

*Małgorzata Rzeszutko**

Taxpayers' Rights after Poland's Accession to the European Union – the Analysis of Selected Issues

Abstract: *This article is to present the most important problems concerning taxpayers' rights after Poland's accession to European Union i.e. neutrality of Tax on Commodities and Services (VAT) for taxpayers, forbidden actions, neutrality and taxation of income from economic activity, lack of neutrality in income tax from corporate bodies (CIT), stability and surety of taxation in Polish legal order. The protection of a taxpayer against lack of neutrality, surety and stability of taxation in the Member States, is also provided by the process of European tax harmonisation. Still, Poland is part of that process since only a few years. Thus it seems justifiable to present main assumptions and manifestations of protection that a Polish taxpayer in the EU can count on. Neutrality is usually associated with excluding the influence of taxing on economic competition within a definite market. Neutrality is, first of all, not discriminating by taxes. For taxes should not negatively affect the development of free market, they cannot constitute a barrier in capital movement, inhibit enterprising and hinder production and employment grow. Similar difficulties may result not only from lack of neutrality in the sphere of taxes, but also from lack of stability of taxation standards. The payers of income taxes are doomed to uncertainty, connected amongst others with frequent changes in the range, techniques of establishing and principles of access to tax relief, differentiated evaluations of tax deductible expenses and unstable catalogue of exemptions. It is difficult to assess these principles positively, even more so if we take into consideration certain changes which are, to say the least, controversial with respect to the requirement of vacatio legis – negatively affecting the situation of tax subjects.*

Introduction

The development of the concept of democratic state of law contributed, among others, to the change of our ideas concerning institutional means of

* **Małgorzata Rzeszutko**, Ph.D. – candidate at the Faculty of Law and Administration of Maria Curie-Skłodowska, University in Lublin (UMCS).

protecting taxpayers' interests. The subject literature emphasises the thesis that creating tax law is subject to numerous limitations imposed through international and constitutional means, as well as other legal principles of organizing the society, courts' jurisprudence and systemic conditions.¹ Harmonisation of tax law in the European Union (EU) Member States, as well as its evolution, take place in accordance with the principles of taxpayer's protection, while preserving the neutrality, stability and security of taxation. According to F.Vanistendael taxation of any individual must have a distinct legal basis.² In some EU Member States this principle is directly defined in constitutional regulations. It is explicitly expressed in art. 18 of the Austrian Federal Constitution,³ art. 170 of Belgian Constitution,⁴ § 81 of Finnish Constitution,⁵ art. 34 of French Constitution.⁶ The wording of art. 2 of the Polish Constitution guarantees the principle of surety of law, whereas art. 84 puts in place the principle of statutory regulation of taxing. Also the principles of inadmissibility of retroactive tax law force, protection of acquired laws and observation of *vacatio legis* (which is especially significant in the case of changes that would worsen the taxpayer' legal situation), formulated by the Constitutional Tribunal (CT) of Polish Republic are to protect the stability and surety of taxation. Besides the above-mentioned regulations, article 217 of the Polish Constitution stands as a guarantee of the taxpayer's rights in the Polish legal system.⁷ It provides that imposing taxes and defining subjects, objects of

¹ F.Vanistendael, *Legal Framework for Taxation in: Tax Law Design and Drafting*, ed. V.Thuronyi, Washington 1996, p.15.

² Ibidem, p.16 and Ch.Geppart, *Thresholds for Access to the Tax Court in: Taxpayer Protection in the European Union*, eds. D.Albregtse, H. van Arendonk, the Hague-London-Boston 1998, p.35-36.

³ Federal Constitutional Law of the Republic of Austria. Translation and introduction: P.Czarny i B.Naleziński, Warsaw 2004, p.57-58.

⁴ Constitution of Belgium: uniform text of 14.02.1994. Translation and introduction: W.Skrzydło, Warsaw 1996, p.67.

⁵ Constitution of the Republic of Finland of 11.06.1999. Translation and introduction: I.Osiński, Warsaw 2003, p.92.

⁶ Constitution of the French Republic of 4.10.1958. Translation and introduction: W.Skrzydło, Warsaw 2005, p.44.

⁷ In the latest jurisdiction of the CT of Polish Republic the tribute control principle was characterised in the CT judgement of 1 September 1998 (U.1/98), CT judgment of 9 February 1999 (U.4/98), CT judgement of the 12 January 1995 (K.12/94). On the understanding of tribute control, see: T.Dębowska-Romanowska, *Istota i treść władztwa finansowego-samowola finansowa (samowola podatkowa), restrykcje finansowe-zagadnienia finansowe w: Konstytucja, ustroj, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl (Essence and contents of financial control-financial lawlessness (tax lawlessness), financial restrictions-financial issues in: Constitution, System, State Financial System. The Book in Memory of prof. Natalia Gajl)*, Warszawa 1999, p.345; A.Bień-Kacała, *Zasada państwowego władztwa*

taxation, tax rates and principles of granting abatements and redemptions, as well as categories of subjects exempted from taxes takes place by means of a law. In some countries this principle is not explicitly formulated in the constitution, but it is drawn out of respective provisions of this act. For instance, in Switzerland it is assumed that it stems from the constitutional principle of taxation equality. The above mentioned principle is one of the pillars of western democratic systems and as the Italian Constitution asserts it is 'a democratic guarantee against arbitrary taxation by the government'.⁸

In the Polish tax law doctrine the authors agree that procedural warranties of taxpayer's interest protection cannot stray from the procedural standards defined by the provisions of the resolution of Council of Europe Minister Committee no. (77) 31 of the 28 September 1977 on the protection of the individual in relation to the acts of administrative authorities.⁹ It was one of the first acts of the European soft law, where the basic requirements for administration in its relationships with an individual were specified. The protection of taxpayers from the area of EU is guaranteed also by some other factors. Firstly, it is the ambiguous character of the process of creating EU tax law with the use of directives. Secondly, the protection of Union taxpayers is possible thanks to the precisely defined line of judicial decisions taken by the European Court of Justice (ECJ). Thirdly, the protection of a taxpayer against lack of neutrality, surety and stability of taxation in the Member States, is also provided by the process of European tax harmonisation. Still, Poland is part of that process since only a few years. Thus it seems justifiable to present main assumptions and manifestations of protection that a Polish taxpayer in the EU can count on. Neutrality is usually associated with excluding the influence of taxing on economic competition within a definite market. Neutrality is, first of all, not discriminating by taxes. For taxes should not negatively affect the development of free market, they cannot constitute a barrier in capital movement, inhibit enterprising and hinder production and employment grow.

daninowego – wybrane zagadnienia w: *Przemiany polskiego prawa (The principle of state tribute control – selected issues in: Transformation of Polish Law (1989-1999))*, ed. E.Kustra, "Studia Juridica Toruniensia", Toruń 2001, p.94.

⁸ Constitution of the Italian Republic. Translation and introduction: Z.Witkowski, Warsaw 2004, p.63.

⁹ Resolution of Council of Europe Minister Committee no. (77) 31 of the 28 September 1977 on the protection of the individual in relation to the acts of administrative authorities, Dziennik Ustaw (Journal of Laws) no. 11/1993, item 50 with amendments. The text of the resolution with full explanations was published in: *Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons*, Strasbourg 1996, p.236-241. See also:

[http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Resolution\(77\)31.asp](http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Resolution(77)31.asp)

Similar difficulties may result not only from lack of neutrality in the sphere of taxes, but also from lack of stability of taxation standards. Without stability of taxing it is impossible for the taxpayer to conduct an effective economic policy, nor manage taxes effectively, create precise visions of the economic results of future actions, or even foresee the amount of tax burden – defining the stability of the range and forms of conducting the business activity. Neutrality of taxation constitutes one of the basic factors determining the form of Community law in the EU. It is related with the purpose for which it is created, so it is also connected with the warranty of correct functioning of the common market. For it requires establishing such tax regulations, which would secure free movement of goods, persons, capital and services, that is liquidation of obstacles in the economic turnover inside the Community and achieving coherence of the set of rules, on the basis of which this turnover could freely develop.

This paper is to present the most important problems concerning taxpayers' rights after Poland's accession to European Union on the basis of selected subject literature i.e. neutrality of Tax on Commodities and Services (VAT) for taxpayers, forbidden actions, neutrality and taxation of income from economic activity, lack of neutrality in income tax from corporate bodies (CIT), stability and surety of taxation in Polish legal order.¹⁰

¹⁰ See more: J.M.Cougnon, *The E.E.C. Merger and Parent-Subsidiary Directives of 23 July 1990 in Practice*, Brussels 1992; M.Keen, *Ekonomia dobrobytu a koordynacja podatków w Unii Europejskiej w: Efektywność polityki podatkowej (Economics of prosperity and coordination of taxes in the European Union in: Effectiveness of Tax Politisc)*, ed. M.P.Devereux, Warszawa 2007, p.345; B.Terra, *European Tax Law*, London 2001; *Wybrane problemy funkcjonowania systemów podatkowych w krajach Unii Europejskiej (Selected Issues of Tax Systems Functioning in European Union Countries)*, *Selected Issues of Tax Systems Functioning in European Union Countries*, ed. E.Denek, Poznań 2005, p.157; J.Antosik, M.Bator, *Opodatkowanie świadczeń złożonych (Taxation of Complex Services)*, "Przegląd Podatkowy" no. 10/2003, p.33; B.Makowicz, *Harmonizacja podatków pośrednich w Unii Europejskiej (Harmonisation of Indirect Taxes in European Union)*, "Studia Europejskie" no. 2/2004, p.92; J.Wyciśłok, *Harmonizacja podatków pośrednich w Unii Europejskiej (Harmonisation of Indirect Taxes in European Union)*, "Studia europejskie" no. 2/2004, p.92; J.Wyciśłok, *Harmonizacja podatków bezpośrednich w świetle Unii Europejskiej (Harmonisation of Direct Taxes in the Light of European Union)*, Warszawa 2005, p.250; M.Bernat, *Harmonizacja podatków bezpośrednich w prawie Unii Europejskiej (Harmonisation of Direct Taxes in the European Union Law)*, "Przegląd Podatkowy" no. 1/2004, p.17; *Polski system podatkowy. Założenia a praktyka (Polish Taxation System. Assumptions and Practice)*, ed. A.Pomorska, Lublin 2004, p.570; B.Garłac, *Podatki bezpośrednie w UE – pozorny brak harmonizacji na przykładzie orzecznictwa ETS w sprawach podatkowych (Direct Taxes in EU - Apparent Lack of Harmonisation on the Example of ECJ Jurisdiction in Taxation Cases)*, "Europejski Przegląd Sądowy" no. 8/2007, p.38; J.Gałuszka, *Harmonizacja podatków pośrednich i bezpośrednich w Unii Europejskiej - implikacje dla Polski (Harmonisation of Direct and Indirect Taxes in*

1. Neutrality of Tax on Commodities and Services (VAT) for taxpayers – general remarks

Poland's accession to the EU resulted in fundamental transformations of the Polish legal system. Within tax law, the effects of Poland's joining the EU are especially noticeable with reference to indirect taxes, that is, first of all, to value added tax (VAT) and the excise tax. This is direct result of the application of article 93 of the European Community Treaty, according to which the Council of EU introduces legal regulations enhancing harmonisation of rules concerning turnover and excise tax, as well as other forms of indirect taxation in such an extent as it is necessary for correct functioning of the internal market.¹¹

The underlying principle of taxation is to leave the taxpayer with possibly unchanged income and property situation, as compared to before the tax imposition. It is not a binding principle, but neutrality is usually associated with excluding the influence of taxation on competition within a given market. In the author's opinion, neutrality is, first of all, not discrimination

European Union - implications for Poland), "Przegląd Podatkowy" no. 6/2000, p.3; *Prawo finansowe i nauka prawa finansowego na przełomie wieków (Financial Law and Science of Financial Law at the Turn of Centuries)*, ed. A.Kostecki, Kraków 2000, p.365; *Finanse publiczne w warunkach akcesji do Unii Europejskiej (Public Finance in Conditions of Accession to European Union)*, ed. L.Patrzałek, Wrocław 2006, p.477; Z.Kmieciak, *Procesowe gwarancje ochrony interesu podatnika (Proceedings Securities for Protecting the Taxpayer's Interest)*, "Kwartalnik Prawa Podatkowego" no. 1/2000, p.9; W.Nykiel, *O potrzebie równowagi między uprawnieniami i obowiązkami podatnika oraz organów podatkowych (On the Need for Balance between Taxpayer's and Tax Authorities' Rights and Obligations)*, "Prawo i Podatki" no. 2/2005, p.25-28; J.Kulicki, *Organy podatkowe, podatnicy i płatnicy (Tax Authorities, Taxpayers and Payers)*, "Prawo Spółek" no. 1/1997, p.41-49; A.Gomułowicz, *Zasada zdolności płatniczej podatnika (Principle of Taxpayer's Solvency)*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" no. 3-4/1990, p.23-32. Cf. also J.M.Klein's report, *The Protection of the Individual with Regard to the Acts of the Tax and Customs Administrations-Aspects Relating to Administrative Law*, published in the collection of materials presented during the colloquium organised by the Council of Europe in Messina (25-27.03.1986), *The Protection of the Individual with Regard to the Acts of the Tax and Customs Administrations*, Strasbourg 1986, p.14.

¹¹ B.David, S.Edwards, *Comprehensive Aspects of Taxation 1984-85 Edition*, Part 1, London-New York, p.25. In detail on the subject: B.Brzeziński, J.Głuchowski, C.Kosikowski, *Harmonizacja prawa podatkowego Unii Europejskiej i Polski (Harmonisation of the European Union and Poland's Tax Law)*, Warszawa 1998; A.Gomułowicz, J.Małecki, *Podatki i prawo podatkowe (Taxes and Tax Law)*, Warszawa 1998; A.Gomułowicz, J.Małecki, *Taxes and Tax Law*, Poznań 1998; G.Sorman, *L'état minimum*, Paris 1985, p.47; A.Zalasiński, *Zakaz dyskryminacji w sferze podatków bezpośrednich w prawie podatkowym Wspólnoty Europejskiej (Ban on Discrimination in the Sphere of Direct Taxes in the European Community Tax Law)*, Warszawa 2006, p.72.

through taxation. Taxes should not negatively affect the development of free market, they should not constitute a barrier in capital movement, or an obstacle for enterprising or hinder production and employment grow. Such effects may result not only from the lack of neutrality in the sphere of taxes, but also from lack of stability of taxation standards. Without stability it is impossible for the taxpayer to manage taxes effectively, create precise visions of the economic results of future actions, or even foresee the amount of tax burden - defining the stability of the range and forms of conducting the business activity. It has to be emphasised that harmonisation of taxes was advised already by the creators of the Rome Treaty in its art. 93 [99]¹² where they *expressis verbis* pointed to turnover tax, excise tax and a group of other indirect taxes. Neutrality of taxation constitutes one of the basic factors determining the form of Community law in the EU.¹³ It is also the warranty of correct functioning of the common market since it requires establishing such tax regulations, which secure free movement of goods, persons, capital and services.

From the point of view of protecting the neutrality of taxation the provisions of four directives of the EU Council are significant, namely these of the 1st,¹⁴ 6th,¹⁵ 8th¹⁶ and 13th Directive.¹⁷ They introduce statutory, executive and administrative regulations in the field of tax law, aimed at making the

¹² The name ‘Rome Treaty’ will be used to indicate the treaty that was signed in Rome on the 25.03.1957. (at present: the Treaty establishing the European Community); when necessary the numbering that existed before the Treaty of Amsterdam entered into force is provided in brackets.

¹³ See: I.Dobrucki, *Neutralność podatku VAT w Unii Europejskiej (Neutrality of VAT in European Union)*, “Glosa” no. 2/2004, p.30.

¹⁴ 1st Council Directive 67/227/EEC of 11.04.1967 on the harmonisation of legislation of Member States concerning turnover taxes; OJ L 71, 14.04.1967, p.1301.

¹⁵ 6th Council Directive 77/388/EEC of 17.05.1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value-added tax: uniform basis of assessment; OJ L 145, 13.06.1977, p.1. Cf. W.Maruchin, *Unijna koncepcja podatnika w ustawie o VAT (The Union Idea of Taxpayer in VAT Law)*, “Prawo Unii Europejskiej” no. 1/2004, p.7; A.Mariański, *Jak w obecnym stanie prawnym zagwarantować ochronę podatnika? (How to Secure Protection of Taxpayer in the Present Legal Status?)*, “Prawo i Podatki” no. 11/2006, p.19-23; A.Mariański, D.Strzelec, *Uzasadnienie decyzji podatkowej a gwarancje ochrony praw podatnika (Justification of Taxing Decision and Securing the Taxpayer’s Rights)*, “Monitor Podatkowy” no. 2/2006, p.26-31.

¹⁶ 8th Council Directive 79/1072/EEC of 6.12.1979 on the harmonisation of the laws of the Member States-Arrangements for the refund of value added tax to taxable persons not established in the territory of the country; OJ L 331, 27.12.1979, p.11-19.

¹⁷ 13th Council Directive 86/560/EEC of 17.11.1986, on the harmonisation of the laws of the Member States relating to turnover taxes - Arrangements for the refund of value added tax to taxable persons not established in Community territory; OJ L 326, 21.11.1986, p.40-41.

conditions on the Community market similar to those on the national markets. The regulations significantly affecting the manner and range of fulfilment of the neutrality requirement are first of all the provisions concerning deduction of calculated tax. This deduction guarantees the taxpayer the effect of neutrality of the tax they had paid in the earlier phase of turnover in the price of purchased commodities or services.¹⁸ It has to be remarked that according to the indicated Community legislation, reducing the due tax by the calculated tax constitutes an indisputable law, and not only a privilege of the taxpayer. The source of this right is art. 2 of the 1st Directive, which, at the same time orders to apply the above-mentioned reduction at every transaction.¹⁹

In the jurisprudence of the ECJ the 1st Directive is seldom interpreted. It is related to the fact that its standards are of general nature and they define the fundamental objectives of the VAT system without concentrating on detailed issues.²⁰ Within the determined cases, the Court, invoking the 1st Directive mainly refers to general principles, such as the neutrality of tax and the right to deduct the calculated tax, as well as the commonality of taxation with value added tax. Due to general nature of the rules, in the ECJ's decisions the 1st Directive is usually referred to alongside the detailed provisions of other directives and it does not constitute the sole basis for rulings. Despite this fact, it should not be forgotten that the basic principles of VAT are still being drawn by the Court from the regulations of the 1st Directive.

In the author's view 6th Directive does not contain detailed provisions defining the effect of quitting the economic activity on the taxpayer's

¹⁸ More on the mechanism of deductions and its influence on neutrality, cf. e.g. J.Kędzior, M.Bator, *Zasada neutralności podatku od wartości dodanej (Principle of Value Added Tax Neutrality)*, "Przegląd Podatkowy" no. 6/2003, p.27-28; T.Bojkowski, *Wolności oraz prawa konstytucyjne podatnika (Taxpayer's Freedoms and Constitutional Rights)*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" no. 3/2004, p.113-126; J.Fornalik, *Definicja podatnika a status organów publicznych (Definition of Taxpayer and the Status of Public Authorities)*, "Monitor Podatkowy" no. 7/2003, p.17-21; J.Kiszka, *Ochrona podatnika w prawie Unii Europejskiej (Protection of Taxpayer in European Union Law)*, "Przegląd Podatkowy" no. 8/2003, p.3-8; idem, *Ochrona podatnika w prawie polskim (Protection of Taxpayer in Polish Law)*, "Przegląd Podatkowy" no. 9/2003, p.3-8; B.Jaffcote, *The Developing European Corporate Tax System*, Monachium 1993; A.Mariański, *Nakaz rozstrzygania na korzyść podatnika-wykładnia prawa (Order to Determine for Taxpayer's Benefit-Interpretation of Law)*, "Monitor Podatkowy" no. 5/2003, p.5-11; J.Bauta, R.Sowiński, *Ochrona podatnika przed skutkami błędnej interpretacji prawa podatkowego (Protection of the Taxpayer against the Effect of Misinterpretation of Tax Law)*, "Przegląd Podatkowy" no. 10/2001, p.51-58.

¹⁹ See more: *VI Dyrektywa VAT: komentarz do Dyrektyw Rady Unii Europejskiej dotyczących wspólnego systemu podatku od wartości dodanej (6th Directive on VAT: Comments to European Union Council Directives Concerning Common Value Added Tax System)*, ed. K.Sachs, Warszawa 2004, p.3.

²⁰ Ibidem, p.13.

entitlement to deduction or repayment of the calculated tax-acquired in during this activity. This is supported by the ECJ's opinion in the case *Inrecommunale voor Zeewaterontziltling (INZO) v. Belgium*.²¹ In the case *INZO* received the repayment of the calculated tax related to the investment expenses it had incurred and after analysis of profitability of the planned investment, it was put into liquidation. Belgian revenue authorities refused to grant the status of a taxpayer to *INZO* and challenged its right to repayment of tax calculated as unrelated to taxed economic activity. However, ECJ did not share the above-mentioned opinion, stating that for status of a taxpayer it is important whether the expenditures were incurred 'with the intention of conducting an economic activity'.²² It also emphasised that the status of a taxpayer cannot be 'retroactively withdrawn as a result of a taxpayer's decision of liquidation without commencement of economic activity'.²³ In the *INZO* case tax authorities of a Member State should have taken declared intentions of commencing economic activity into consideration and only if *mala fide* action is proven they could withdraw the VAT payer status from the company intentionally making expenditures only in order to acquire the right to deductions. It is the only case justifying divergence from the principle of legal surety that orders to retain durability of the rights of a subject treated as a taxpayer. According to the regulation of the 6th Directive, the right to deductions is not time limited. Simultaneously, EU rules establish adjustment of previous deductions, the purpose of which is to achieve the correct level of tax encumbrance when the taxpayer performed a bigger or a smaller deduction than one to which he was entitled. In case of taxpayers performing taxed activities not encompassed by VAT, the deductions on the basis of established estimated proportion of the tax to the deduction, undergo annual correction. However, special solutions are provided for corrections of tax calculated at purchasing investment goods. Here, in all Member States the five-year correction period should be applied.²⁴

On the other hand, art. 17 of the 6th Directive lists *expressis verbis* only four categories of the calculated tax, to which the deduction can be applied.²⁵ It is significant for this subject that it also introduces a general rule that

²¹ See: case C-110/94 *Inrecommunale voor Zeewaterontziltling (INZO) v. Belgium*, [1996] ECR I-857.

²² See: par. 23 of the decision of ECJ in the case C-110/94 *Inrecommunale voor Zeewaterontziltling (INZO) v. Belgium*, [1996] ECR I-857.

²³ Analogical decisions of ECJ were taken in cases: C-37/95 *Ghent Coal Terminal NV v. Belgium*, [1998] ECR I-1 and C-268/83 *Rompelman*, [1985] ECR 655.

²⁴ See: *VI Dyrektywa VAT: komentarz do Dyrektyw Rady Unii Europejskiej dotyczących wspólnego systemu podatku od wartości dodanej*, op.cit., p.413.

²⁵ *Ibidem*, p.413.

a taxpayer is entitled to the paid tax deduction to the extent to which the purchased goods and services are used for the purposes of the taxed transactions. More over it lists exceptions which give a broader dimension to the right to deductions than one resulting from art. 17.2 of the 6th Directive according to which the right to deduction of calculated tax is formed in the extent to which the purchased commodities and services are used for the purposes of taxed transactions.²⁶

When analyzing the regulations concerning neutrality of VAT for taxpayers one should indicate that the common VAT system entitles to deduction or repayment of the tax paid in a given country not only the taxpayers who perform taxed activities on the territory of the same state.²⁷ The principle of imposing the tax only upon the ultimate consumers of commodities and services implies that the right to deduction should also be available to taxpayers who make purchases (price including VAT) on the territory of a given country in order to conduct economic activity in another state. The basis for this mechanism is included in article 17.4 of the 6th Directive and the subsequent implementing directives: 8th Council Directive on the harmonisation of the laws of the Member States Arrangements for the refund of value added tax to taxable persons not established in the territory of the country and 13th Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory. The taxpayers have access to repayment of the paid tax, irrespectively of the place where goods were purchased. They have this right both when they are comprised by VAT registration in the territory of the Community, but they performed the registration in country other than that of the purchase of goods, as well as when they conduct the VAT-taxed activity outside the area of the EU and are not subject to obligatory tax registration within its borders.²⁸

²⁶ See: Art. 17.2 of 6th Directive Council Directive 77/388/EEC of 17.05.1977: *'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay (...)'*,

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0388:EN:HTML>

²⁷ See joined cases: C-439/04 and C-440/04 Kittel, [2006] ECR I-6161, par. 10 and joined cases: C-354/03, C-355/03 and C-484/03 Optigen, [2006] ECR I-483, par. 29; case C-62/93 BP Soupergaz, [1995] ECR I-1883, par. 18 and joined cases C-110/98 to C-147/98 Gabalfrisa, [2000] ECR I-1577, par. 43.

²⁸ See: R.Namysłowski, *Zwrot VAT podmiotom zagranicznym (VAT Repayment to Foreign Subjects)*, "Przegląd Podatkowy" no. 12/2002, p.22-27. Cf. W.Maruchin, *Orzecznictwo Europejskiego Trybunału Sprawiedliwości w zakresie VAT-czynności podlegające opodatkowaniu (Jurisdiction of European Court of Justice Concerning VAT - Taxable Actions)*, "Prawo i Podatki Unii Europejskiej w praktyce" no. 2/2006, p.41; J.-M.Tirard, *Corporate Taxation in EU Countries*, London 1994; A.J.Easson, *Taxation in the European Community*, London 1993.

Tax return on the basis of the 8th and the 13th Directives does not constitute an inseparable mechanism of return that would result from the special status of foreign recipients, or an instrument encouraging to make purchases on the territory of a given country, but it is simply a special form of accomplishing the principle of VAT's neutrality for taxpayers.²⁹ Article 2 of the 8th Directive,³⁰ defining the scope of VAT return, makes the condition of the connection between the purchased commodities and services with transactions defined in article 17(3) (a) and (b) of the 6th Directive. The question arises, why the regulations of the 8th Directive do not refer to article 17 (2), which expresses the basic principle of the common VAT system, requiring the connection between the calculated tax undergoing deduction and the tax actions. However, it should be remembered that the provision of article 17 (3) (a) constitutes *lex specialis* to the principle expressed in article 17 (2). For whereas article 17 (2) concerns mainly the cases when taxed purchases are made in a given country, article 17(3) (a) concerns an analogous relationship between taxed purchases made in one country and taxed economic activity conducted in another country. At present the rules of the 8th Directive regulate the principles of returning tax only to taxpayers with seat in the territory of the Community, whereas the principles of returning tax to payers with seats outside the Community are regulated by the 6th Directive. The rules contained in the 13th Directive are close to the provisions of the 6th Directive yet they contain a few significant differences, first being the possibility of granting tax return to payers from a given country on the basis of the principle of reciprocity and the possibility of conditioning the return on establishing the tax representative by the taxpayer.

Summing up the analysis of the formal basis of indirect taxes harmonisation in the European Community countries we should answer the question why harmonisation of legislation related to indirect taxes is thought to be especially important in this process. In my analysis, the answer should be sought in the creation of the common market as the basic economic goal of the European integration. The differences in the principles of indirect taxation between Member States could cause situations, in which undertakings would take economic decisions as to the place of performance or purchase of a given service on the basis of comparing taxation principles in given countries. Attention should be brought to the fact that differences in taxation principles

²⁹ See: M.Chomiuk, *Prowadzenie działalności gospodarczej przez oddział firmy zagranicznej (Conducting Economic Activity by a Branch of Foreign Company)*, "Przegląd Podatkowy" no. 3/2003, p.22.

³⁰ See: *VI Dyrektywa VAT: komentarz do Dyrektyw Rady Unii Europejskiej dotyczących wspólnego systemu podatku od wartości dodanej*, op.cit, p.945.

constitute not only the subject of tax rates, but also various definitions of taxable actions, taxation basis, or the moment and place of forming tax obligation. The differentiation of the above principles among the states accessing the European Community meant different taxation for similar services in different countries.³¹ This problem definitely intensified in the cases of international transactions. Differences in taxation systems might lead to situations in which purchasing given services in one Member State would be more advantageous than in another. Even more importantly, lack of harmonisation could lead to cases of double taxation on one kind of services and absolute lack of taxation on others. As it was already mentioned, with reference to commodities these problems were in most cases eliminated by appropriate taxation of imports with simultaneous tax exemption for exports. However, it should be remembered that one of the basic goals of the Community was creating the common market without internal customs and fiscal frontiers and thus it was necessary to approximate the regulations being in force in the Member States to eliminate harmful tax competition between states, in spite of the lack of internal customs frontiers.³²

The above considerations became an important factor in the harmonisation of indirect taxes in such a way as the decisions concerning choice of the place for conducting economic activities, as well as the decisions of purchasers (taken both by undertakings and ultimate consumers of commodities and services), were not conditioned by the differences of taxation. The basic goals of harmonisation are clearly visible in detailed legislation concerning the common VAT system, *i.e.* the regulations of the 6th Directive.³³ Many provisions directly contain the obligation of Member States to implement Community rules, so as not to allow double taxation, lack of taxation, or competition disturbance.

2. Forbidden actions

Currently a significant problem concerns the supremacy of VAT neutrality principle, even if that was to lead to taxation upon illegal activities. The analysis of the judgment ECJ in the case of *Optimus*³⁴ sheds light on the

³¹ J.Ostrowski, *Oddział przedsiębiorcy zagranicznego a VAT (Foreign Entrepreneur's Branch and VAT)*, "Monitor Podatkowy" no. 3/2003, p.5.

³² Cf. M.Kalinowski, *Granice legalności unikania opodatkowania w polskim systemie podatkowym (The Limits of Legality in Avoiding Taxation in Polish Tax System)*, Toruń 2001, p.61.

³³ See more: B.J.M.Terra, J.Kajus, *A guide to the 6th VAT Directive - Commentary to the Value Added Tax European Community*, Amsterdam 1991, p.257.

³⁴ See: the judgment ECJ in the case 366/05 *Optimus*, [2007] ECR I-04985.

matter. It may seem that this verdict, adjudicated just before Poland's accession to the EU, constitutes the superior rule in the necessity to respect the directives on VAT. This case related to stamp duty levied on an increase of capital of a Portuguese public limited company, paid up in cash although, as at 1 July 1984, transactions of that kind were exempt from such duty. The reference to the ECJ was a step in an action taking place before the Portuguese courts. The ECJ decided the following: *'In the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1st January 1986, in the absence of derogating provisions in the Act of Accession of that State or in another Community document, Article 7 (1) of Council Directive 69/335/EEC of 17th July 1969 concerning indirect taxes on the raising of capital,³⁵ as amended by Council Directive 85/303/EEC of 10th June 1985,³⁶ must be interpreted to mean that the mandatory exemption for which it provides applies to all transactions falling within the scope of Directive 69/335 which, on 1st July 1984, were exempted, in that State, from capital duty or which were subject to that duty at a reduced rate of 0,50% or less. In the case of a State such as the Portuguese Republic, which acceded to the European Communities with effect from 1st January 1986, Article 7 (1) and 10 of Directive 69/335, as amended by Directive 85/303, prohibit the introduction, after 1st January 1986, of stamp duty on a transaction increasing share capital falling within the scope of Directive 69/335 which, on 1st July 1984, was exempted from that duty under national law³⁷.*

Firstly, the Court noticed the exemption from art. 7.1 par. 4 of the act on the tax on commodities and services and the excise tax on imported goods that had previously been exported. Secondly, the court indicated the principal aspect referring to the systemic structure of VAT in the matter of its neutrality. This principle is embedded both in the first and sixth VAT directives, as well as in the jurisdiction of ECJ. Thirdly, the court raised the issue of assessing civil-legal factors by tax authorities in the context of tax law on the basis of art. 58 and art. 83 of the Civil Code.³⁸ In my view, the judgment in the case *Optimus* indirectly contains all the earlier directions of the correct interpretation, simultaneously emphasizing the line of ECJ's jurisprudence with reference to the challenges that the Supreme Administrative

³⁵ Council Directive 69/335/EEC of 17th July 1969 concerning indirect taxes on the raising of Capital; OJ L 249, 3.10.1969, p.25-29.

³⁶ Council Directive 85/303/EEC of 10th June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital; OJ L 156, 15.6.1985, p.23.

³⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0366:EN:HTML>

³⁸ See: a decision of the Supreme Administrative Court in Warsaw of 24.11.2003 (FSA 3/03).

Court in Warsaw and the Polish legislator have to meet after our country's accession to the EU. Community legislation aims at full harmonisation of the general turnover tax, the result of which was the development of Community VAT pattern.³⁹ On the other hand, amending regulations concerning taxation with income tax from legal entities for the year 2004 was focused on the necessity of adjusting the internal law to the solutions resulting from the EU directives. The changes then introduced extended tax preferences provided at connecting and dividing for the domestic bidding company, also to the companies that have their seats or managing boards on the territory of a Community Member State.

An appropriate example is the decision of ECJ in the case *Tullihallitus v. Kaupo Salumets et al. (Finland)*,⁴⁰ where the Court found that the Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products,⁴¹ the 6th Directive, Council Directive 92/83/EEC on harmonisation of the structures of excise duties on alcoholic beverages⁴² and Council Regulation 2913/92 /EEC of the 12.10.1992 establishing the Community Customs Code⁴³ should be interpreted in such a way, as to create the tax obligation also in the situation of illegal import of ethyl alcohol from the third states upon the territory of the Community. It was stated that the obligation of VAT is created in the case of illegal traffic of goods, competing with legal turnover of these goods. According to the Court, the principle of VAT neutrality orders equal taxation treatment of legal and illegal turnover of the same goods.⁴⁴

³⁹ See: K.Gortat-Kopacka, A.Sobczak, *Wpływ dyrektyw unijnych na kształtowanie CIT w Polsce (Effect of Union Directives upon the Formation of CIT in Poland)*, "Przegląd Podatkowy" no. 2/2005, p.24. Cf. B.Brzeziński, M.Kalinowski, *Europejskie prawo podatkowe w świetle orzecznictwa ETS (European Tax Law in the Light of ECJ Jurisdiction)*, Gdańsk 2001, p.84-85.

⁴⁰ See: case C-455/98 *Tullihallitus v. Kaupo Salumets*, [2000] ECR, I-4993.

⁴¹ Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products; OJ L 76, 23.3.1992, p.1-13.

⁴² Council Directive 92/83/EEC of the 19.10.1992 on harmonisation of the structures of excise duties on alcoholic beverages; OJ L 316, 31.10.1992, p.21.

⁴³ Council Regulation 2913/92/EEC of the 12.10.1992 establishing the Community Customs Code; OJ L 302, 19.10.1992, p.1-50.

⁴⁴ Cf. case C-111/92 *Lange v. Finanzamt Fürstfeldbruck*, [1993] ECR I-4677. It follows in particular from par. 16 of *Lange* that the principle of fiscal neutrality precludes a generalised differentiation between lawful and unlawful transactions, except where, because of the special characteristics of certain products, all competition between a lawful economic sector and an unlawful sector is precluded.

In order to protect taxpayers, who, acting in bona fide, performed the deduction of the tax calculated in this way at investment purchases, the 6th Directive in its art. 20.2 assumes making partial corrections in such a way that the correction should concern only one-fifth of the amount of this tax and should not cause too big accumulation of encumbrance.⁴⁵ A similar protective character of the neutrality requirement is also related to the assumption of dividing the twenty-year correction period into yearly periods, which the directive introduced for purchase of real estates as capital goods. This allows to respect the principle of equal treatment of taxpayers and the consequences of corrections remain independent of the kind of purchased goods. The character of Community law requires that the accomplishment of neutrality rule should refer to the subjects acting within more than one state.

However, in the provisions of art. 24 of the 6th Directive, we can find a simplified scheme of taxing, provided by the European legislator for the so-called ‘small enterprises’.⁴⁶ On the basis of the article referred to above, the European legislator permitted introduction into the state legislations of provisions concerning taxation of ‘small entrepreneurs’ that diverge from general principles. Bearing in mind that an appropriate scheme should be formed for taxation of ‘small entrepreneurs’ the European legislator allowed for amending the rules on subject exemptions. Firstly, the level of sales should be decreased to the level below which all subjects conducting organised economic activity would be obligatorily exempted from taxation. Secondly, it would be advisable to apply the simplified taxation scheme to ‘small enterprises’ that in the scale of one tax year achieve sales that hardly exceed the threshold of subject exemption, i.e. the amount of 5000 euro.⁴⁷ The European legislator left for the taxpayers taking advantage of subject exemption the possibility of choosing whether to undergo taxation on general basis, or according to the rules provided only for ‘small entrepreneurs’. For instance, Germany introduced the simplified taxation scheme for the so called ‘small enterprises’ in response to the demands of ‘small entrepreneurs’ and in order to decrease the costs of tax administration related to servicing these particular taxpayers.⁴⁸

The ruling issued in case *Einberger v. Hauptzollamt Freiburg (Germany)*⁴⁹ concerned a very important issue of imposing VAT upon actions constituting

⁴⁵ See: *VI Dyrektywa VAT: komentarz do Dyrektyw Rady Unii Europejskiej dotyczących wspólnego systemu podatku od wartości dodanej*, op.cit., p.483.

⁴⁶ *Ibidem*, p.594. In detail, on the subject: P.Farmer, R.Lyal, *EC Tax Law*, Oxford 1994, p.214ff.

⁴⁷ I.Olchowicz, *Rachunkowość podatkowa (Tax Accountancy)*, Warszawa 2001, p.391.

⁴⁸ Cf. A.Tait, *Value added tax*, London 1972, p.130.

⁴⁹ See: case 294/82 *Einberger v. Hauptzollamt Freiburg (Germany)*, [1984] ECR I-1177.

forbidden deeds. This problem was also referred to by the Polish legislator through the regulations of art. 6.2 of The Act on the Goods and Services.⁵⁰ In its reasoning ECJ stated that the illegal import of drugs to the Community, which is only related to criminal responsibility, is not regulated in the rules of the 6th Directive. That is why, according to the Court, article 2 of 6th Directive⁵¹ should be interpreted so as not to create the tax obligation in the sales tax upon import of drugs into the Community, strictly controlled by appropriate authorities with to the view of using them for therapeutic and scientific purposes.

The significant divergence from the general principle that only action performed by the taxpayers is taxable found its reflection in the ruling in case *G.Bergeres-Becque v. Chef de service interrégional des douanes (France)*.⁵² For the purposes of applying art. 95 of the EEC Treaty where value-added tax is levied on the importation of goods by a non-taxable person, no distinction should be made according to whether or not the transaction giving rise to the importation was effected for valuable consideration where a Member State levies value-added tax on the importation from another Member State of goods supplied by a non-taxable person, the taxable amount does not include the amount of the value-added tax paid in the exporting Member State which is still contained in the value of the goods when they are imported.

In its judgment in case *Gaston Schul Douane Expeditieur BV v. Inspecteur der Invoerrechten en Accijnzen, Roosendaal (Holland)*⁵³ the ECJ was of opinion that article 2.2 the 6th Directive, is consistent with the Treaty and thus it has binding force. It should be interpreted so as not to create an obstacle in fulfilment of the duty defined in article 95 of the Treaty – that is of taking into consideration for the application of VAT for importing products by natural person not being a taxpayer (in the situation when there is no such tax at the supply of similar products by such a person to the territory of the import Member State) of the remaining part of the VAT paid in the export Member State and still constituting a part of the product's value at the moment of import.

⁵⁰ See more: the Act on the Goods and Services of 11.03.2004, Dziennik Ustaw (Journal of laws) no. 54/2004, item 535.

⁵¹ See: *VI Dyrektywa VAT: komentarz do Dyrektyw Rady Unii Europejskiej dotyczących wspólnego systemu podatku od wartości dodanej*, op.cit., p.30.

⁵² Case 39/85 *G.Bergeres-Becque v. Chef de service interrégional des douanes (France)*, [1986] ECR 259.

⁵³ See also: case 15/81 *Gaston Schul Douane Expeditieur BV v. Inspecteur der Invoerrechten en Accijnzen, Roosendaal (Holland)*, [1982] ECR 1409.

3. Neutrality and taxation of income from economic activity

The achievement of neutrality requires assurance that within the internal market the commodities and services will be taxed in each country, irrespective of the country of their origin, in a way that excludes non-equal competition, cases of double taxation, or lack of taxation.⁵⁴ The need to comply with these conditions was the main reason for attaching special importance to harmonisation of law related to indirect taxes. The postulate of harmonisation is not unknown to the Polish legislator, as we find the relevant provision in the Constitution of the Polish Republic, forming the legal basis of taxation. From the principle of state of law expressed in art. 2 of Polish Constitution and from the principle of equality towards law, contained in art. 32 of this act, one can conclude that the entering of the state, through taxes, into the sphere of rights, including the property rights of individuals, should take place with respect of the requirement, but without discriminating any taxpayers. Simultaneously in the light of the principle of freedom of economic activity, established in article 22 of Polish Constitution taxes can constitute a tool for limiting the freedom of conducting this activity only when this limitation is justified by an important public interest. Thus, these principles should correspond to the need for neutrality, and not affect the taxpayers' decisions.

According to current state of law there is a distinction between income tax payers, based on their legal form criterion. Not only there are separate legal regulations concerning taxing the incomes of natural persons⁵⁵ and the income tax on legal entities (including entities without legal personality),⁵⁶ but the tax solutions applied to them are completely different. It is significant that there is no neutrality as to the legal form of the conducted activity. A separate problem is lack of tax neutrality regarding the place where activity is conducted, example of which is in the regulations concerning taxing foreign branches of enterprises established in Poland.

Significant activities with regard to taxpayer protection are undertaken by the European Commission which contributes to removing tax obstacles that small and medium-sized enterprises encounter when they conduct their activities in other Member States of the European Community by enabling them to apply the principles being in force in their mother state, in the field of

⁵⁴ See: N.Gajl, *Teorie podatkowe w świecie (World Tax Theories)*, Warszawa 1992, p.149.

⁵⁵ Act of 26.07.1991 on income tax from natural persons, *Dziennik Ustaw (Journal of laws)* no. 14/2000, item 176 with subsequent amendments.

⁵⁶ Act of the 15.02.1992 on income tax from legal persons, *Dziennik Ustaw (Journal of laws)* no. 54/2000, item 654 with amendments.

imposing legal entities with income tax.⁵⁷ According to the assumptions of the European Commission, enterprises will be able to specify the taxable profits of the dominating company and the qualifying dependent companies and plants in other EU Member States on the basis of the principles of calculating tax basis that are in force in their state of origin. The tax basis, established in this way, will be divided between the particular countries, according to their share in general incomes. European Commission recommends that self-employment should be included in the project only in special cases that should be individually analysed by the tax administration of a given Member State. In this part of the paper neutrality shall be presented first from the Polish perspective and then the Community solutions will be discussed.

Depending on whether the activity of a foreign entrepreneur is conducted on the territory of Poland by means of a plant, or without such kind of a unit, the incomes of this plant may be doubly taxed (both in the state of the entrepreneur's seat, and in Poland, as the source state), or Poland-as the source state-may be deprived of the right to tax the indicated incomes of a foreign subject.⁵⁸ It should be emphasised that in the situation of admitting the Polish tax jurisdiction there is the problem of the method of ascribing to the branch the incomes that were in fact achieved by this very branch, and another related problem -of differentiating when the mutual relationships between the head office and the plant lead to understating the income of this plant.⁵⁹

Protection of taxpayers against lack of tax neutrality is also provided by Community legal solutions adopted for the excise taxes mainly in tobacco products, mineral oils and alcoholic beverages. Due to their fiscal significance it is especially important that regardless of the place of turnover, similar regulations concerning calculation of tax and the level of taxation rates are in force in the common market. Lack of such solutions would affect competitiveness of the common market, disturbing it. The principle of protecting the rights of individuals – in cases of delays or irregularities in implementing directives – is consequently supported in the jurisdiction of ECJ. In the case of *Ursula Becker v. Finanzamt Münster-Innenstadt*,⁶⁰ ECJ acknowledging justifiability of the taxpayer's claim – stemming from art. 13.Bd and the 6th Directive-for repayment of unduly collected tax – stated that

⁵⁷ Outline of a possible experimental application of Home State Taxation to small and medium-sized enterprises, <http://ec.europa.eu/>

⁵⁸ See more: L.Etel, *Reforma opodatkowania nieruchomości w Polsce (Real Estate Taxation Reform in Poland)*, Białystok 1998, p.32ff.

⁵⁹ See: H.Litwińczuk, *Nowa konstrukcja podatków dochodowych (New Structure of Income Taxes)*, "Przegląd podatkowy" no. 4/2003, p.7.

⁶⁰ Case 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt*, [1982] ECR 53.

a Member State cannot, towards its citizens, effectively rely on neglecting the duty resulting from the Directive, if no appropriate means were undertaken in order to implement it. The Court in answer to the questions submitted to it by the *Finanzgericht Münster* by order of 27 November 1980, hereby rules: ‘As from 1 January 1979 it was possible for the provision concerning the exemption from turnover tax of transactions consisting of the negotiation of credit contained in Article 13 B (d) 1 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment to be relied upon, in the absence of the implementation of that directive, by a credit negotiator where he had refrained from passing that tax on to persons following him in the chain of supply, and the State could not claim, as against him, that it had failed to implement the directive’.⁶¹ In the case of *Ursula Becker v. Finanzamt Münster-Innenstadt*, just like in the case of *Gerda Kloppenburg v. Finanzamt Leer*⁶² the Court also assumed that in case of missing the date of directive implementation, individuals can always rely on the direct effect of the directive, instead of the non-compliant national law provisions or nonexistent internal regulations, especially when lack of directive implementation in the country’s legal order negatively affects the taxpayer’s situation.

The issue of neutrality as to the place of conducting the activity exists also in the case of taxing dividends paid among companies in different states. Namely acquiring dividends by companies with seats in Poland from companies seated in other states remains tax-neutral.

4. Lack of neutrality in Income Tax on Corporate Bodies (CIT). Tax effects related to transformation of companies

There has been an ongoing argument in the EU on whether the income tax on corporate bodies should be harmonised. Direct taxes as those without such a crucial effect upon the movement of goods and services as indirect taxes, still have not undergone an extensive harmonisation. According to art. 93 of the EC Treaty, harmonisation of Member State legislation may refer only to sales taxes, excise tax and other indirect taxes.⁶³ However, unification of

⁶¹ Ibidem.

⁶² See: the judgment in case 70/83 *Gerda Kloppenburg v. Finanzamt Leer*, [1984] ECR 1075-1087. Cf. also decisions in cases 26/62 *Van Gend en Loos*, [1963] ECR 1; case 96/84 *Vereniging Slachtpluimvee-Export v. Rewe-Zentral-Aktiengesellschaft*, [1985] ECR 1157-1166.

⁶³ See: J.Buzewski, J.Jędraszczyk, *Neutralność podatku-podstawowa cecha wspólnego systemu VAT (Neutrality of Tax-Basic Feature of Common VAT System)*, “Monitor Podatkowy” no. 5/2003, p.18.

direct taxes is possible in the light of EU constitutional provision if the conditions indicated in the treaties are met. It should be emphasised that in accordance with the principle of subsidiarity the fields outside the exclusive competence of EU i.e. indirect taxes, the Community will undertake actions only when the purposes of the intended actions cannot be accomplished to the sufficient extent on the level of Member States.⁶⁴ The principle of subsidiarity is a warranty for the national parliaments for establishing income tax rates and the manner of calculating taxes at their own discretion.⁶⁵

Council Directive 90/434/EEC⁶⁶ of 23.07.1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States concerns preservation of tax neutrality in connection with organisational transformation of companies, whereas the aim of the second one is eliminating multiple taxation of dividends transferred by branches in one country to mother companies in another state.

Council Directive 90/435/EEC⁶⁷ on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States establishes two alternative methods of excluding multiple charging of dividends.⁶⁸ The taxpayers are subjected to the results of tax exemption method, or to the effects of tax credit method. In the first situation the mother company does not pay any tax on the dividend paid by the daughter company. In the second case the tax is paid by the mother company. However up to the amount of an appropriate domestic tax it is decreased by the amount of the tribute paid by the daughter company. A similar manifestation of protecting Polish taxpayers is also the solution known under the name of bad debt relief,

⁶⁴ See: M. Wiktorowicz, *Zasada subsydiarności w zmaganiach kompetencyjnych Komisji Europejskiej i Rady (na przykładzie opodatkowania osób prawnych podatkiem dochodowym według zasad państwa macierzystego) (Subsidiarity Principle in Competence Struggles of European Commission and Council (on the example of imposing income tax upon corporate bodies according to the principles being in force in the mother country))*, "Prawo i Podatki Unii Europejskiej" no. 3/2005, p.19.

⁶⁵ Ibidem, p.20.

⁶⁶ Council Directive 90/434/EEC of 23.07.1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States; OJ L 225, 20.08.1990, p.1.

⁶⁷ Council Directive 90/435/EEC of the 23.07.1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; OJ L 225, 20.08.1990, p.6. Cf. Council Directive 2003/49/EC of 3.06.2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States; OJ L 157, 26.06.2003, p.1.

⁶⁸ See more:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0435:EN:HTML>

provided in art. 11(B)5c) of the 6th Directive.⁶⁹ It is a relief with a protective function for the taxpayers who reveal the so-called bad debts, and it involves the possibility of annulment by the supplier due to contracting party's refusal or total or partial default. This way taxpayers get a chance of making the amount of taxation basis conditional on whether they received their whole due payment, or a part of it. Thus, they are not exposed to the necessity of paying the tax despite the fact that have not received their dues, and, consequently, they are at least partially protected from unfavourable tax effects of the so-called payment hold-ups. An example of such lack of consequence is evident in all the laws on VAT and excise tax.

It could be claimed that unification of the basis of income tax from corporate bodies would significantly simplify the work of companies, especially international concerns on the common market. This would allow them to limit the tax risks connected with conducting economic activity within the area of EU. Harmonisation of income tax from corporate bodies, besides many advantages, also has some negative aspects. Unification of the basis for CIT tax assessment would contribute to limitation of the already existing tax competition among the EU Member States.

5. Stability and surety of taxation in Polish legal order

A basic significant change after harmonisation of the Polish tax system for the Polish taxpayers is an additional argument in litigations concerning taxpayers' rights - inconsistency of tax regulations with Community legislation. Since Poland's accession to the EU Poland has been obliged not only to observe the law established by the EU, but also it has to recognise the primacy of this law over the internal regulations. In such cases the basis for solving this normative conflict is the existing possibility of referring the case to ECJ by the taxpayer. In my view it is worth emphasizing that it is the ECJ that decides about the consistency of the domestic law with Community legislation, so it guards the taxpayer's rights. A good example for proving this thesis is the verdict that ECJ announced on the 18 January 2007 in the *Brzeziński* case.⁷⁰ Mr Brzeziński purchased a Golf, manufactured in 1989, in Germany which he then imported into Poland. After submitting a simplified declaration relating to the acquisition of that vehicle in the Community, he paid PLN 855 by way of excise duty. Taking the view that that such a duty is contrary to the provisions of the European Community Treaty, he requested

⁶⁹ See: *VI Dyrektywa VAT: komentarz do Dyrektyw Rady Unii Europejskiej dotyczących wspólnego systemu podatku od wartości dodanej*, op.cit., p.231.

⁷⁰ See: C-313/05 *Brzeziński*, [2007] ECR I-513.

reimbursement of the excise duty he had paid. After having been unsuccessful before the customs authorities, Mr Brzeziński brought an action before the Regional Administrative Court in Warsaw. That court referred questions concerning the compatibility of the Polish excise duty with Community law to ECJ for a preliminary ruling. The Court notes that art. 90 European Community Treaty seeks to ensure the complete neutrality of internal taxation as regards competition between products already on the domestic market and imported products. In considering the compatibility of the excise duty in the light of art. 90 European Community Treaty, the Court states that it is necessary to compare the effects of the excise duty imposed on vehicles imported from another Member State with the effects of the residual excise duty imposed on second-hand vehicles already on the Polish market, which have already been subject to that same duty at the time of their initial registration. The Court notes that the excise duty at issue in the main proceedings is charged only once, on new and second-hand vehicles, in respect of all vehicles intended for registration in Poland, whether they were manufactured in Poland or imported from other Member States. However, the excise duty imposed on second-hand vehicles sold more than two years after their date of manufacture increases with the age of the vehicle. The Court holds that it is for the national court to examine whether such an increase in the rate is imposed only on second-hand vehicles originating from a Member State other than the Republic of Poland and whether, by contrast, for second-hand vehicles which were registered when they were new in Poland the percentage of residual excise duty incorporated into the price of such a vehicle remains constant. The Court adds that a system of taxation may be considered compatible with art. 90 European Community Treaty only if it is so arranged as to exclude any possibility of imported products being taxed more heavily than similar domestic products, so that it cannot in any event have discriminatory effect. The Court accordingly holds that Community law precludes an excise duty, in so far as the amount of the duty imposed on second-hand vehicles over two years old acquired in a Member State other than Poland exceeds the residual amount of the same duty incorporated into the purchase price of similar vehicles already registered in Poland. The Court further holds that there is no need to limit the temporal effect of this judgment. The Court's decision unambiguously confirmed the opinion that had been expressed for a long time, that the excise tax, collected by the Polish tax authorities on used passenger cars imported from other EU countries is inconsistent with the Community law.⁷¹

⁷¹ Ibidem.

The changes in tax regulations might be too fast and they can lead to clashes with other standards, or to breach the taxpayers' legal safety. Meeting these conditions secures the certainty of taxation. Besides the durability of legal regulation, this predictability is influenced by the clarity of language used in legal acts. It has to be understandable for any addressee of the regulation. Otherwise, the *sine qua non* condition of avoiding adverse consequences of applying a regulation which is not clear enough becomes official explanation. This however hinders taxpayers' decisions. Also apart from authoritarian evaluation of tax authorities, which cannot be excluded, it is contrary to law and the requirement of legal protection of an individual. At present it is mainly related to vagueness and lack of uniformity in the interpretation of regulations concerning duplicates of VAT-RR and VAT- MP invoices, as well as special moments of deducting VAT from the so-called 'media invoices'. The basic problem faced by the excise taxpayers for years has been the frequency and non-predictability of the fluctuation of the tribute.

The degree of respecting the requirements of neutrality, stability and surety of taxation in the Polish tax regulations significantly diverges from their realisations in the standards of EU law. It seems especially necessary to depart from solutions come from sub-statutory regulations. However, in order to adjust the internal regulations to the EU law in the field of taxpayer protection, it is indispensable to remove groundless time limitations in decreasing due tax by the calculated tax, regulations defining transactions, at which deductions are inadmissible, and excluding the application of standards transferring the liability of the contracting party's errors onto the taxpayer.

The regulations related to taxation of 'small entrepreneurs' should be transformed in such a way that they would significantly improve the tax situation of their addressees. It is advisable to analyse broader application of the cash method and introducing the institution of Community law, referred to as bad debt relief, the functioning of which would contribute to the increase of taxpayer's rights protection against negative consequences of *inter alia* insolvency of their customer.⁷² The use of cash accounting or certain retail schemes removes the problem of VAT on bad debts from the suppliers. Cash accounting enables you to account for VAT on the basis of payments received and made instead of on tax invoices issued and received. The VAT payable or repayable for each accounting period will be the difference between the total amount of VAT included in payments received from your customers and the total amount of VAT included in payments made to your suppliers. As to income taxes, it is worth demanding cancellation of differences in taxation

⁷² See about bad debt relief and cash accounting scheme: http://www.pem.co.uk/content/forums_vat/vatbdr.html

treatment of particular ways of restructuring companies, which breach the principle of neutrality, as well as greater respect for the requirement of neutrality with regard to the place where the activity is conducted

To sum up the above considerations, we can state that another method of strengthening the taxpayer's position, especially in the sphere where tax obligations arise by virtue of law, is institutional character of tax counselling due to the statutory specification of counsellors' duties and principles of their liability. In all countries their activity is heavily regulated which, undoubtedly, enhances clear structuring of relationships between the taxpayer, counsellor and tax authority. A functionally similar form of defending the taxpayer's interests is supporting them by a 'taxpayer ombudsperson'. Such an institution, constituting one of the links of revenue service, has been appointed amongst others in, Austria, Denmark, France, but also in Australia and the USA. The task of a 'taxpayer ombudsperson' is helping taxpayers at the stage of recognizing complaints against tax authorities and submitting appropriate motions and remarks to the managing boards of these authorities. To guarantee relative surety of law (of the taxpayer's legal situation), one could also reach for other patterns, practically verified in different countries. It is worth taking into consideration the idea of introducing in Poland the institution of initial tax decision, co to or connecting tax assessment with an independent audit that would be subject to statutory restrictions. Fulfilment of the indicated needs is significant not only for the legal security and development of Polish taxpayers' economic activity in the nearest future, but it also constitutes a *sine qua non* condition of non-discriminated participation of these subjects in the common market, on the basis of principles that today affect their competitors from the area of the EU.

Conclusions

The analyses conducted in this paper enable us to claim that the degree of compliance with the requirements of taxation neutrality, stability and surety in Polish tax regulations is substantially different from the accomplishment of these three requirements in the norms being in force in the EU law.

Firstly, neutrality of taxation constitutes one of the basic factors determining the form of Community law in the European Union. It is related with the purpose for which it is created, so it is also connected with the warranty of correct functioning of the common market. For it requires establishing such tax regulations, which would secure free movement of goods, persons, capital and services, that is liquidation of obstacles in the economic turnover inside the Community and achieving coherence of the set of rules, on the basis of which this turnover could freely develop.

Secondly, it requires specifying such tax regulations in the Polish legal system that would secure free movement of goods, persons, capital and services, i.e. cancellation of limitations in the sphere of economic turnover within the Community and achieving coherence of rules on the basis of which that turnover could freely develop. Thus, in order to adjust the internal regulations to the EU law it is necessary to depart from solutions resulting from sub-statutory regulations.

Thirdly, as far as the protection of taxpayers in the Polish legal order it is also necessary to eliminate unjustified time limits in decreasing due tax by the calculated tax, regulations defining transactions at which deduction is inadmissible, as well as excluding the application of norms that transfer the liability of the taxpayer's contracting party's errors onto the taxpayer. Thus, the Polish regulations concerning taxation of small payers should be transformed in such a way, as to, in accordance with the assumptions determining their formation, make them principally strengthen the tax situation of their addressees. The accomplishment of the indicated priorities is significant not only for the permanent economic development and legal security of the Polish taxpayers in their nearest future, but it is also a *sine qua non* condition of this subjects' full participation in the common market, on the basis of principles that are today in force for their competitors from the area of European Community.