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À PROPOS DE NOUS

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THE WITHHOLDING AGENT'S OBLIGATIONS AND THE CONCEPT OF OPEN GOVERNMENT

by **Magdalena BUDZIAREK**, Department of Financial Law of
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This article aims to present principles imposing withholding agent's obligations under Polish law and their evaluation from the point of view of assumptions of the open government concept. This assessment is important due to the widespread nature of the withholding agent's obligations and the seriousness of the burden of obligations.

Withholding agent's obligations in the Polish legal system are currently being imposed on a wide range of entities; on employers and other entities paying benefits subject to personal income tax¹ and legal persons², notaries on inheritance and gift tax³ and tax on civil law transactions⁴, on enforcement bodies and court bailiffs in respect of goods and services tax⁵ and excise duty⁶, and also on entities hosting a poker tournament in the field of gaming tax⁷.

The strong tendency to expand the catalog of entities acting as withholding agents should also be noted. In an international context, the OECD in seeking ways to reduce tax evasion, is now proposing to introduce a withholding tax for international digital economy transactions. In this case, the withholding agent's obligations would be imposed on business entities purchasing digital goods or services (*business-to-business*) and on payment institutions if digital goods or services are purchased by the consumer (*business-to-consumer*)⁸.

A significant ailment of the withholding agent's function indicates the essence and scope of the withholding agent's obligations. Determinations in this respect define the legal limits of imposition of the withholding agent's function, which are necessary for the assessment of the Polish law from the point of view of an open government concept.

¹ Act of July 26, 1991 on Personal Income Tax, Dz. U. z 2016, pos. 2032 t.j..

² Act of February 15, 1992 on Corporate Income Tax, Dz.U. z 2016, pos. 1888 t.j.

³ Act of July 28, 1983 Inheritance and Gift Tax Act, Dz.U. z 2017, pos. 833 t.j.

⁴ Act of September 9, 2000 Tax on Civil Law Transactions, Dz.U. z 2017, pos. 1150 t.j.

⁵ Act of March 11, 2004 on Goods and Services Tax, Dz.U. z 2017, pos. 1221 t.j.

⁶ Act of December 6, 2008 Excise Duty, Dz.U. z 2017, pos. 43 t.j.

⁷ Gambling Act of November 19, 2009 Dz. U. z 2016, pos. 471 t.j.

⁸ OECD/G20 Base Erosion and Profit Shifting. Project. Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, p. 113-114.

§ 1 – WITHHOLDING AGENT – DUTIES AND RESPONSIBILITY

The essence of the withholding agent's institution is the obligation to carry out transactions which relate to tax payable by another entity. According to Article 8 Act of August 29, 1997 Tax Ordinance⁹ “a withholding agent (called also paying agent-added by author) is a natural person, a legal person or an organizational unit without legal personality that, pursuant to the provisions of tax law, is obliged to calculate tax, collect tax from a taxpayer and pay tax to a tax authority within the appropriate time limit”. As is apparent from the scope of the withholding agent's obligations, he is a peculiar intermediary between the taxpayer and the tax authority. It is an entity that assists the state in collecting taxes.

“A withholding agent who fails to perform the obligations laid down in Article 8 Tax Ordinance is liable for uncollected tax or for collected but unpaid tax. A withholding agent is liable for this amounts with his entire property. If a tax authority discovers in the course of tax proceedings that the withholding agent fails to perform his obligations, the tax authority issues a decision on the tax responsibility of a withholding agent determining the amount due on account of tax not collected or collected but not paid. A withholding agent is not liable if otherwise provided in separate provisions or if tax was not collected due to the taxable person's fault; if this is the case, the tax authority shall issue a decision on the taxable person's responsibility. The taxable person's responsibility may be declared in a decision defining the amount of the tax liability” (Article 30 § 1, 3, 4 i 5 Tax Ordinance).

The withholding agent also has obligations other than calculating, collecting and paying taxes. In the Polish doctrine, they are referred to as instrumental tax obligations. In spite of the considerable variation in their character and the extensive catalog, the above obligations are referred to in Article 8 Tax Ordinance. These include, for example, the obligation to prepare and submit a tax return to the tax authority and to send it to the taxpayer, obligation to store tax collection documents until the end of the limitation period of the withholding agent's liability¹⁰ or obligation to appoint persons whose duty it is to calculate and collect taxes, and to pay the collected taxes to a tax authority¹¹.

⁹ Dz.U. z 2017, pos. 201 t.j..

¹⁰ According to Article 32 Tax Ordinance “withholding agents are obliged to store documents relevant to the collection of taxes until the end of the limitation period of the withholding agent's liability” (sec. 1). “In the event of liquidation or windup of a legal person or organisational unit without legal personality, the entity that conducts the liquidation or windup notifies the competent tax authority in writing of the place where documents relevant to the collection of tax are stored at the latest on the last day of the existence of a legal person or organisational unit without legal personality” (sec. 1a). “After the end of the time limit referred to in § 1, withholding agents are obliged to deliver documents relevant to the collection of tax to taxpayers; if it is not possible to deliver those documents to taxpayers, documents are destroyed” (sec. 2).

¹¹ According to Article 31 Tax Ordinance “legal persons and organisational units without legal personality that are withholding agents are obliged to appoint persons whose duty it is to calculate, collect taxes, and to pay the collected taxes to a tax authority in a timely

§ 2 – LEGAL NATURE OF WITHHOLDING DUTIES

Withholding duties (an obligation to calculate tax, collect tax from a taxpayer and pay tax to a tax authority) and the accompanying so called instrumental obligations constitute a class of non-monetary burden and public services¹² as stipulated in Article 84 of the Constitution of the Republic of Poland¹³. According to this provision, “everyone is obliged to bear the burden and public services, including taxes, as set forth in the law”. Withholding obligations are burden and public services other than taxes that help to maintain the state, although they are not monetary and their direct purpose is not a fiscal goal.

This determines the need to assess constitutionality of the withholding agent’s institution as regards to providing the withholding agent’s obligations from the point of view of the principle of proportionality (Article 31 sec. 3 of the Constitution). Therefore, in any event, the providing withholding agent’s obligations should be assessed as to whether they are the means to achieve objectives pursued by the legislator, necessary for the protection and realization of the public interest with which they are connected, and whether their effects are proportionate to the extent of the burden imposed on the citizen¹⁴.

Assessing fulfillment by the withholding agent of his obligations as regarding the principle of proportionality, requires determination as to which of the rights or constitutional freedoms are limited by art. 8 of Tax Ordinance¹⁵. In the case of the withholding agent institution, this assessment should be carried out primarily for infringements of the right to property and other property rights (Article 64 sec. 1 and 2 of the Constitution).

Assessment of the suitability and necessity of withholding an agent’s obligations from the point of view of the principle of proportionality should take into account the high degree of effectiveness of the withholding agent’s activities in the field of tax collection.

In Polish and foreign doctrine, it is generally accepted that the withholding agent’s institution provides for effective collection of

manner as well as to report to the tax authority of venue the names and addresses of those persons. This information shall be submitted within the time limit determined to make the first payment, and if any of the appointed person changes - within 14 days from the day when a new person was appointed”.

¹² Budziarek M., *Prawo notariusza do rekompensaty za wykonywanie czynności płatnika w podatkach stanowiących dochody gmin*, „Łódzki Biuletyn Notarialny” No 13, July 2009, p. 89, też, *Charakter prawny poboru podatku przez płatnika*, „Kwartalnik Prawa Podatkowego” No 3-4/2010, p. 62; Dębowska-Romanowska T., *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną*, CH BECK 2010, p. 124-125; Huhla A., *Ciężary i świadczenia publiczne a podatki w świetle art. 84 Konstytucji Rzeczypospolitej Polskiej*, [w:] *Konstytucyjne uwarunkowania tworzenia i stosowania prawa finansowego i podatkowego*, red. Lewkowicz P. J., Stankiewicz J., Białystok 2010, p. 142; Kociubiński P., *Powojenne przekształcenia własnościowe w świetle konstytucji*, Warszawa 2013, p. 149.

¹³ Dz.U. z 1997, No 78, pos. 483.

¹⁴ Judgment of the Constitutional Court of October 25, 2004, sygn. akt SK 33/03, Dz.U. z 2004, No 237, pos. 2382.

¹⁵ Judgment of the Constitutional Court of January 29, 2002, sygn. akt K 19/01, OTK-A 2002/1/1, Dz.U. z 2002, No. 10, pos. 107.

taxes. This effectiveness is primarily a result of the subject's responsibility. The withholding agent is responsible with all of his assets for failure to fulfill his obligations resulting in material damage on the part of the public-law entity. However, there is no public liability for improper performance of the withholding agent's obligations which did not have such an effect. It follows from the liability of the withholding agent that he is interested in collecting a higher amount than he owes because in that case, he is not liable.

Secondly, high efficiency of the withholding agent's actions is derived from his status. The withholding agent is not a public administration body and he fulfills his duties without public authority. Therefore, the legislator imposing the withholding agent's obligations on a specific category of subjects "is forced" - with public interest in mind - to ensure their effectiveness in carrying out this function. Regarding the withholding agent's institution, the time and conditions for tax collection must be established by the legislature in order to guarantee the withholding agent's ability to enforce tax which the competent authorities hold (the right to use enforcement measures). This result was obtained by introducing a collection at source, i.e., a priori or simultaneous collection with taxable transactions (e.g., before payment of remuneration or notarization).

Particular efficiency of the withholding agent's activities in the public interest justifies intervention of the legislator in the rights and freedoms of entities charged in such situations where there is high risk of non-payment of tax. The imposition of the withholding agent's obligations on enforcement bodies and bailiffs in the VAT tax, as well as on entities which pay benefits to non-residents subject to personal and legal income tax, is in accordance with Article 31 sec. 3 of the Constitution.

Assessment of the provision of the withholding agent's obligations in the light of the principle of proportionality also requires that the legislator's intentions of those obligations' regulatory effect remain in proportion to the burden imposed on the citizen (principle of proportionality in the strict sense)¹⁶. Measures aimed at implementing objectives set by the legislator must be as burdensome as possible for the entities subject to the obligations¹⁷. The withholding agent's obligations may be imposed on specific categories of entities, provided that they are - on the one hand - obligations that can be fulfilled and - on the other - such which do not prevent the withholding agent from his normal functioning and do not force him to take a particular course of action. It would be problematic for the burdened entity. The legislator cannot impose the withholding agent's obligations on a given category of entities

¹⁶ Judgment of the Constitutional Court of June 17, 2008, sygn. akt K 8/04, Dz.U. z 2008, No 110, pos. 707; Judgment of the Constitutional Court of October 25, 2004, sygn. akt SK 33/03, Dz.U. z 2004, No 237, pos. 2382; Judgment of the Constitutional Court of November 20, 2002, sygn. akt K 41/02, M.P. z 2002, No 56, pos. 763.

¹⁷ Judgment of the Constitutional Court of 27.04.2004 r., sygn. akt K 24/03, OTK ZU No 4/A/2004, pos. 33, s. 465.

at the same time expecting that from among the many possible and legally permissible ways of doing business, these entities will choose in such a way that these obligations are feasible¹⁸.

§ 3 – WITHHOLDING AGENT AND COSTS OF OPERATING THE TAX SYSTEM

Assessing the degree of burdensomeness of the withholding agent's obligations in the light of the proportionality principle should also take into account the effects of performance of these obligations on the withholding agent's assets. Accordingly, the withholding agent's obligations should also be assessed from the point of view of their proprietary consequences to the subject of the charge and not, as is generally the case, solely to the public legal entity.

Assessing a withholding agent's institution, it is usually indicated that collection performed by the withholding agent is one of the cheapest methods of collecting taxes¹⁹. This cheapness is linked to the reduction of tax collection costs related to the activities of the tax authorities²⁰. Limitation of tax collection costs should be maintained at the lowest possible level. Implementation of the above postulate should be made by reducing the costs incurred by taxpayers in connection with the payment of taxes²¹ and the expenses incurred by the state for tax administration maintenance²². Use of the withholding agent's institution to collect taxes results in lowering the costs of state authorities²³. Minimizing these costs is done twofold. First, by transferring to the withholding agents the costs that the state incurs in connection with the collection of taxes and secondly by not including them in the total cost of collecting taxes. The occurrence of this phenomenon is signaled both in foreign²⁴, and Polish doctrine²⁵. There is no doubt that the performance of the withholding agent's obligations entails the incurrence of expenses by the entity (e.g., cost of an additional employee to be charged with the calculation, collection and payment of tax). Expenses of the withholding agent cover all expenses that the entity incurs as a withholding agent. Therefore, they do not cover only the costs of performing the

¹⁸ Judgment of the Provincial Administrative Court in Warsaw of July 18, 2007, sygn. akt III SA/Wa 759/07, <http://orzeczenia.nsa.gov.pl>.

¹⁹ Unlike: Alik M., von Kommer V., *Handbook for Tax Administration, Organizational Structure and Management of Tax Administrations 2000*, Ministry of Finance, The Netherlands, p. 12; Panfil P., *Zabezpieczenie realizacji obowiązków ciążących na płatniku*, „Gdańskie Studia Prawnicze” tom XIX 2008, p. 437.

²⁰ Rusek J., *Instytucja płatnika w prawie polskim*, CH BECK, Warszawa 2007, p. 49.

²¹ Wójtowicz W. (red.), *Prawo podatkowe – część ogólna i szczegółowa*, CH BECK Warszawa 2009, p. 24.

²² Gomulowicz A., Malecki J., *Podatki i prawo podatkowe*, Warszawa 2006, p. 38.

²³ Sawczuk J., *Odpowiedzialność podatkowa i zabezpieczenie realizacji obowiązków ciążących na płatniku*, „Studia Prawnicze KUL” No 1 (53) 2013, p. 111; also: Olszowy W., *Niektóre zagadnienia prawne podmiotowości podatkowej*, Acta Universitatis Lodzensis. Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno-Społeczne, seria 1, zeszyt 31, p. 48.

²⁴ Kay J. A. and King M. A., *The British Tax System*, Oxford University Press 1990, p. 54.

²⁵ Rusek J., *Instytucja ...*, p. 54.

obligation to calculate, collect and pay tax, but also the cost of performing instrumental duties.

The withholding agent's costs are internally differentiated. They should cover not only the "financial costs" category, i.e., expenses related to the performance of obligations expressed in money, but also "time costs" and "psychological costs". The withholding agent's costs are therefore the equivalent of the time spent by that entity in calculating, collecting and paying taxes, preparing tax returns, and the equivalent of stress often caused by misunderstanding tax law. The above costs - even with the exception of "psychological costs" which are difficult to calculate - are enormous²⁶. Their distribution and level is varied and dependent on many factors, including the type of tax to be calculated, collected and paid (tax on civil law transactions and the tax on goods and services) as well as the status of the withholding agent (small employer and large corporation).

Partial coverage of the above costs serves in practice the institution of "remuneration" for the performance of the withholding agent's obligations. According to Article 28 sec. 1 Tax Ordinance "withholding agents are entitled to lump-sum remuneration for timely payment of taxes collected on behalf of the state budget. If the tax is the income of a local government unit, the local government may determine the remuneration for withholding agents for the collection of taxes" (Article 28 sec. 4 Tax Ordinance). The withholding agent's remuneration takes the form of lump-sum remuneration, due to difficulty in calculating all the costs incurred by the withholding agent and the lack of a close link between the level of costs and the amount of tax paid. Remuneration of the withholding agent - contrary to its name - is not a civil law payment for the provision of services to the state. The withholding agent is obliged to collect taxes by assisting the state in collecting public revenue. Remuneration is a measure to alleviate the burden of public burden, which is the withholding agent's obligations.

In spite of remuneration paid to the withholding agent, which should compensate for a part of their expenses, the legislator does not take into account the costs incurred by the withholding agents in the general cost of functioning of the tax system. Similar claims can be made for remuneration paid to withholding agents, which - even if not included - increases the operating costs of the system. Costs incurred by the withholding agents and due remuneration should be included in the general cost of functioning of the tax system, including the functioning costs of tax administration ("administrative costs" ²⁷) and taxation costs incurred by the

²⁶ Tiley J., *Revenue Law*, 6th edition 2008, Oxford and Portland 2008, p. 10. The most burdensome are the expenses incurred by employers who act as withholding agents to pay for staff who handle PAYE.. *Ibidem*, p. 240-241.

²⁷ The costs of functioning of the tax administration include the cost of remuneration of employees of the tax authorities, the cost of their accommodation and business trips, the cost of paying for telephones or other equipment necessary for their functions. Ishi H., *The Japanese Tax System*, Third Edition, Oxford University Press, 2004, p. 55. Similarly, these costs are accounted for by Polish doctrine - Matuszewski W., *Koszty zapłaty podatku*.

taxpayer (“taxation compliance costs”²⁸)²⁹. Costs equivalent to the expenses incurred by the withholding agents are not included in any of these categories. For obvious reasons, expenses incurred by withholding agents are not expenditures of the state budget or the budgets of local government units, and expenses referred to as taxpayer’s expenses. In the meantime, the sum of the above costs is recognized as a whole for determining the operating costs of the tax system and tax administration, which in turn is the starting point for assessing the efficiency, effectiveness and cost of collecting taxes³⁰.

The need to include the withholding agent’s costs in the “compliance costs” category also arises from the dependency between costs incurred by the withholding agent and the costs associated with functioning of the tax administration and costs incurred by taxpayers in connection with payment of tax. This dependency occurs between all three cost categories, not two³¹. As administrative costs increase, “compliance costs” fall, which includes costs incurred by the taxpayer and the withholding agent. The increase in cost of the withholding agent, however, implies a decrease in both administrative costs and costs incurred by the taxpayer. The withholding agent, while fulfilling his obligations, partially covers both the tax authority and the taxpayer. Existence of the above dependencies clearly indicates that the amount paid by the withholding agent directly affects the cost of functioning of the tax system.

Failure to include expenses incurred by the withholding agents in general cost accounting of functioning of the tax system does not imply that such costs do not exist. There is no such institution as a “free” collection of taxes. Transferring to the withholding agents a part of the expenses associated with tax collection does not also result in the loss of their public character. This is due to the fact that the withholding agent acts as an assistant to the state and not to the taxpayer. For this reason, the withholding agent’s expenditure is not a private matter of the category of the subject but also a public matter.

Although these expenditures are internally differentiated and are not always monetary in nature, they should be disclosed and taken into account from a structural point of view, also from a systemic

Wybrane zagadnienia metodologiczne w świetle ekonomicznej analizy prawa, „Toruński Rocznik Podatkowy” 2010, p. 155.

²⁸ The category of taxation compliance costs includes expenses incurred by the taxpayer to know the tax law (costs of obtaining necessary materials and time, including the costs of paid training), preparation of tax returns and data, tax consultancy services and resolution of any disputes with the authorities. (up to the court of law). Finally, particularly with regard to business entities, these are the costs of keeping records and accounting for tax purposes, the cost of employing additional staff in connection with the necessity of carrying out such work, etc. *See*: Matuszewski W., *Koszty ...*, p. 155.

²⁹ More about the costs of operating the tax system and the tax administration: Evans C., *The operating costs of taxation: a review of the research*, *Economic Affairs* 2001, No 2, p. 5; Tran-Nam B., *Use and Misuse of Tax Compliance Costs in Evans, The operating costs of taxation: a review of the research*, *Economic Affairs* 2001, No 2, p. 281; Rusek J., *Instytucja ...*, p. 50-51; Matuszewski W., *Koszty ...*, p. 151-162.

³⁰ *Ibidem*, p. 162.

³¹ Unlike: Matuszewski W., *Koszty ...*, p. 162; Rusek J., *Instytucja ...*, p. 53.

point of view. These expenditures are important not only from the point of view of competitiveness in the market economy (principle of equality and universality in imposing a withholding agent's obligations), but also from the point of view of public interest. From the principle of proportionality in the imposition of non-tax burden and public services, it appears that the monetary equivalent of these expenditures constitutes a particular component of the state's financial-state system, and in a specific relation to it public expenditure on the maintenance of the state apparatus should decrease. Therefore, a state imposing the withholding agent's obligations is required to disclose and calculate the equivalent of this non-tax burden and public service, in such a way that it forms the basis for political debate on the introduction of the withholding agent's obligations. The above order is not equivalent to calculating the cost of each specific activity for each individual withholding agent, which consists in calculating, collecting and transferring collected tax. This may only concern lump-sum costs, identified in a probabilistic model³². The transparency and calculation of the equivalent of this weight (lump-sum method for determining its amount) is legally required in the light of the Constitution. "Any draft law on the introduction of this obligation requires the applicant to determine the financial consequences of its implementation." (Article 118 sec. 3 of the Constitution) The withholding agent's costs are therefore an obligatory component of justification of the bill in relation to the expected savings in expenditure on tax administration. Non-disclosure of the withholding agent's costs in justification of draft law on the introduction of the withholding agent's obligations violates the standards resulting from the principle of openness of public activity resulting from Article 54 sec. 1 and Article 61 sec. 1 Constitution. Article 54 sec. 1 of the Constitution gives every person the freedom to express their views and to acquire and disseminate information. In line with Article 61 sec. 1 of the Constitution, the citizen has the right to obtain information on the activities of public authorities and persons performing public functions.

Accordingly, the legal criterion that needs to be taken into account when deciding on imposing the withholding agent's obligations is the approximate (flat-rate) calculation of costs associated with fulfilling the function of a withholding agent in relation to the benefit of the state and local government units, in the form of a reduction in the expenditure on state administration and in relation to the benefits of increasing efficiency of tax collection.

Calculating the approximate costs associated with fulfilling the function of the withholding agent and their identification by the applicant in the justification of the bill draft will allow more than a full parliamentary debate over legitimacy of the withholding agent's

³² See: Dębowska-Romanowska T., Budziarek M., *Prawne znaczenie ujawnienia kosztów i nakładów związanych z wypełnianiem obowiązków płatnika*, „Łódzki Biuletyn Notarialny” No 1 (16), November 2012, p. 34.

obligations. Disclosure of the withholding agent's costs is also important for the public consultation of the draft law imposing the withholding agent's obligations at the stage of the government legislative process³³.

Lack of such information significantly undermines the soundness of the public consultation process. In the course of consultation, citizens should have access not only to the draft legislative act but also to the justification which should include a full impact assessment. Therefore, this evaluation should also include the financial implications of the implementation of the law both for the state and for entities charged with the obligations of the withholding agent.

Evaluation of the regulation's financial effects cannot be reduced - as is often the case in Polish practice - to the general conclusion that collection of withholding tax is in the public interest due to high efficiency and low cost of tax collection. This cheapness of collection of withholding tax should be demonstrated by indicating to what extent the expenditure on tax administration will be reduced. Indication of such savings in the expenditure of public funds will constitute an important argument justifying the introduction of these obligations. Citizens, aware of such specific benefits of imposing new obligations on them, are more likely to accept a new public burden. Thoroughly conducted public consultations allow to minimize the conflict where the discussed issue is particularly controversial. This is undoubtedly imposition of the withholding agent's obligations on new categories of entities.

CONCLUSIONS

In conclusion, it should be noted that the current Polish regulations are consistent with the concept of an open government. They fulfill its demands to provide citizens with access to public information and ability to participate in the legislative process in the form of public consultations. Unfortunately, the practice of applying these rules raises many objections. In spite of the legal obligation to calculate and disclose the cost of collecting tax incurred by the withholding agents in the explanatory memorandum of the bill, such costs are not disclosed. This is a consequence of failure to include them in the overall cost of functioning of the tax system, and hence their recognition by the legislator as "non-existent". The public authority submitting a bill for public consultation in such circumstances does not fulfill its informational function and does not operate with respect to the principle of transparency. It is also difficult to talk about the openness and willingness of the government to cooperate with the citizens, which is the essence of an open government.

³³ *The legal basis for carrying out the public consultation of the draft law imposing withholding agent's obligations is sec. 36 of the Resolution No. 190 Of The Minister's Council of October 29, 2013 Working Regulations of the Council of Ministers, M.P. 2016, pos. 1006 t.j.*

