms of minimizing tax burdens by the taxpayers is very strong. The issues of tax optimization, tax avoidance or tax evasion are often addressed in recent literature. Moreover, beliefs are being expressed that tax management should exist in the minds of all people who pay taxes and not only entrepreneurs should undertake actions in the process of tax optimization⁷.

2. The causes of minimization of tax burdens

The causes of minimization of tax burdens both in legal and illegal ways, are not uniform. They should be searched for in four areas: moral, political, economic and technical⁸. The reluctance of the taxpayers to pay taxes, i.e. to give away a part of the income they worked for, for the sake of institutions under public law – is

⁴ D. Ćwikowski, *Gospodarka nieoficjalna a system bezpieczeństwa ekonomicznego państwa* [in:] K. Raczkowski (ed.), *Bezpieczeństwo ekonomiczne. Wyzwania dla zarządzania państwem*, Warszawa 2012, p. 303 et seq.; P. Pietrasz, *Opodatkowanie dochodów nieujawnionych*, Warszawa 2007, p. 42.

⁵ M. Niesiobędzka, *Dlaczego nie płacimy podatków? Psychologiczna analiza uchylania się od opodatkowania*, Warszawa 2013, p. 21.

⁶ M. Niesiobędzka, *Dlaczego nie płacimy...*, p. 13 et seq.; P. Pietrasz, *Opodatkowanie dochodów...*, p. 43; R. Sowiński, *Uchylanie się...*, p. 37 et seq.

⁷ J. Szlęzak-Matusewicz, *Zarządzanie podatkami osób fizycznych*, Warszawa 2013, p. 13.

⁸ P. Pietrasz, *Opodatkowanie dochodów...*, p. 44 et seq.

a natural human reaction, as psychologists and lawyers emphasize⁹. The free of charge nature of taxes alone can develop an aversion. The taxpayer receives a message that their paying taxes is their constitutional obligation, but they are not entitled to demand any benefits in return. In that sense taxes can be even considered as a sign of submission¹⁰.

The sources of minimization of tax burdens lie not only in the external but also in the internal sphere of human life. The natural human tendency to avoid taxes is only one of the factors. Other very important causes of minimizing the tax burdens are: high level of tax burdens, bad tax policy, low quality of tax legislation, probability of tax control, the severity of the sanctions or a low level of ethics of tax authorities, and even the economic situation. The adversity of taxpayers is intensified by the lack of knowledge about what the sources coming from taxes are spent on or by the mismanagement and irrational spending of public money.

Introducing new taxes, not accepted by the society and increasing them results in defensive reactions of the tax payers that manifest in minimizing of the tax burden¹¹. At the same time, the legislator appears not to notice that a high level of tax burdens does not equal to proportionally higher budget revenues¹². Exceeding the limits of taxation can lead to liquidation of the source of taxation, what is not a desired outcome¹³. By setting taxes, shaping their legal construction, the legislator should remain loyal to the taxpayer, which means that they should respect the payer's freedoms and economic rights guaranteed by the Constitution¹⁴. In the mind of the taxpayer, however, a conviction is rooted that the argument about the justice of the taxation is overused to mask the fiscal interest of the state¹⁵. The payer's resistance is a natural reaction in the face of the increase of tax burdens, whether it is made by increasing of the current rates, by removing tax reduc-

⁹ A. Gomułowicz, *Podatki a etyka*, Warszawa 2013, p. 39; M. Niesiołowska, *Dlaczego nie płacimy...*, p. 7, P. Pietrasz, *Opodatkowanie dochodów...*, p. 42 et seq.

¹⁰ A. Gomułowicz, *Podatki a etyka...*, p.34.

¹¹ D. Ćwikowski, *Gospodarka nieoficjalna...*, p.305 et seq.

¹² For more on the relationship between the amount of tax and tax payer's behavior: R. Sowiński, *Uchylanie się...*, p. 65 et seq.

¹³ P. Pietrasz, *Opodatkowanie dochodów...*, p. 43.

¹⁴ A. Gomułowicz, *Podatki a etyka...*, p. 33.

¹⁵ A. Gomułowicz, *Zasady podatkowe*, [ed.] [in:] L. Etel, *System prawa finansowego. Prawo daninowe*, vol. III, Warszawa 2010, p. 127.

tions and exemptions, or by introducing new regulations imposing additional tax burdens on the payers¹⁶.

It should be explained that tax optimization, a legal way of lowering the tax burdens, is a search for possibly the most beneficial level of tax burden, a group of actions taken by the tax payer leading to a reduction of tax burdens within the limits of applicable law¹⁷. It is most often minimizing of the tax burden, however it should be stipulated that the tax payers take various factors into consideration. While analyzing the tax situation they can choose a solution that will not guarantee the lowest possible level of taxation, but at the same time it will be e.g. the least time-consuming or the least risky. During tax planning, various factors are taken into consideration, not only the absolute amount of tax burden. Lack of coordination between essential factors of optimization as the amount of tax burden, costs connected with paying taxes and the level of tax risk can bring an opposite effect than the desired one. It is probable that the tax payer's effort to minimize the tax burden without at the same time balancing of, for example, the tax risk or the cost of the consulting services will result in – at least in some cases – additional costs outweighing the benefits coming from the minimizing of the tax burden. Therefore the taxpayers' actions should focus on achieving balance between lowering the tax risk and tax spending¹⁸. Tax optimization should thus be understood as the search for possibly the most beneficial, optimal with regards to tax burdens and tax related issues, structures and solutions relating to economic activities undertaken by the taxpayers¹⁹.

Free market enforces continuous increasing of the level of competitiveness of businesses, especially in times of downturn and crisis, what should be associated with, among others, reduction of business costs. One of the ways of lowering the business costs is tax optimization. As far as business costs are concerned, nowadays there is nothing that provides as significant possibility to lower economical costs of running a business as tax planning does²⁰. A company structure that is op-

¹⁶ J. Szlęzak-Matusiewicz, *Zarządzanie podatkami osób fizycznych*, Warszawa 2013, p. 21.

¹⁷ J. Wyciśłok, *Optymalizacja podatkowa. Legalne zmniejszanie obciążeń podatkowych*, Warszawa 2013, p.31.

¹⁸ J. Szlęzak-Matusiewicz, *Zarządzanie podatkami ...*, p.20.

¹⁹ J. Wyciśłok, *Optymalizacja podatkowa ...*, p. 29.

²⁰ J. Wyciśłok, *Optymalizacja podatkowa ...*, p. VII.

timal with regards to taxes decides about competitive advantage and is a factor that has increasingly more meaning in shaping the decisions of entrepreneurs²¹.

3. Consequences of the phenomenon

The necessity of tax collection by the state is tightly connected to the tasks it carries out. The more tasks, the greater the need of funds. Therefore, it needs to be clearly communicated to the taxpayers, that the demands they are vocalizing such as f. ex. access to high quality education and medical services, social services, security, etc. generate high expenses and at the same time a need for funds necessary to fulfill those tasks.

According to art. 84 of the Constitution of the Republic of Poland, everyone is obliged to bear the public burdens and coverage, including taxes referred to in the act. Use of the biggest quantifier “everyone” by the legislator of the constitutional system is an expression of generality of the duty to support the state and sustaining its functions by everyone who benefits from its care²².

Too big, widespread, and additionally multi-sector tax optimization, tax avoidance and evading paying taxes lower the level of the economic safety of the state and the quality of public goods as a result of necessary financial savings²³. Minimizing of the tax burdens bears negative consequences in regards to the stability of public finances, predictability of income and planning public expenses. The consequence of that phenomenon will be a significant lowering of the budgetary income. Having adequate means by the State is necessary to carry out its constitutional tasks and those imposed by the society²⁴. Avoidance of bearing the tax burden not only lowers the state’s ability to fulfill its tasks, but also negatively affects the economy²⁵. While carrying out an analysis of economic, legal and social consequences of minimizing the tax burdens, the scale of the phenomenon is important²⁶. Cur-

²¹ J. Wyciśłok, *Optymalizacja podatkowa* ..., p. 30.

²² T. Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną*, Warszawa 2010, p. 123

²³ D. Ćwikowski, *Gospodarka nieoficjalna*..., p. 310; R. Sowiński, *Uchylenie się*..., p. 156.

²⁴ A. Gomułowicz, *Podatki a etyka*..., p. 121.

²⁵ A. Gołdyn, *Przyczyny ucieczki przed podatkiem*, “Monitor Podatkowy” 1996 no. 6, p. 170 et seq.; R. Sowiński, *Uchylenie się*..., p. 155 et seq., as well as p. 182 et seq.; J. Wyciśłok, *Optymalizacja podatkowa* ..., p. 7

²⁶ M. Niesiobędzka, *Dlaczego nie płacimy*..., p. 11.

rently the size of the phenomenon of minimizing the tax burdens is big and idynamic, and is still growing²⁷.

Measures taken in order to prevent and fight the phenomenon of minimizing the tax burden can be divided into two categories, one is legal measures and the other is related to tax payers' ideas. The tax law provisions should be constituted whilst respecting the requirements of proper legislation²⁸. At the same time, it should be noted that the more complicated the tax system is, the bigger benefits can be acquired by the taxpayers as a result of legislative errors²⁹. Introduction of legal solutions that will result in an increase of the sense of fairness of the tax system should bring about an increase in cases of voluntary fulfillment of tax obligations by the taxpayers³⁰.

Modern states should react to the phenomenon of minimizing the tax burden. It cannot be allowed for a situation to exist, where taxpayers evade paying taxes and avoid taxation and where the dynamic of that is still growing. At the same time it needs to be said that the phenomenon of avoiding taxation is only seemingly less harmful to the state's financial interests than illegal tax evasion³¹. The common feature of the actions, different in their character, undertaken in order to avoid taxation is the lowering of the tax burden below the level considered by the legislator as adequate in a given legal and tax situation³².

The easiest way to compensate the shortages in tax revenues by the public authority is to increase the amount of the tax burdens or to introduce new ones. Minimizing of the tax burden, evading taxes can directly result in shifting the tax burdens onto taxpayers who do not use minimizing techniques³³.

²⁷ P. Pietrasz, *Opodatkowanie dochodów...*, p. 43; R. Sowiński, *Uchylanie się...*, p. 169.

²⁸ Ruling of the Constitutional Court (TK) from 11 May 2004, K 4/03, OTK-A 2004, no. 5, entry 41.

²⁹ A. Gomułowicz, *Wybrane zagadnienia prawodawstwa podatkowego*, "Przegląd Legislacyjny" 1999, no. 1, p. 18.

³⁰ R. Sowiński, *Uchylanie się...*, p. 229.

³¹ Ruling of the Supreme Administrative Court (NSA), I SA/Po 1883/97.

³² B. Brzeziński, A. Olesińska, *Klauzula normatywna zapobiegania unikaniu opodatkowania* [in:] B. Brzeziński (ed.), *Prawo podatkowe. Teoria. Instytucje. Funkcjonowanie*, Toruń 2009, p. 290; A. Olesińska, *Polska klauzula...*, p. 233.

³³ A. Gomułowicz, *Podatki a etyka...*, p. 122.

4. Minimizing of the tax burden – is it common or is it an exception?

Undertaking actions by the taxpayer in order to minimize or even eliminate the tax burdens is becoming increasingly popular. In recent years we observe an increase of the scale of that phenomenon³⁴. What is more, it seems, that as a result of the dissemination of knowledge about ways of minimizing the tax burden, the availability of professional advice in this respect, the phenomenon will become even more common than it is now.

The phenomenon of tax optimization, that is finding legal ways to lower the tax burden is, and should be, accepted. It is a consequence of legal regulations intentionally introduced by the legislator, e.g. tax deductions and exemptions, the right to choose between possible methods of taxation. If the existing law gives the taxpayer an opportunity to select a few legal constructs to achieve the intended economic purpose, and each of them will have a different fiscal dimension, then choosing the most beneficial solution cannot be treated as a circumvention of the law³⁵. There is, after all, no norm in the applicable tax laws that can be used to derive a principle from, that would require the taxpayer to act in order to create a tax burden in the highest possible amount, to maximize the tax burdens³⁶. If the existing law gives the taxpayer the opportunity to choose from a number of legitimate ways to achieve the intended economic purpose, and each of them will result in a different height of the tax burden, the choice of the most favorable tax solutions cannot be regarded as a circumvention of the law³⁷.

In Polish legislature there is no added legal norm, which would prohibit taxpayer to take steps to reduce or even avoid taxation, unless of course the actions of the tax payer are not in conflict with the existing regulations.

Specialists had a large influence on the dissemination of actions to minimize the tax burden. They are providing services in the field of possibilities of optimal use of tax components, but also of using the imperfections of the tax law.

³⁴ P. Pietrasz, *Opodatkowanie dochodów...*, p. 43.

³⁵ Ruling of the Administrative Court in Warszawa (WSA) from 30 March 2004, III SA 2984/02, CBOSA

³⁶ A Ruling of Administrative Court in Warszawa (WSA) judgement from 31 May 2006, III SA/Wa 983/06, CBOSA and jurisdiction cited in it.

³⁷ K. Zagrobelny, Gloss to the ruling of the Supreme Administrative Court (NSA) from 9 February 2000, I SA/Gd 2036/97, "Orzecznictwo Sądów Polskich" 2001, no. 10, p. 153.

The problem of minimizing the tax burden has become an important venue of action of experts, advisors in the field of legal services who offer consultations in this regard. A large number of publications, both of a specialized and popular character, and information on the subject provided by the media also contributed largely to dissemination of the phenomenon of tax optimization. Therefore, one should expect the intensification of the phenomenon of tax optimization. This assertion is confirmed by studies which indicate existence of the common beliefs about the frequency and widespread occurrence of phenomenon of hiding income³⁸.

Today, tax optimization, tax avoidance and tax evasion even cease to be a unique phenomenon, and become a standard. This is also due to the fact that tax payers are forced to use them by the competition that achieves better financial results using the tools to minimize the tax burden³⁹. The social aspect of the phenomenon is also a factor that affects the potential increase of scale of the phenomenon.

5. Outlook

The phenomenon of minimizing the tax burden is widely distributed throughout the world, it is a global phenomenon that is gaining in intensity and cannot be neglected⁴⁰.

So far the entrepreneurs took advantage of the possibilities of tax optimization very carefully. Many managers recognize tax optimization as a risky way of reducing costs⁴¹. However, this phenomenon is expected to intensify. In particular, the dissemination of knowledge and the availability of advisory services in the field of tax avoidance and tax optimization will contribute to it, as well as a large number of publications describing this problem. Currently, tax optimization is an important area of the business, it became profitable not only for international corporations, but also for operating locally tax advice offices.

Tax avoidance and tax optimization brings the benefit of a lower tax burden to increasingly more tax payers. Practical communication flowing directly from other taxpayers is an important factor that will increase the scale of actions taken to reduce the tax burden. If taxpayers are convinced that in a similar situation, other tax

³⁸ R. Sowiński, *Uchylanie się ...*, p. 131.

³⁹ J. Wyciśłok, *Optymalizacja podatkowa...*, p. 2 et seq.

⁴⁰ R. Sowiński, *Uchylanie się ...*, p. 221.

⁴¹ J. Wyciśłok, *Optymalizacja podatkowa...*, p. 30.

payers would benefit from techniques to minimize the tax burden, they will be more inclined to take such action⁴². Entrepreneurs observing the competition, which uses tax optimization, will be somewhat forced to take the same measures to minimize the cost of doing business. Competitiveness, the rules of the capital market are also ruthless in this regard. Tax optimization, as graphically indicated by K. Zagrobelny, is not the notion of a black or gray area, but the action of the wise and prudent people, because it is hard to accept that someone who could pay less will pay more⁴³.

The obligation to bear public burdens is a fundamental obligation imposed on citizens, inherently related to the functioning of the state, and even lawful means to minimize the tax burden for taxpayers bear serious consequences in the form of a gradual reduction of public revenues. It is important to remember that no general clause has been introduced that would require the choice of such a method of taxation which would be associated with the highest possible level of the tax burden. An important aspect in this regard is also the ethics of taxpayers, and in relation to tax payers who are large tax payers, also the awareness of management regarding the social responsibility of conducted activities. Minimizing the tax burden has a negative impact on public finances, reduce the budget revenues, adds to the difficulty of planning of budget revenue and expenditure. Taxpayers who evade the payment of taxes or avoid the tax burden, receive financial benefits at the expense of those who diligently fulfill tax obligations⁴⁴. This leads, therefore, to social injustice, which is why public authorities should take steps to prevent it.

The assessment of tax evasion, tax fraud is not difficult. These are attitudes that should be explicitly considered reprehensible and unethical. Deceiving the state in terms of taxes cannot be accepted⁴⁵. However, the assessment of the phenomenon of tax optimization, tax avoiding, which are lawful ways to minimize the tax burden, is not that unambiguous. First of all, the natural resistance of taxpayers to avoid sharing assets and earned income should be taken into account. The principle of freedom of contract is also significant in this regard, which may benefit tax payers shaping their legal and tax situation.

⁴² R. Sowiński, *Uchylenie się* ..., p. 132.

⁴³ K. Zagrobelny, *Gloss to* ..., p. 153.

⁴⁴ A. Gomułowicz, *Podatki a etyka* ..., p. 122.

⁴⁵ A. Gomułowicz, *Podatki a etyka* ..., p. 34.

However, the difficulty of making a clear assessment of the phenomenon of minimizing the tax burden, especially with regard to actions in accordance with the law, should not obscure the effects it causes and consequences of the intensification of this way of thinking of the tax payers about the tax burden. Negative effects of the tax burden minimization for public finances will grow in direct proportion to the increasing frequency of this phenomenon. For this reason, the awareness of the legislature of this problem is essential, as well as taking deliberate action to reduce its effects. At the same time, these actions should be undertaken within certain reasonable limits. A not permissible response to the problem of intensifying the effects of tax optimization and tax avoidance would be an introduction of regulations that will lead to excessive fiscal stringency. This means that the legislature must respect the constitutional standards, and respect the political, economic and psychological boundaries of taxation⁴⁶.

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⁴⁶ A. Gomułowicz, *Podatki a etyka...*, p. 33.

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