RIGHT TO REIMBURSEMENT OF EXCISE DUTY VERSUS TIGHTENING OF TAX SYSTEM THROUGH INTERPRETATION OF LAW

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1. INTRODUCTION

Reimbursement of excise duty is an essential element of an excise duty recovery process. Tax authorities refuse to comply with the obligation to reimburse excise duty within a statutory period, although the obligation is binding on them. Administrative courts play an important role in this respect as they eliminate those tax decisions from the course of law which are issued to ensure the tightness of the tax system. Courts may exert influence on tax authorities, which are obliged to reimburse excise duty in the event of incorrect implementation of the EU law. An important role in this respect is played by pro-EU interpretation by Polish administrative courts. Judgments given in tax matters play a major role in the legislative process as they enforce amendments to the Polish tax law in a manner consistent with the EU law. Through interpretation of directives in the light of their wording and purposes, the process of harmonising excise duty should be to eliminate irregularities arising on transposition of directives.

This study analyses some select decisions of administrative courts that rejected claims for duty reimbursement under the provisions of the Excise Duty Act[1] which are inconsistent with the European Union law. Addressed here, the topic is all the more important because, as a result of incorrect implementation, tax authorities ensured the tightness of the Polish tax system through interpretation of law.

Excise duty is a tax levied on the consumption of certain excise goods. By levying excise duty, the state taxes the consumption of those products in a particular

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[1] Act of 6 December 2008 on excise duty, consolidated text, Dz.U. 2019, item 864, as amended; hereinafter referred to as Excise Duty Act.

manner which are considered by the state to be excise goods. Excise duty is single-phase tax that increases, and becomes an integral part of a price for excise goods. Excise duty is indirect tax, which means that it is a consumer that ultimately bears the cost of excise duty, and not an entity that is formally obliged to calculate and pay excise duty to tax authorities (e.g. manufacturer, importer, distributor). Excise duty is also a selective tax, i.e. tax imposed by the legislator only on certain goods.[2]

These specific arrangements for excise duty in the EU law are confirmed by the Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty[3]. The provisions of the Horizontal Excise Directive clearly indicate that the EU tax law constitutes an independent autonomous legal system.[4] The EU Directive is a basic instrument for harmonising European law, yet it has no equivalent in Polish legislation. The EU Directive is binding in its entirety upon the member states as far as the result is concerned which is to be achieved by introducing the Directive into the legal system.

For the issue in question, it should be noted that reimbursement of excise duty constitutes a payment other than tax as reimbursement results from settlements between a taxpayer and a tax authority.[5] Legal academics and commentators assume that reimbursement is a specific type of entitlement available to a taxpayer that empowers such taxpayer to request a specific action from the tax authority, i.e. to obtain a certain payment from the tax authority, as reimbursement of excise duty already paid. To be eligible for reimbursement of excise duty on intra-Community supply (export) of excise goods, several criteria have to be met.[6] First, the legal basis for reimbursement of excise duty has be included in provisions of substantive tax law and the taxpayer requesting reimbursement has to satisfy conditions specified in the provisions of tax law.[7] Second, reimbursement of excise duty is an instrument directly related to duties already paid. Third, it is the taxpayer's entitlement and never an obligation to submit a request for reimbursement of excise duty. Fourth, a claim for reimbursement should be determined by the tax authority in a tax decision.

Given the above, it should be noted that one is eligible for reimbursement of excise duty if the Excise Duty Act, which regulates rights and obligations of an excise-duty payer, contains clear provisions making it possible for a tax claim to arise and be determined. Should this be the case, at a written request of an entity

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[2] A. Drozdek, *Przesłanki podmiotowe prawa do zwrotu podatku akcyzowego*, Studia Prawnoustrojowe No. 34, 2016, p. 114.

[3] OJ L 9, 14.01.2009, as amended; hereinafter referred to as Directive 2008/118/EC, the Horizontal Excise Directive, or the Directive.

[4] R. Biernat, *Wpływ dyrektyw i rozporządzeń Unii Europejskiej na polskie prawo podatkowe*, Zeszyty Prawnicze No. 14.4, 2014, p. 155.

[5] B. Brzeziński, A. Olesińska, *Glosa do wyroku NSA z dnia 27 listopada 2003 r. (sygn. III SA 2950/02)*, Przegląd Orzecznictwa Podatkowego No. 2, 2015, p. 118.

[6] See M. Popławski, *Charakter prawny instytucji zwrotu podatku*, Państwo i Prawo No. 9, 2007, pp. 86–88; M. Popławski, *Charakterystyka uprawnień podatkowych*, [in:] L. Etel (ed.), *System prawa finansowego*, Vol. III: *Prawo daninowe*, Warszawa 2010, pp. 632–633.

[7] For tax claims, the relationship valid for a tax obligation where the tax authority is a creditor and the taxpayer is a debtor is reversed. This means that the tax authority becomes a debtor, while the taxpayer becomes a creditor entitled to demand certain performance from the other party to the tax relationship; see M. Popławski, *Charakter prawny*, *op. cit.*, p. 78.

requesting reimbursement, the tax authority is obliged to issue a tax decision and determine a correct amount of reimbursement of excise duty on intra-Community supply (export) of excise goods based on such decision.

2. ENTITIES ELIGIBLE FOR REIMBURSEMENT OF EXCISE DUTY UNDER THE EXCISE DUTY ACT

It is Article 82 paras 1 and 2 of the Excise Duty Act where the legislator provided for reimbursement of excise duty. The aforesaid provisions stipulate the possibility of get excise duty reimbursed in Poland in the event of exporting excise goods outside the territory of the Republic of Poland within the meaning of the Act of 12 October 1990 on the state border protection[8]. Article 82 para. 1 provides for reimbursement in the event of intra-Community supply of excise goods, while Article 82 para. 2 is relating to the export of excise goods outside the European Union. In both cases, excise duty must be first paid in Poland.

The analysis of the provisions of the Excise Duty Act leads to interesting conclusions regarding a group of entities eligible for reimbursement of excise duty. Article 82 para. 1 of the Excise Duty Act points out that there are just two "entities" that are eligible for reimbursement, i.e. the taxpayer that made the intra-Community supply (export) of excise goods, or the entity that purchased those excise goods and made the intra-Community supply (export) thereof. Interpretation of the said provision also leads to significant practical problems, which are reflected in the judgment of the Supreme Administrative Court of 29 January 2014[9]. In its judgment, the Court indicated that there are only and exclusively two categories of entities that are eligible for reimbursement. The first category includes taxpayers that have paid relevant excise duty to an appropriate account of the tax authority (as excise-duty payers) and made intra-Community supply or export of excise goods. The second category includes taxpayers that have purchased from the taxpayer excise goods with excise duty already paid and then made an intra-Community supply or export thereof. This means that both the taxpayer that has made the intra-Community supply or export, and the entity other than the taxpayer that has purchased such goods from the taxpayer and subsequently exported them from the territory of Poland are eligible for reimbursement of excise duty. In this case, the exporting entity pays excise duty by settling the price for excise goods purchased from the excise-duty payer that has already paid excise duty to the account of the competent tax authority. In the ruling of 8 December 2015, the Voivodeship Administrative Court in Kraków[10] highlighted that the provisions of the Excise Duty Act entitle no one but the formal taxpayer or the first purchaser of goods following suspension of excise duty, i.e. the first intermediary in the excise goods distribution chain, to reimbursement of excise duty. With this specific interpretation of the Excise Duty Act provisions, neither the

[8] Consolidated text, Dz.U. 2018, item 1869, as amended.
[9] I FSK 284/13, LEX No. 1449673.
[10] I SA/Kr 1267/15, LEX No. 1968471.

second nor any subsequent intermediary trader in excise goods in Poland before such goods are exported to any other member state or outside the European Union customs territory is eligible for reimbursement of excise duty.

In the cases examined herein, the legislator requires a request for reimbursement of excise duty to be submitted. This procedure results from the provisions of the Excise Duty Act indicating that tax reimbursement in the case of an intra-Community supply of excise goods is possible on a written request submitted to a competent head of a tax office together with documents confirming that excise duty has been paid in Poland. In turn, in the case of export of excise goods, reimbursement of excise duty is possible upon a written request submitted to a competent head of the tax office within a year from the date of exporting excise goods, together with documents confirming that excise duty has been paid in Poland, or of documenting the fact of having exported excise goods from Poland outside the customs territory of the European Union in a manner consistent with customs legislation. As referred to herein above, the legal regulation thus indicates the optional nature of the right to reimbursement that may but does not have to be exercised by eligible entities.[11]

The findings above are thus relevant for the subject matter of this study and correspond to the research problem specified in the title hereof. The legal regulations referred to above include a dichotomous division of entities, actually narrowing down the group of entities eligible for reimbursement of excise duty, and, at the same time, indicating steps that should be taken to receive reimbursement of excise duty on intra-Community supply or export. It is, therefore, beyond doubt that the legislator included a exhaustive list of entities authorised to submit a request for reimbursement of excise duty in Article 82 para. 1 of the Excise Duty Act to ensure the tightness of the tax system. As a consequence, no interpretation is acceptable which would "extend" the group of persons that may claim reimbursement of excise duty, as the steps referred to in Article 82 para. 1 of the Excise Duty Act may only and exclusively be taken by entities expressly mentioned therein. When interpreting the provision of Article 82 para. 1, tax authorities primarily aim at ensuring the tightness of the tax system through interpretation of law.

3. RIGHT TO REIMBURSEMENT OF EXCUSE DUTY UNDER DIRECTIVE 2008/118/EC

Grounds for concluding that the Polish legislator ensures the tax system tightness through interpretation are found primarily in recitals of Council Directive 2008/118/EC. According to the recitals, it is necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all member states. Therefore, at the EU level, it has been clarified when excise goods are released for consumption and who is obliged to pay excise duty. Relevant clarification can be found, inter alia, in the provisions of Article 33(1) to (6)

[11] A. Drozdek, *Sądowa kontrola decyzji podatkowych w sprawie zwrotu podatku akcyzowego w przypadku wewnątrzwspólnotowej dostawy wyrobów akcyzowych*, forthcoming.

of the Directive, which set out the rules for reimbursement of excise duty already paid. Therefore, these provisions should be considered as a binding indication for tax authorities of the member states as to who is to be a taxpayer of excise duty tax, including specifically who may claim reimbursement on account of an intra-Community supply or export of excise goods, and in what situations.

It is also important that any supply, storage for the purpose of further supply, or supply to any business entity operating on the self-employed basis, which occurs in the member state other than the member state where the release for consumption takes place, results in excise duty chargeable in such other member state. The above-specified rule clearly indicates that the payment of excise duty in the member state where the release for consumption takes place has to result in reimbursement of excise duty in the case where the goods concerned have been exported to any other member state or outside the EU, whenever law is interpreted in accordance with the purpose of Directive 2008/118/EC. This means that the EU member state is obliged to reimburse excise duty paid in that member state if excise goods have been moved to another member state or exported outside the European Union. And this is how the principle of single tax at the place of consumption is implemented.

This view is shared by legal academics and commentators, and reflected in judicial decisions. As far as the judicial decisions are concerned, even the Supreme Administrative Court clearly emphasized in its justification to the judgment of 28 February 2017 that the comparison between Article 22(2) Directive 2008/118/EC and Article 82 para. 1 of the Excise Duty Act leads to the conclusion that the tax authority interprets the national provision that is inconsistent with the EU provision, and thereby tightens the tax system. The argument supporting this view is the fact that Article 82 para. 1 narrows down the group of entities eligible for reimbursement of excise duty to entities that have purchased excise goods from the excise-duty payer. In turn, it is clear from Article 22(1) and (2) of Directive 2008/118/EC that the reimbursement of excise duty in the situation described in (1) takes place if the goods subject to a dispatch to another country have been taxed in the country of dispatch, regardless of who traded in these excise goods in the country of dispatch, and how many times. Given the above-described unambiguous wording of Directive 2008/118/EC, subsequent traders in excise goods, who have purchased these goods from the first intermediary, should apply for reimbursement of excise duty because they are eligible for reimbursement under the EU regulations.[12] Although the provisions of the Directive authorise individual member states to introduce their own excise duty reimbursement procedures, these procedures cannot prevent certain categories of suppliers, including intermediaries trading in excise goods, from claiming reimbursement of excise duty. The provisions of the Horizontal Excise Directive neither restrict reimbursement of excise duty to any specific type(s) of entities from which taxed excise goods[13] have been purchased, nor do they authorise member states to introduce any such restriction. This view is

[12] Judgment of the Supreme Administrative Court of 28 February 2017, I GSK 1967/15, LEX No. 2274855.

[13] Judgment of the Supreme Administrative Court of 28 February 2017, I GSK 2029/15, LEX No. 2284713.

confirmed by Article 9 of Directive 2008/118/EC that does not entitle any member state to introduce any such restriction as to the entities eligible for reimbursement of excise duty. Evidence to support this claim can be found in Article 33(1) of Directive 2008/118/EC, which provides that "where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State". It is clear from the provision of Article 33 of Directive 2008/118/EC that excise duty should be reimbursed where excise goods, which are dispatched to another country, are subject to excise duty in the country of dispatch, and it does not matter who has traded in these goods in the country of dispatch, and how many times. The unambiguous wording of the Directive allows the conclusion that also further entities trading in excise goods first purchased from the first intermediary are entitled to reimbursement of excise duty. The above-mentioned provision of the Directive thus grants the right of reimbursement to all and any purchasers, i.e. not only to the first intermediary, but also to any further intermediaries in the process of trading in excise goods, provided, however, that they have necessary documents to prove that excise duty has been settled in Poland, and other documents required under excise tax regulations. Moreover, Article 33(6) of the Directive indicates that excise duty should be reimbursed or remitted in the member state where the release for consumption has taken place if competent authorities of the other member state find that excise duty has become chargeable and has been collected in that member state.

The excise duty reimbursement solutions adopted in the Polish Excise Duty Act violate rules arising from the EU law, and thus deprive the EU law of effectiveness. It is, therefore, clear that, by ensuring the tightness of the tax system through interpretation of law, the tax authorities prevent certain entities from getting reimbursement of excise duty paid in the territory of Poland. In this way, tax authorities allow the possibility of the same goods being subject to excise duty in two member states, which is contrary to the principle of taxation in the country of consumption or the principle of single excise duty. This principle results from recital 28 of Directive 2008/118/EC, which allows the possibility of excise goods being taxed in the country of their consumption, as well as the obligation to reimburse duty paid where goods were not consumed in the country but moved to another member state. This means that both the taxpayer that has made an intra-Community supply or export, and the entity that is not the taxpayer and has purchased such goods from the taxpayer and then exported them from the territory of Poland are eligible for reimbursement of excise duty. In this case, the exporting entity pays excise duty by settling the price for the excise goods purchased from the excise-duty payer who has first paid excise duty to the tax authority.[14]

When examining the legal issue of refusal to reimburse excise duty in order to ensure the tightness of the tax system through interpretation of law, it should be pointed out that any formulation of legal provisions that are inconsistent with

[14] A. Drozdek, *Przesłanki podmiotowe*, *op. cit*., p. 119; Judgment of the Supreme Administrative Court of 29 January 2014, I FSK 284/13, LEX No. 1449673.

the EU law makes persons dispatching excise goods to another member state or outside the territory of the Union feel insecure. Such insecurity may increase due to violation of the rules of the EU excise duty system, whose primary purpose is to effectively levy excise duty on excise goods in the country of their consumption, and to make excise goods subject to taxation only once.[15] As a consequence, taxpayers are eligible for reimbursement of any excise duty paid in situations where excise duty is paid in one member state and then the excise goods are exported to another member state or outside the EU. In these cases, the EU regulations require the introduction of the excise duty reimbursement procedure in case of entities that have incurred the cost of excise duty and have dispatched excise goods outside the territory of a given member state. The rule is that intra-Community supplies or exports of excise goods are not subject to excise duty in Poland. Assuming that intra-Community acquisitions or imports of excise goods is subject to excise duty in a supplier's country, any excise duty already paid in Poland should be reimbursed to the supplier. Therefore, if there is an intra-Community supply (export) of excise goods on which excise duty has been paid in Poland, such excise duty should be reimbursed both to the excise-duty payer that has made the intra-Community supply or export, and to other entities that have purchased these goods from the taxpayer and subsequently made intra-Community delivery or export.[16]

The use of the following terms in the provisions of the Excise Duty Act:

1) taxpayer who has made an intra-Community supply (export) of excise goods;
2) entity that has purchased excise goods from the taxpayer and made their intra-Community supply (export),

serves to tighten the tax system through interpretation of law. Following this view, the present Excise Duty Act, when read literally, leads to an erroneous conclusion and, consequently, to double taxation of the same excise goods, which is contrary to the principle whereby excise duty is a single-phase tax. Restriction as to the group of entities deemed eligible for reimbursement in the case of intra-Community supplies and exports of excise goods results in a situation where excise duty is paid by both the excise-duty payer in the country of dispatch and the excise-duty payer in the country of delivery (import). Double excise duty is clearly in contradiction with the basic principles governing this tax. Where excise goods with excise duty paid are held in the member state other than the one in which they have originally been admitted to trading, such duty is to be reimbursed or remitted. Therefore, the provisions of the Excise Duty Act should not be interpreted in a way that is inconsistent with the wording and purpose of the EU regulation. Furthermore, Article 33 of the Directive leaves no room for introduction of any additional regulations by member states that would undermine such reimbursement.[17]

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[15] See S. Parulski, *Akcyza. Komentarz*, Warszawa 2016, p. 886.

[16] See J. Matarewicz, *Ustawa o podatku akcyzowym. Komentarz*, Warszawa 2014, p. 473.

[17] A. Drozdek, *Zwrot podatku akcyzowego z tytułu eksportu towarów na podstawie przepisu krajowego niezgodnego z prawem unijnym w świetle orzecznictwa sądów administracyjnych*, Monitor Prawa Celnego i Podatkowego No. 10 (267), 2017, pp. 378–379.

4. OBLIGATION TO INTERPRET POLISH TAX LAW IN ACCORDANCE WITH EU LAW

The interpretation of the provisions of Directive 2008/118/EC adopted by the tax authority is actually the *contra legem* interpretation. This is because the tax authority assumes that there are preconditions contained in the herein analysed provisions that affect a tax base.

Acceptance of the interpretation of the disputed provisions of the Excise Duty Act is clearly inconsistent with the literal wording of Article 33 of Directive 2008/118/EC, as this, according to the tax authority, would lead to the tax base being established based on non-statutory criteria, which in turn would constitute a gross violation of Article 217 of the Constitution.[18] It should be noted here that, pursuant to Article 217 of the Constitution, the imposition of taxes, as well as other public imposts, the specification of those subject to tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, must be effected by means of statute. It is, therefore, beyond any doubt that this is actually the situation with reimbursement of excise duty in the event of intra-Community supplies or exports of excise goods outside Poland, and such situation is unfavourable for the taxpayer.[19]

Given the above-presented legal deliberations regarding the right to reimbursement of excise duty on an intra-Community supply (export), it should be noted that the tax authority should abandon any linguistic interpretation and primarily rely on constitutional values. Pursuant to the provision of Article 91 of the Constitution, directives are a source of law which is formally binding. Article 91 para. 3 of the Constitution confirms a multi-component structure of the Polish legal system and consequences thereof for the application of law, by entering the rule into the Constitution that European Union law shall have primacy where there is conflict between the EU law and national law.[20] The principle of primacy of the European law requires all rules of the EU law to be applied where there is any conflict between the EU law and any previous or subsequent national regulation of any member state. On the other hand, the principle of direct effect means that any rights conferred on individuals by the EU law can be directly invoked before national authorities for the purpose of exercising such rights, provided that the following conditions are met:

1) provisions of a directive are precise and unconditional;
2) rights of individuals against the state arise from the rules of the directive;
3) deadline for implementation of the directive by the member state has expired and rules contained therein have not been implemented or have been incorrectly implemented.

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[18] Constitution of the Republic of Poland of 2 April 1997, Dz.U. No. 78, item 483, as amended; hereinafter referred to as the Constitution.

[19] M. Zieliński, *Wyznaczniki reguł wykładni prawa*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 3–4, 1998, pp. 17–18.

[20] Judgments of the Supreme Administrative Court: of 5 December 2013, I GSK 280/12, LEX No. 1528821; of 28 February 2017, I GSK 1967/15, LEX No. 2274855.

The Court of Justice of the European Union also has repeatedly emphasized direct vertical effect of directives, i.e. the possibility for an individual to directly invoke effective rules of the Community law against the state, because no member state can derive benefits from its own unlawful conduct, *ex injuria non oritur ius*.[21] There is a statement that can be found in the literature and I share that the purpose of the Directive should be sought in the recitals of Directive 2008/118/EC. The recitals contain guiding principles for a given legal regulation, as well as declarations and rulings which play a directional role in the process of interpreting an operative part of the Directive.[22] As far as reimbursement of excise duty is concerned, when determining the significance of a national rule constituting a measure for implementing the Horizontal Excise Duty Directive, the tax authority should first refer to the EU law in which the implemented tax rule is embedded. At the same time, any regulation of tax law by way of a statute or directive requires simultaneous interpretation of the two texts, i.e. national law and the EU law. This, in turn, involves systemic interpretation of national law, which gains importance in the context of the EU law, especially when the national legislator has not properly fulfilled its obligation to implement the Directive. The Excise Duty Act must be thus understood in the specific context of the purpose and content of the provisions of Directive 2008/118/EC, which have been incorrectly implemented in so far as they relate to the taxpayer's right to reimbursement of excise duty on an intra-Community supply (export) of excise goods, and, as such, ensure the tightness of the tax system.

The obligation to interpret national law in accordance with the EU law was formulated by the Court of Justice of the European Union. Relevant rulings include but are not limited to the judgment of 13 November 1990, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, case C-106/89,[23] in which the Court emphasized that incorrect implementation of directives opens a possibility for systemic interpretation, thus allowing achievement of fundamental purposes of a horizontal directive. The case-law indicates that the result of linguistic interpretation basically determines which tax law rule, i.e. national or European, becomes the basis for settling a given case. The significance of any provision of national tax law in the light of Directive 2008/118/EC is to be interpreted as far as it is required to achieve the purpose set out in the Directive recitals.

It follows that, in applying national law, the tax authority is required to interpret provisions thereof, whether adopted before or after the Directive, as far as possible in the light of the wording and purpose of the Directive in order to achieve the

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[21] See the judgment of the European Court of Justice of 4 December 1974, case 41/74, *Y. van Duyn v. Home Office*, ECLI:EU:C:1974:133, LEX No. 84379, highlighting that the possibility to invoke direct effect of any provision of the directive is a right of an entity upon which such directive confers an entitlement that cannot be exercised due to fault on the side of the EU member state; and the CJEU judgment of the European Court of Justice of 8 October 1987, case 80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431, LEX No. 129563, highlighting that no member state can invoke against individuals any provision of the directive that has not been implemented or has been incorrectly implemented.

[22] D. Antonów, *Wykładnia prawa podatkowego po wstąpieniu Polski do Unii Europejskiej*, Warszawa 2009, p. 210.

[23] ECLI:EU:C:1990:395, LEX No. 124953, ECR 1990/10/I-4135.

result pursued by it, and thereby comply with the third paragraph of Article 189 of the Treaty[24]. This means that the primary purpose of systemic interpretation is to ensure compliance between rules that belong to separate legal systems (i.e. Polish law and the EU law) and to inspire an authority, which applies national law, to choose such result of interpretation that ensures the highest possible effectiveness of the EU law. Consequently, the tax authority should interpret existing internal law in such a way as to incorporate both the content and purpose of a relevant provision of European law. Member state authorities may neither invoke direct effect of any directive, nor correct defective or imprecisely implemented national provisions by applying pro-European Union interpretation of the latter in line with the purposes of such directive, if this would adversely affect the taxpayer's more favourable position guaranteed under national law.[25] In the tax relationship between the taxpayer and the tax authority, a directive has direct effect and can be the basis for a decision, provided that the deadline for its implementation by the member state expired, the directive was implemented after the deadline or not in accordance with its content, and, moreover, where the directive is clear, precise and unconditional. Directives are directly effective acts of the EU law as they can be used as the basis for reconstruction of an explicit legal rule. This view is supported by the argument that an act of the European Union law, whose provisions are directly effective, may constitute (and constitutes) a benchmark for controlling operations of public administration with regard to their compliance with law, including compliance with the EU law. This is connected with the obligation of the national authorities applying law to perform an integrating function consisting in the application of EU law. If a national provision does not comply with a provision of the Directive, the tax authority has the right to apply the EU provision directly. This power arises from both the principle of primacy and the principle of direct effect of the EU law. In this situation the obligations of tax authorities with regard to the application of the EU tax law should be primarily fulfilled through interpretation of law. The interpretation process is not only intended to understand the text of a legal act, but also, in a sense, guarantees the effectiveness of the EU law in the national legal system.

In the light of the above deliberations, it should be concluded that tax authorities should refrain from applying a national statutory rule pursuant to the principle of primacy of the EU law whenever there is any conflict between such rule of national law and the EU law. Then, a directly effective provision of Directive 2008/118/EC or any other national provision interpreted in accordance with the Directive should apply. This link between systemic interpretation and the principle of primacy of the EU law results in the refusal to apply national provisions that are inconsistent with the content of the EU provisions. The tax authority is under the obligation of correct interpretation, i.e. the tax authority must demonstrate that it has exercised care in selecting interpretation methods and has competence to use them. It should be noted that the fundamental objective of systemic interpretation is to guarantee

[24] Treaty on the Functioning of the European Union of 13 December 2007, consolidated version, OJ C 202, 7.6.2016, p. 47.

[25] Judgment of the Supreme Administrative Court of 10 March 2015, I FSK 100/14, LEX No. 1772571.

compliance between rules under Polish law and those of the EU law, and to indicate such result of interpretation to the authority applying national law which ensures the highest possible effectiveness of the EU law.

5. CONCLUSIONS

The discussion presented in this study makes it possible to formulate general conclusions.

When denying the right to reimbursement of excise tax in order to ensure tightness of the tax system, the tax authority should first compare the content of the transposed provision of Directive 2008/118/EC and the Excise Duty Act. In the event that the EU rules conflict with the wording of the national provision and the taxpayer requests that the EU rule be applied in the manner specified in the Directive, the tax authority should not apply the rule of national law resulting from the Excise Duty Act, and make it possible for the taxpayer to benefit from the EU regulation, i.e. Directive 2008/118/EC. It should be clearly emphasized that this principle follows from the provision of Article 120 of the Tax Ordinance[26] stipulating that tax authorities operate on the basis of legal provisions. Being a member of the European Union, Poland is obliged to give priority to the EU tax law.

Based on the analysis presented in this paper, it should be noted that as a general rule in most cases systemic and teleological interpretation should be followed when the provisions of Directive 2008/118/EC are to be applied. Interpretation by reference to recitals and to purposes of a regulation that are contained therein is a common method of interpreting law which should be employed by the tax authority. The tax authority's interpretation strategy should consist in making use of the systemic interpretation approach to refer to a specific fragment of the legal act being interpreted, i.e. recitals. The primary purpose of the systemic interpretation is to ensure compliance between provisions belonging to separate legal systems, i.e. of the Polish law and those of the EU law, and to indicate such result of interpretation to the authority applying national law that would ensure the highest possible effectiveness of the EU law. Consequently, the tax authority should interpret existing domestic law in such a way as to reflect both the content and purpose of the provision of the EU law. Then, through the teleological interpretation, the tax authority should retrieve the purpose of the regulation defined in recitals, by reconstructing the teleological context in which the interpreted provisions should be embedded. The teleological interpretation of the EU law requires that the purposes of specific legal solutions be taken into account rather than the literal wording of the provisions containing such solutions.

In addition, it should be emphasized that the pro-EU interpretation should be followed at the discretion of the authority applying law as far as possible to achieve the result set out in Directive 2008/118/EC. There is no obligation to interpret *contra*

[26] Act of 29 August 1997: Tax Ordinance, consolidated text, Dz.U. 2019, item 900, as amended.

legem or in a way that would undermine or reject national law. In relevant circumstances, the authorities have thus the obligation not to apply national law that is inconsistent with the EU law; consequently, the principle of primacy is followed to replace a national rule with an EU rule.

It should also be emphasized that the tax authority acting within its competence as an authority of a member state, is obliged to follow the principle of cooperation under Article 10 of the EC Treaty[27] and fully apply the directly applicable EU law, and ensure the protection of individuals' rights arising from such EU law by refusing to apply any provision of national law that would possibly conflict with such EU law, whether such national law is adopted before or after the provision of the EU law.

As a consequence, tax authorities should apply the Directive in a manner consistent with the provisions of the Constitution, specifically Article 217, as far as tax obligations are concerned. Article 217 of the Constitution referred to above, interpreted together with Articles 2 and 7 of the Constitution, sets fundamentals in the Polish tax system for protecting entities subject to fiscal provisions against steps taken by tax authorities to ensure the tax system tightness through interpretation of law.

Until 28 February 2017, case law presented diversified approaches. Some adjudication panels of administrative courts held the view that each entity was eligible for reimbursement of excise duty on intra-Community supplies of goods or exports of excise goods. According to a different adjudication method, however, which was followed in most administrative court decisions regarding reimbursement, it was only the taxpayer, i.e. a person who actually paid applicable excise duty to an account of a competent tax authority, who could submit a reimbursement request. After 28 February 2017, there was a significant shift in decisions issued by administrative courts. Case law established after that date confirmed that every entity that made intra-Community supply of goods or exported excise goods had the right to request reimbursement.

However, there is no doubt that the provisions of the Excise Duty Act are inconsistent with the EU law. When incorporating Directive 2008/118/EC into Polish law, the legislator tightened the tax system, thus depriving the EU law applied by tax authorities and administrative courts of full effectiveness and primacy.

Depriving an excise-duty payer of right to reimbursement of excise duty is by no means acceptable. It should be borne in mind that Directive 2008/118/EC constitutes a set of provisions for harmonisation of excise duty, and any incorrect implementation hinders business operations or even prevents honest taxpayers from conducting business activity by diminishing their feeling of legal security.

[27] Treaty of 25 March 1957 establishing the European Community, Dz.U. 2004, No. 90, item 864/2, as amended.

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RIGHT TO REIMBURSEMENT OF EXCISE DUTY VERSUS TIGHTENING OF TAX SYSTEM THROUGH INTERPRETATION OF LAW

Summary

Reimbursement of excise duty is an essential element of this tax recovery process. Tax authorities refuse to comply with the obligation to reimburse excise duty on an intra-Community supply (export) of excise goods within a statutory period, although the obligation is binding on them. When ensuring the tightness of the tax system, the tax authority should first compare the content of the transposed provision of Directive 2008/118/EC and the Excise Duty Act. In the event that the EU rules conflict with the wording of the national provision and the taxpayer requests that the EU rule be applied in the manner specified in the Directive, the tax authority should refuse to apply the rule of national law resulting from the Excise Duty Act, and make it possible for the taxpayer to benefit from the EU regulation. It should be borne in mind that the tax authority is under the obligation to interpret national law in compliance with the purpose of the Directive and such interpretation should be preceded by determination of that purpose. A method of interpretation must ensure that the purpose of the Directive is determined. The objective of the analysis offered herein is to explore issues pertaining to interpretation of the Directive concerning general arrangements for excise duty. Due to improper implementation, the arrangements ensured the tightness of the tax system through legal interpretation. Nevertheless, it is claimed that grounds for proper implementation of the Directive are provided by the obligation to follow a pro-EU interpretation that should be preceded with reconstruction of the purpose of the regulation as defined in the recitals, as far as possible in order to achieve the effect specified in the Directive 2008/118/EC.

Keywords: reimbursement of excise duty, tightness of the tax system, interpretation of law

PRAWO DO ZWROTU PODATKU AKCYZOWEGO A ZAPEWNIENIE SZCZELNOŚCI SYSTEMU PODATKOWEGO W DRODZE WYKŁADNI PRAWA

Streszczenie

Instytucja określenia zwrotu podatku akcyzowego stanowi istotny element odzyskania tego świadczenia. Organy podatkowe, pomimo istnienia obowiązku zwrotu podatku akcyzowego z tytułu wewnątrzwspólnotowej dostawy (eksportu) wyrobów akcyzowych w ustawowym terminie, odmawiają podatnikom prawa do zwrotu podatku akcyzowego. Organ podatkowy, zapewniając szczelność systemu podatkowego, w pierwszej kolejności powinien porównać treść transponowanego przepisu dyrektywy 2008/118/WE z ustawą o podatku akcyzowym. W przypadku gdy normy unijne prowadziłyby do sprzeczności z brzmieniem przepisu krajowego, organ podatkowy powinien – jeśli podatnik domaga się zastosowania tej normy w sposób określony w dyrektywie – odmówić zastosowania normy prawa krajowego wynikającej z ustawy o podatku akcyzowym i umożliwić mu skorzystanie z unormowania unijnego. Należy bowiem pamiętać, że na organie podatkowym ciąży obowiązek przeprowadzenia wykładni prawa krajowego z zgodnie z celem dyrektywy. Czynność ta niewątpliwie powinna być poprzedzona ustaleniem celu dyrektywy. Sposób przeprowadzenia wykładni musi zapewnić ustalenie celu tej regulacji. Niniejszy artykuł analizuje problematykę wykładni dyrektywy w sprawie ogólnych zasad dotyczących podatku akcyzowego, które w wyniku nieprawidłowej implantacji zapewniły w drodze wykładni prawa szczelność systemu podatkowego. Autor podnosi jednak, że podstawą do przeprowadzenia prawidłowej implementacji dyrektywy jest obowiązek dokonania wykładni prounijnej, która powinna być poprzedzona odtworzeniem zdefiniowanego w preambule celu regulacji tak dalece, jak jest to możliwe, aby osiągnąć rezultat określony w dyrektywie 2008/118/WE.

Słowa kluczowe: zwrot podatku akcyzowego, szczelność systemu podatkowego, wykładnia prawa

DERECHO DE DEVOLUCIÓN DE ACCISA Y LA SEGURIDAD DE HERMETICIDAD DEL SISTEMA TRIBUTARIO EN VIRTUD DE LA INTERPRETACIÓN DE LA LEY

Resumen

La institución de determinación de la devolución de accisa es un elemento importante para recibir esta prestación. Los órganos tributarios, a pesar de la existencia de la obligación de devolución de accisa en concepto de la entrega intracomunitaria (exportación) de productos sometidos a accisa en el plazo legalmente establecido, niegan su devolución a los tributarios. El órgano tributario, a la hora de asegurar la hermeticidad del sistema tributario, en primer lugar debería comparar el contenido del precepto de la directiva 2008/118/CE implementada, con la ley de accisa. En caso la normativa comunitaria sea contraria con el precepto nacional, el órgano tributario deberá – si el sujeto obligado quiere que se aplique la norma de la forma determinada en la directiva – negarse a aplicar la norma de derecho nacional resultante de la ley de accisa y permitirle al sujeto obligado el uso de la regulación comunitaria. Hay que recordar que el órgano tributario tiene la obligación de interpretar el derecho nacional de acuerdo con la finalidad de la directiva, la interpretación ha de ser precedida por la determinación de la finalidad de esta

regulación. La finalidad del presente artículo es un análisis de problemas de la interpretación de la directiva en cuanto a las reglas generales aplicables a accisa, que debido a la implementación incorrecta garantizaron, mediante su interpretación, la hermeticidad del sistema tributario. El autor, sin embargo sostiene que el fundamento para implementar correctamente la directiva consiste en la obligación de efectuar una interpretación pro comunitaria, que ha de ser precedida por la reproducción de la finalidad de la regulación definida en preámbulo, de la forma extensa posible, para conseguir el resultado determinado en la directiva 2008/118/CE.

Palabras claves: devolución de accisa, hermeticidad del sistema tributario, interpretación de derecho

ПРАВО НА ВОЗВРАТ АКЦИЗНОГО НАЛОГА В СВЕТЕ ОБЕСПЕЧЕНИЯ ЖЕСТКОСТИ НАЛОГОВОЙ СИСТЕМЫ ПУТЕМ ТОЛКОВАНИЯ ЗАКОНОДАТЕЛЬСТВА

Резюме

Определение размера акцизного налога, подлежащего возврату, является важным элементом акцизной процедуры. Однако, налоговые органы, несмотря на существовании обязанности возвратить акцизный налог в установленные сроки при поставках подакцизных товаров внутри Европейского Союза (экспорт в страны ЕС), отказывают налогоплательщикам в праве на возврат акцизного налога. При обеспечении жесткости налоговой системы налоговый орган обязан, прежде всего, сравнить содержание транспонированного положения Директивы 2008/118/ЕС с Законом «Об акцизном налоге». В случае, когда нормы ЕС находятся в противоречии с положениями национального законодательства, налоговый орган обязан (если налогоплательщик требует применения норм, установленных Директивой), отказаться от применения положений национального законодательства, вытекающих из Закона «Об акцизном налоге», предоставляя налогоплательщику возможность воспользоваться нормами ЕС. Имея в виду, что налоговый орган обязан толковать национальное законодательство в соответствии с целями Директивы, такому толкованию, безусловно, должно предшествовать определение целей Директивы. Толкование должно осуществляться таким образом, чтобы цели Директивы были определены и учтены. Автор статьи анализирует проблематику, связанную с толкованием Директивы в части общих правил акцизного налогообложения, в результате неправильной имплементации которых при толковании законодательства налоговая система приобретает чрезмерную жесткость. По утверждению автора, правильная имплементация Директивы 2008/118/ЕС требует проевропейского ее толкования. Такому толкованию Директивы должно предшествовать определение целей, установленных в ее преамбуле, с тем, чтобы эти цели были по мере возможности достигнуты.

Ключевые слова: возврат акцизного налога, жесткость налоговой системы, толкование законодательства

DER ANSPRUCH AUF VERBRAUCHSTEUERERSTATTUNG UND DIE GEWÄHRLEISTUNG EINER STRAFFUNG DES STEUERSYSTEMS IM WEGE DER RECHTSAUSLEGUNG

Zusammenfassung

Die Regelung der Verbrauchsteuererstattung ist ein wesentliches Element zur Einziehung dieser Leistung. Die Steuerbehörden verweigern Steuerpflichtigen aber, trotz Pflicht zur Rückerstattung der Verbrauchsteuer für die innergemeinschaftliche Lieferung (Ausfuhr) von verbrauchsteuerpflichtigen Waren innerhalb der gesetzlich vorgesehenen Frist, ihren Anspruch auf eine Verbrauchsteuererstattung. Die Steuerverwaltung hat, um eine Straffung des Steuersystems sicherzustellen, in erster Linie den Inhalt der umgesetzten Richtlinie 2008/118/EG mit dem polnischen Verbrauchsteuergesetz abzugleichen. Kollidieren die Unionsnormen mit dem Wortlaut der Vorschrift des nationalen Rechts, muss die Steuerverwaltung – wenn der Steuerpflichtige die Anwendung dieser Norm in der Form fordert, wie sie in der Richtlinie geregelt ist – die Anwendung der Vorschrift des nationalen Rechts gemäß dem polnischen Verbrauchsteuergesetz ablehnen und es ihm ermöglichen, die anwendbaren EU-Rechtsvorschriften in Anspruch zu nehmen. Es ist nämlich zu bedenken, dass die Steuerverwaltung zur Auslegung des nationalen Rechts im Einklang mit der Zielsetzung der Richtlinie verpflichtet ist und dem hat zweifellos die Feststellung vorauszugehen, welche Ziele die Richtlinie verfolgt. Die Art und Weise der Auslegung muss sicherstellen, dass die Zielsetzung dieser Vorschriften festgestellt wird. Ziel der im Artikel angestellten Überlegungen ist eine Analyse der Auslegung der europäischen Richtlinie über die allgemeinen Regelungen über die Verbrauchsteuer, die infolge der fehlerhaften Umsetzung im Wege der Rechtsauslegung zu einer Straffung des Steuersystems geführt haben. Der Autor argumentiert jedoch, dass Grundlage für eine korrekte Umsetzung der Richtlinie die Pflicht zu einer unionsrechtskonformen Auslegung ist, der – so weit wie möglich – die Wiedergabe der in der Präambel definierten Zielsetzung der Richtlinie voranzugehen hat, um das in der Richtlinie 2008/118/EG bezeichnete Ziel zu erreichen.

Schlüsselwörter: Verbrauchsteuererstattung, Straffung des Steuersystems, Rechtsauslegung

LE DROIT À UN REMBOURSEMENT DES DROITS D'ACCISES ET L'ASSURANCE DU RESSERREMENT DU SYSTÈME FISCAL PAR UNE INTERPRÉTATION DE LA LOI

Résumé

L'institution de la détermination du remboursement des droits d'accise est un élément important pour récupérer cet avantage. Les autorités fiscales, malgré l'obligation de rembourser les droits d'accise pour la livraison intracommunautaire (exportation) de produits soumis à accise dans les délais réglementaires, refusent aux contribuables le droit de remboursement des droits d'accises. Les autorités fiscales, qui veillent à la rigidité du système fiscal, devraient tout d'abord comparer le contenu de la disposition transposée de la directive 2008/118/CE à la loi sur les droits d'accise. Au cas où les normes de l'UE entraîneraient une contradiction avec le libellé d'une disposition nationale, l'autorité fiscale devrait – si le contribuable demande que la norme soit appliquée de la manière indiquée dans la directive – refuser d'appliquer la norme de droit national résultant de la loi sur les droits d'accise et lui permettre de bénéficier de la norme de l'UE. Il convient de rappeler que les autorités fiscales sont tenues d'interpréter le droit

national conformément à l'objectif de la directive, qui devrait sans aucun doute être précédé par l'établissement de l'objectif de la directive. La méthode d'interprétation doit garantir que l'objectif du règlement est établi. Le but de l'analyse entreprise dans cet l'article est d'analyser le problème de l'interprétation de la directive sur les règles générales en matière d'accises, qui, du fait d'une implantation irrégulière, garantissait de par la loi le resserrement du système fiscal. L'auteur affirme toutefois que la mise en œuvre correcte de la directive repose sur l'obligation d'interprétation pro-UE, qui devrait être précédée de la reproduction de l'objectif réglementaire défini dans le préambule, dans la mesure du possible afin d'obtenir le résultat spécifié dans la directive 2008/118/CE.

Mots-clés: remboursement des droits d'accise, resserrement du système fiscal, interprétation de la loi

DIRITTO AL RIMBORSO DELL'ACCISA E PREVENZIONE DELL'EVASIONE FISCALE ATTRAVERSO L'INTERPRETAZIONE DEL DIRITTO

Sintesi

L'istituzione del rimborso dell'accisa costituisce un elemento essenziale per recuperare tale prestazione. Le autorità tributarie, nonostante l'esistenza dell'obbligo di rimborso dell'accisa a titolo di cessione intracomunitaria (esportazione) di prodotti soggetti ad accisa entro il termine di legge, negano ai contribuenti il diritto al rimborso dell'accisa. L'autorità tributaria per prevenire l'evasione fiscale in primo luogo deve confrontare il contenuto della disposizione recepita della direttiva 2008/118/CE con la legge sull'accisa. Nel caso in cui le norme comunitarie fossero in contraddizione con le norme nazionali, l'autorità tributaria deve – se il contribuente richiede l'applicazione di tale norma nel modo stabilito nella direttiva – negare l'applicazione delle norme del diritto nazionale derivanti dalla legge sull'accisa e permettere al contribuente di beneficiare della regolamentazione comunitaria. Bisogna infatti ricordare che l'autorità tributaria ha l'obbligo di interpretare il diritto nazionale conformemente al fine della direttiva, e tale attività indubbiamente deve essere preceduta dalla determinazione del fine della direttiva. La modalità di interpretazione deve assicurare la determinazione del fine di tale regolamentazione. Obiettivo dell'analisi intrapresa nel presente articolo è l'analisi delle problematiche di interpretazione della direttiva sui principi generali riguardanti l'accisa, che in conseguenza di una scorretta implementazione garantiscano attraverso interpretazione del diritto la prevenzione dell'evasione fiscale. L'autore sostiene tuttavia che la base per la corretta implementazione della direttiva è l'obbligo di interpretazione conforme al diritto dell'Unione, che deve essere preceduta per quanto possibile dalla determinazione del fine della regolamentazione, definito nel preambolo, per poter ottenere il risultato stabilito nella direttiva 2008/118/CE.

Parole chiave: rimborso dell'accisa, prevenzione dell'evasione fiscale, interpretazione del diritto

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