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# Directions of Judicial Interpretation of the Concept of Tax Deductible Costs<sup>2</sup>

## Abstract

The article presents a critical analysis of the judicial decisions of administrative courts in cases in which the concept of tax deductible costs was interpreted. As a result of this analysis, a discrepancy was identified between the judiciary's understanding of this concept and the statutory wording of the provisions defining it. The article identifies administrative court rulings that contain clear inconsistencies involving the application of statutory wording inconsistent with the legal framework in force at the time when a given tax liability arose. It is demonstrated that the judiciary's interpretation of the concept of tax deductible costs had a positive impact on the development of the current statutory wording of this concept by making the legislator aware that the previous legal definitions of tax deductible costs did not correspond to economic reality, which ultimately resulted in their supplementation with costs incurred for the purpose of maintaining or securing a source of revenues.

**Keywords:** personal income tax, corporate income tax, tax deductible costs, interpretation of tax law, administrative courts.

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## Kierunki sądowej wykładni pojęcia kosztów uzyskania przychodów<sup>3</sup>

### Streszczenie

W artykule przedstawiono krytyczną analizę orzecznictwa sądów administracyjnych w sprawach, w których dokonywano wykładni pojęcia kosztów uzyskania przychodów. W wyniku tej analizy stwierdzono rozbieżności pomiędzy sposobem rozumienia tego pojęcia przez sądy a brzmieniem przepisów definiujących to pojęcie. Wskazano orzeczenia sądów administracyjnych, w których dostrzegalne są wyraźne nieścisłości polegające na stosowaniu innego brzmienia przepisów nieodpowiadające stanowi prawnemu obowiązującemu w chwili powstania danego zobowiązania podatkowego. Wykazano, że sposób rozumienia pojęcia kosztów uzyskania przychodów w orzecznictwie miał pozytywny wpływ na ukształtowanie obecnego brzmienia definicji tego pojęcia poprzez uświadomienie ustawodawcy, że wcześniejsze definicje prawne kosztów uzyskania przychodów nie odpowiadały rzeczywistości gospodarczej, co skutkowało ich uzupełnieniem o koszty zachowania lub zabezpieczenia źródła przychodów.

**Słowa kluczowe:** podatek dochodowy od osób fizycznych, podatek dochodowy od osób prawnych, koszty uzyskania przychodów, wykładnia prawa podatkowego, sądownictwo administracyjne.

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## Introduction

The concept of tax deductible costs of obtaining revenues (hereinafter: TDC) is currently included in Poland's Personal Income Tax Act (in Polish: *ustawa o podatku dochodowym od osób fizycznych*, hereinafter: PITA) and Corporate Income Tax Act (in Polish: *ustawa o podatku dochodowym od osób prawnych*, hereinafter: CITA).<sup>4</sup> In both acts, TDC are defined at two levels by indicating the general characteristics of recognised costs and referring to a closed list of expenses not recognised as such. Both acts also contain supplementary catalogues of expenses classified as TDC. If an expense is not expressly indicated in these catalogues, the main problem becomes its classification as TDC based on the legal definition.

In the history of changes in the definition of TDC, it should be noted that their legislative amendment introduced in 2006 was caused by the need to adapt the statutory wording to the way it had been interpreted by the judicial decisions of administrative courts.<sup>5</sup> The indicated circumstance suggests the need to conduct research on the hypothesis that there was (and perhaps still is) a discrepancy between the way the concept of TDC is understood by the judiciary and the statutory wording of the provisions defining it.

Judicial interpretation developed in the decisions of the Polish Supreme Administrative Court (hereinafter referred to as: NSA) and Provincial Administrative Courts (hereinafter referred to as: WSA) concerning TDC has been the subject of scholarly analysis. Among academic studies, one can find primarily commentaries based on these judicial decisions, regarding particular definitions or specific types of costs.<sup>6</sup> However, in the literature on the subject, there has so far been no analysis

<sup>4</sup> Art. 22(1) of the Personal Income Tax Act (Journal of Laws of 1991, no. 80, item 350 as amended) and Art. 15(1), first sentence, 1 of the Corporate Income Tax Act (Journal of Laws of 1992, no. 21, item 86, as amended).

<sup>5</sup> Draft Act amending the Corporate Income Tax Act, Sejm Paper of the Sejm of the 5<sup>th</sup> Term, No. 733 of 26.06.2006, p. 5, [https://orka.sejm.gov.pl/Druki5ka.sf/0/3D6B575F704FA549C125719C00369DB2/\\$file/733.pdf](https://orka.sejm.gov.pl/Druki5ka.sf/0/3D6B575F704FA549C125719C00369DB2/$file/733.pdf).

<sup>6</sup> See, e.g., A. Gomułowicz, *Koszty uzyskania przychodów. Zasady ogólne*, Warszawa 2005; A. Huchla, *Kształtowanie się kosztów uzyskania przychodów przedsiębiorcy w podatku dochodowym od osób prawnych*, "Studia Finansowoprawne" 2014, 3, pp. 61–71; M. Münnich, *Koszty uzyskania przychodów w podatkach dochodowych od osób fizycznych i prawnych – specyficzna klauzula generalna czy definicja legalna?*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2020, 82(1), pp. 203–215, <https://doi.org/10.14746/rpeis.2020.82.1.14>; D. Niestrzębski, *Ewolucja pojęcia kosztów uzyskania przychodów*, "Kwartalnik Prawa Podatkowego" 2007, 1, pp. 9–17; W. Nykiel, *Pojęcie kosztów uzyskania przychodów – zagadnienia podstawowe*, "Monitor Podatkowy"

of the consistency of the judicial decisions of administrative courts with the legal definitions of TDC in force at a given time, which would allow for the verification of the abovementioned hypothesis.

In order to verify it, this article analyses the acts regulating both income taxes in Poland, in which the legislator formulated or amended the concept of TDC, as well as the judicial decisions of administrative courts interpreting this concept, issued in the Third Republic of Poland.<sup>7</sup> The subject of the research is limited exclusively to the concept of TDC. No analysis of the correctness of the decisions in the cases examined is undertaken, and the cited judgments are analysed only with regard to the way the concept of TDC was perceived by the judiciary. The issue of eligible costs, subjective and objective exemptions, deductions, reliefs, and TDC from capital gains is also not addressed.

In order to ensure clarity of the argument, certain definitional simplifications have been adopted in the article. An analysis of the content of all versions of tax regulations defining this concept shows that their definitions begin with the phrase “Tax deductible costs are costs incurred for the purpose”, then indicate the types of purposes for which they are incurred, and finally, after the phrase “except for costs listed in”, indicate a provision in which a closed negative list of expenses that do not constitute TDC is specified. It is therefore possible to assume that the definition of TDC in both tax acts is identical in substance. The adoption of such simplification is also supported by existing judicial decisions. Both the NSA and the WSA, when considering cases related to the concept of TDC, sometimes use interchangeably interpretations of those costs made in the light of PITA and CITA. For example, the WSA in Opole, in its judgment of 30 November 2005 concerning corporate income tax,<sup>8</sup> referred to the judgment of the NSA of 29 November 1994 concerning personal income tax.<sup>9</sup> The WSA in Warsaw acted similarly in its judgment of 25 September 2012<sup>10</sup> when referring to the resolution of seven judges of the NSA of 14 March 2011.<sup>11</sup> In turn, in the matter of personal income tax, the WSA

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2007, 3, 102–106; M.A. Pogoński, *Koszty uzyskania przychodów w podatkach dochodowych (PIT, CIT)*, Warszawa 2020.

<sup>7</sup> The court judgments cited in the article are available in the Central Database of Administrative Court Judgments (Centralna Baza Orzeczeń Sądów Administracyjnych, <https://orzeczenia.nsa.gov.pl>), and those that are absent from this database are available in the LEX Legal Information System (<https://sip.lex.pl>, hereinafter referred to as: Lex) – in such a case, the article provides the number of the judgment in this system.

<sup>8</sup> Judgment of the WSA in Opole of 30.11.2005, I SA/Op 119/05.

<sup>9</sup> Judgment of the NSA of 29.11.1994, SA/Wr 1242/94.

<sup>10</sup> Judgment of the WSA in Warsaw of 25.09.2012, III SA/Wa 1049/12.

<sup>11</sup> Resolution of 7 judges of the NSA of 14.03.2011, II FPS 8/10.

in Gliwice in its judgment of 18 September 2017<sup>12</sup> referred to the judgments of the NSA of 19 June 2012 and 27 June 2013 in matters concerning corporate income tax<sup>13</sup> and indicated Article 22(1) of PITA as the equivalent of Article 15(1) of CITA. The equivalence of the definitions contained in these provisions was also indicated by the NSA in its judgment of 16 December 2020.<sup>14</sup> For the sake of clarity, the phrase “Tax deductible costs are” and the phrase “except for costs listed in” have been omitted from the remainder of the article, along with references to provisions containing negative catalogues, as well as references to the connection with sources of revenue included in some definitions. The legal status is current as of 15 October 2025.

## Overview of the Normative Definitions of Tax Deductible Costs

After the political transformation in Poland in 1989, until the end of 1991, the Act of 16 December 1972 on Income Tax (hereinafter referred to as ITA 1972) was in force with respect to income taxes, in which TDC were defined as “any costs being incurred for the purpose of earning revenues.”<sup>15</sup> In 1989, some of the provisions of the ITA 1972 were transferred to a separate legal act, resulting in the Act of 31 January 1989 on Corporate Income Tax (hereinafter referred to as CITA 1989).<sup>16</sup>

The ITA of 1972 was repealed on 1 January 1992 by the Act of 26 July 1991 on Personal Income Tax, which modified the definition of TDC by replacing the phrase “being incurred” (Polish: “ponoszone”) with “(which have been) incurred” (“poniesione”).<sup>17</sup>

However, CITA 1989 was repealed with retroactive effect from 1 January 1992 by the Act of 15 February 1992 on corporate income tax and on amending certain acts regulating taxation principles (hereinafter referred to as CITA 1992), in which the word “any” was deleted from the definition of TDC, the phrase “being incurred” was replaced with “incurred” and the phrase “as well as costs of operating a legal person” was added.<sup>18</sup> This definition was in force in CITA 1992 only for one

<sup>12</sup> Judgment of the WSA in Gliwice of 18.09.2017, I SA/GI 309/17.

<sup>13</sup> Judgments of the NSA: of 19.06.2012, II FSK 2486/10; of 27.06.2013, II FSK 2192/11.

<sup>14</sup> Judgment of the NSA of 16.12.2020, II FSK 2966/18.

<sup>15</sup> Act of 16.12.1972 on Income Tax (Journal of Laws No. 53, item 339).

<sup>16</sup> Act of 31.01.1989 on Corporate Income Tax (Journal of Laws No. 3, item 12).

<sup>17</sup> Act of 26.07.1991 on Personal Income Tax (Journal of Laws No. 80, item 350).

<sup>18</sup> Act of 15.02.1992 on corporate income tax and amending certain acts regulating taxation principles (Journal of Laws No. 21, item 86).

year and was amended by the Act of 6 March 1993 on amending certain acts regulating the principles of taxation and certain other acts, with retroactive effect from 1 January 1993, by removing the phrase “as well as costs of operating a legal person” from the definition.<sup>19</sup>

The definitions of TDC included in both tax acts were harmonised on 16 November 2006 by the Act amending the Personal Income Tax Act and certain other acts.<sup>20</sup> As of 1 January 2007, tax deductible costs in both tax acts became “costs incurred for the purpose of earning revenues or maintaining or securing a source of revenues.”<sup>21</sup> It should be noted, however, that the inclusion of costs incurred for the purpose of maintaining or securing a source of revenues in both definitions from 2007 resulted from the need to adapt their wording to the understanding developed in the judicial decisions of administrative courts.<sup>22</sup> This understanding refers to historical solutions, namely: (i) the content of Article 6 of the Act of 16 July 1920 on State Income Tax and Property Tax,<sup>23</sup> functioning since 1923 as the Income Tax Act<sup>24</sup>, in force in the years 1920-1945, according to which income was determined, inter alia, “after deducting the costs of earning, maintaining and securing income,” and (ii) the content of Article 10 of the Decree of 8 January 1946 on Income Tax, in force in the years 1946-1972, according to which the costs of obtaining revenues from a particular source were “any costs being incurred for the purpose of earning, maintaining or securing revenues, except for the costs listed in Article 11” of that Decree.<sup>25</sup>

The most recent change to the definition of TDC was introduced in the area of corporate income tax in connection with the need to separate income derived in the form of capital gains from other categories of income. As of 1 January 2018, the definition of TDC includes “costs incurred for the purpose of earning revenues from a source of revenues.”<sup>26</sup>

<sup>19</sup> Act of 6.03.1993 on amending certain acts regulating the principles of taxation and certain other acts (Journal of Laws No. 28, item 127).

<sup>20</sup> Act of 16.11.2006 on amending the personal income tax act and amending certain other acts (Journal of Laws No. 217, item 1588) and the Act of 16.11.2006 amending the Corporate Income Tax Act (Journal of Laws No. 217, item 1589).

<sup>21</sup> Art. 22 section sentence 1 of PITA and Art. 15 section 1 sentence 1 of CITA.

<sup>22</sup> Draft Act amending the Corporate Income Tax Act, Sejm Paper of the Sejm of the 5<sup>th</sup> Term, No. 733 of 26.06.2006, p. 5, [https://orka.sejm.gov.pl/Druki5ka.sf/0/3D6B575F704FA549C125719C00369DB2/\\$file/733.pdf](https://orka.sejm.gov.pl/Druki5ka.sf/0/3D6B575F704FA549C125719C00369DB2/$file/733.pdf).

<sup>23</sup> Act of 16.07.1920 on State Income Tax and Property Tax (Journal of Laws of the Republic of Poland 82 item 550).

<sup>24</sup> Regulation of the Minister of Treasury of 14.07.1923 on the text of the Act on State Income Tax, in the wording in force since the entry into force of the Act of 9.03.1923 (Journal of Laws of the Republic of Poland 77, item 607).

<sup>25</sup> Decree of 8.01.1946 on Income Tax (Journal of Laws of the Republic of Poland No. 2, item 14).

<sup>26</sup> Act of 27.10.2017 amending the Personal Income Tax Act, the Corporate Income Tax Act and the Act on flat-rate income tax on certain revenues earned by natural persons (Journal of Laws 2017, item 2175).

To summarise these developments, the definitions of TDC applicable in the above-mentioned periods were as follows (the designations of subsequent versions of these definitions, used later in the article, are provided in parentheses):

- ❑ Regarding personal income tax:
  - 1973–1991: “any costs being incurred for the purpose of earning revenues”;
  - 1992–2006: “any costs incurred for the purpose of earning revenues” (PITA 1992);
  - since 2007: “costs incurred for the purpose of earning revenues or maintaining or securing a source of revenues” (PITA 2007);
- ❑ Regarding corporate income tax:
  - 1973–1991: “any costs being incurred for the purpose of earning revenues”;
  - 1992: “costs incurred for the purpose of earning revenues as well as costs of operating a legal person” (CITA 1992);
  - 1993–2006: “costs incurred for the purpose of earning revenues” (CITA 1993);
  - 2007–2017: “costs incurred for the purpose of earning revenues or maintaining or securing a source of revenues” (CITA 2007);
  - since 2018: “costs incurred for the purpose of earning revenues from a source of revenues or for the purpose of maintaining or securing a source of revenues” (CITA 2018).

## The Concept of Tax Deductible Costs as a Legal Definition

In the terminology used by administrative courts when referring to provisions containing the concept of TDC, the most common terms include: “a very general and comprehensive definition of the costs of earning revenues,”<sup>27</sup> “general rule,”<sup>28</sup>

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<sup>27</sup> E.g., Judgment of the NSA of 11.05.1999, I SA/Łd 1058/97.

<sup>28</sup> E.g., Judgments of the WSA in Warsaw: of 27.04.2005, III SA/Wa 1659/04; of 26.06.2013, III SA/Wa 3219/12.

“general formula,”<sup>29</sup> “general provision,”<sup>30</sup> “definition,”<sup>31</sup> and even a “general definition of the costs of earning revenues.”<sup>32</sup>

However, the Provincial Administrative Court (WSA) in Wrocław, in three judgments from 2006, 2007, and 2009, found that the provision containing the concept of TDC lacks a legal definition of costs, which means that the legislator, by consciously using this concept in a vague manner, allowed for its flexible application under tax law.<sup>33</sup> This view was also expressed by the NSA in two judgments from 2009 and 2011.<sup>34</sup>

The view presented by the WSA in Wrocław and the NSA regarding the alleged lack of a definition of TDC in the income tax acts must be considered clearly erroneous. In accordance with the principles of legislative technique specified in the Regulation of the Prime Minister of 20 June 2002 on the “Principles of Legislative Technique”<sup>35</sup> (hereinafter: PLT), a legal definition of a legal concept is formulated in such a way as to indicate beyond any doubt that it refers to the meaning of terms; in particular, it is given the form: “the term *a* means *b*.”<sup>36</sup> If a definition enumerates its components, it is a scope definition, and if enumerating all the elements of the scope of the defined concept in one legal provision is not possible, the definition clearly states that the text of the same or another act contains elements supplementing this definition.<sup>37</sup>

An analysis of the content of the provisions defining TDC in both tax acts clearly shows that they were formulated in accordance with the typical structure of a legal definition, consisting of *the definiendum*: “tax deductible costs,” definitional link: “are,” *a definiens* constructed by indicating the general features that are to characterise the TDC, starting with the words “costs incurred for the purpose

<sup>29</sup> E.g., Judgments of the NSA: of 29.05.2014, II FSK 1812/12; of 17.12.2015, II FSK 2806/13.

<sup>30</sup> E.g., Judgments of the NSA: of 28.07.2020, II FSK 3266/19; of 8.12.2020, II FSK 2116/18; of 16.12.2020, II FSK 2966/18; of 26.01.2021, II FSK 2791/18; of 24.02.2021, II FSK 2966/20; of 6.12.2011, II FSK 1092/10 and Judgment of the WSA in Cracow of 9.05.2018, I SA/Kr 371/18.

<sup>31</sup> E.g., Judgments of the WSA in Gliwice: of 20.05.2004, I SA/Ka 925/03; of 26.05.2004, I SA/Ka 1126/03; of 22.02.2005, I SA/Gl 74/04; Judgment of the WSA in Cracow of 17.07.2008, I SA/Kr 545/08; Judgments of the WSA in Łódź: of 11.03.2008, I SA/Łd 1218/07; of 15.12.2011, I SA/Łd 1125/11; Judgment of the WSA in Poznań of 29.01.2015, I SA/Po 470/14, and Judgments of the WSA in Warsaw: of 15.02.2010, III SA/Wa 1592/09; of 25.01.2022, III SA/Wa 1914/21.

<sup>32</sup> E.g., Judgment of the WSA in Łódź of 2.10.2013, I SA/Łd 370/13.

<sup>33</sup> Judgments of the WSA in Wrocław: of 9.05.2006, I SA/Wr 67/05; of 19.02.2007, I SA/Wr 1260/06; of 4.12.2009, I SA/Wr 1136/09.

<sup>34</sup> Judgments of the NSA: of 1.12.2009, II FSK 950/08; of 15.11.2011, II FSK 929/10.

<sup>35</sup> Regulation of the Prime Minister of 20.06.2002 on the “Principles of legislative technique” (consolidated text Journal of Laws of 2016, item 283).

<sup>36</sup> § 151 section 1 of the PLT.

<sup>37</sup> § 153 section 1 and 2 of the PLT.

of earning revenues,” and a reference to the negative catalogue supplementing this definition. In the light of the provisions of the PLT, it should therefore be considered that the concept of TDC was constructed in both tax acts as a legal scope definition.

The NSA addressed this issue explicitly in the Resolution of seven judges from 2012, stating unequivocally that the provisions containing the term TDC constitute its legal definition.<sup>38</sup>

## The Concept of Tax Deductible Costs as a General Clause

In some judgments concerning TDC, the NSA and the WSA have pointed out that the legislator, in defining this concept, used analogous constructions resembling general clauses in both tax acts, with the reference allegedly extending to the entire content of the defining provision.<sup>39</sup> In some judgments, administrative courts identify the provision containing the definition of TDC as a general clause indirectly indicating that the general clause is either contained<sup>40</sup> or formulated in<sup>41</sup> the provision defining these costs. The WSA in Gliwice expressed its view in descriptive terms in its judgment of 22 September 2008, indicating that the general clause allegedly contained in Article 22 section 1 of the PITA, due to the ambiguity of its wording, is of an evaluative nature.<sup>42</sup> However, the NSA, in its judgments of 5 April 2016 and 29 August 2018, found that Article 15 section 1 of the CITA, containing a definition of TDC from a tax perspective and allegedly formulated on the principle of a general clause, is of a general nature.<sup>43</sup> The view that the legislator based the structure of the provisions defining the TDC on the principle of

<sup>38</sup> Resolution of 7 judges of the NSA of 25.06.2012, II FPS 2/12.

<sup>39</sup> Judgments of the NSA: of 11.01.2001, I SA/Wr 2445/98, LEX No. 73203; of 25.06.2009, II FSK 217/08; of 3.12.2009, II FSK 1019/08; of 2.03.2017, II FSK 281/15; of 17.10.2019, II FSK 3570/17; of 19.02.2020, II FSK 3623/18; Judgment of the WSA in Gliwice of 2.03.2009, I SA/GI 975/08; Judgments of the WSA in Łódź: of 31.05.2017, I SA/Łd 26/17; of 31.05.2017, I SA/Łd 27/17; of 31.05.2017, I SA/Łd 28/17; Judgments of the WSA in Poznań: of 20.08.2009, I SA/Po 291/09; of 15.10.2009, I SA/Po 398/09; of 18.07.2012, I SA/Po 479/12; Judgment of the WSA in Warsaw of 8.06.2017, III SA/Wa 2198/16 and Judgments of the WSA in Wrocław: of 15.11.2005, I SA/Wr 991/04; of 20.06.2012, I SA/Wr 442/12.

<sup>40</sup> Judgments of the NSA: of 4.08.1999, III SA 7803/98, LEX No. 39469; of 2.04.2003, SA/Sz 1998/01, LEX No. 82394; Judgment of the WSA in Poznań of 13.05.2010, I SA/Po 71/10; Judgment of the WSA in Warsaw of 26.06.2013, III SA/Wa 3219/12, and Judgment of the WSA in Wrocław of 20.06.2012, I SA/Wr 442/12.

<sup>41</sup> Judgments of the NSA: of 17.08.2016, II FSK 1757/14; of 17.08.2016, II FSK 1758/14.

<sup>42</sup> Judgment of the WSA in Gliwice of 22.09.2008, I SA/GI 686/08.

<sup>43</sup> Judgments of the NSA: of 05.04.2016, II FSK 308/14; of 29.08.2018, II FSK 2239/16.

a general clause was also expressed by the WSA in Opole in its judgments from 2005 and 2009.<sup>44</sup>

In the largest group of such judgments, administrative courts state that the concept of TDC, in the light of the provisions defining it, is based on a general clause, and identify the full content of the defining provision as the content of that clause.<sup>45</sup>

The concept of a general clause has not yet been defined in legal language and remains the subject of numerous disputes in legal theory.<sup>46</sup> General clauses are used to include non-legal criteria with axiological connotations in legal provisions.<sup>47</sup> They are intended to clearly indicate the type of non-legal good or value which, according to the legislator's intention, is to be protected by this phrase in the process of applying the law. The scope of meaning of each general clause is determined exclusively in the process of interpretation, taking into account norms and assessments belonging to the non-legal sphere commonly accepted in society.<sup>48</sup> The use of general clauses does not require change in the law; however, their application requires observing the directions of change in the assessment of the general assumptions of the adopted system of values, their justification, and their dependence on

<sup>44</sup> Judgments of the WSA in Opole: of 30.11.2005, I SA/Op 119/05; of 8.04.2009, I SA/Op 72/09; of 24.06.2009, I SA/Op 179/09.

<sup>45</sup> Judgments of the NSA: of 7.04.1994, SA/Po 3369/93; of 26.03.1998, I SA/Po 1254/97; of 23.10.1998, SA/Sz 2174/97; of 22.09.1999, I SA/Ka 143/98, LEX No. 57789; of 24.05.2000, I SA/Ka 2121/98, LEX No. 43912; of 6.03.2002, I SA/Ka 2496/00, LEX No. 72292; of 30.05.2001, I SA/Gd 2698/98, LEX No. 1693829; of 28.10.2003, SA/Bd 1944/03, LEX No. 90267; of 4.03.2010, II FSK 82/10; of 7.12.2012, II FSK 432/11; of 18.02.2016, II FSK 3644/13; of 12.05.2016, II FSK 837/14; of 15.01.2020, II FSK 477/18; Judgments of the WSA in Bydgoszcz: of 9.11.2011, I SA/Bd 660/11; of 21.12.2011, I SA/Bd 824/11; of 7.02.2012, I SA/Bd 22/12; of 2.04.2019, I SA/Bd 66/19; of 24.09.2019, I SA/Bd 449/19; Judgments of the WSA in Gdańsk: of 22.06.2005, I SA/Gd 1297/03; of 22.06.2005, I SA/Gd 1298/03; of 21.10.2005, I SA/Gd 1588/02; Judgments of the WSA in Gliwice: of 20.05.2004, I SA/Ka 925/03; of 26.05.2004, I SA/Ka 1126/03; of 21.10.2005, I SA/GI 846/05; of 19.04.2018, I SA/GI 206/18; Judgment of the WSA in Gorzów Wielkopolski of 6.04.2011, I SA/Go 88/11; Judgment of the WSA in Cracow of 2.02.2007, I SA/Kr 976/04; Judgments of the WSA in Lublin: of 15.04.2015, I SA/Lu 1300/14; of 10.01.2018, I SA/Lu 732/17; of 20.03.2019, I SA/Lu 48/19; of 21.02.2020, I SA/Lu 701/19; Judgments of the WSA in Łódź: of 5.10.2010, I SA/Łd 474/10; of 13.10.2010, I SA/Łd 579/10; of 7.07.2011, I SA/Łd 248/11; of 15.12.2011, I SA/Łd 1125/11; of 26.06.2012, I SA/Łd 611/12; of 13.11.2012, I SA/Łd 758/12; Judgment of the WSA in Olsztyn of 27.06.2013, I SA/OI 276/13; Judgments of the WSA in Poznań: of 27.08.2013, I SA/Po 220/13; of 29.01.2015, I SA/Po 469/14; of 29.01.2015, I SA/Po 470/14; of 27.09.2017, I SA/Po 243/17; of 23.11.2017, I SA/Po 723/17; Judgment of the WSA in Rzeszów of 27.08.2020, I SA/Rz 193/20; Judgments of the WSA in Warsaw: of 27.04.2005, III SA/Wa 1659/04; of 26.11.2010, III SA/Wa 893/10, and Judgments of the WSA in Wrocław: of 7.05.2004, I SA/Wr 2445/01; of 15.12.2006, I SA/Wr 1565/05; of 10.01.2007, I SA/Wr 703/06; of 19.01.2007, I SA/Wr 364/06; of 29.01.2007, I SA/Wr 1544/06; of 19.02.2007, I SA/Wr 1260/06; of 3.12.2007, I SA/Wr 903/07; of 10.02.2009, I SA/Wr 1109/08; of 10.02.2009, I SA/Wr 1110/08; of 14.04.2010, I SA/Wr 1873/09; of 5.08.2010, I SA/Wr 623/10; of 23.07.2013, I SA/Wr 684/13; of 23.07.2013, I SA/Wr 685/13.

<sup>46</sup> A. Szot, *Klauzula generalna jako ponadgałęziowa konstrukcja systemu prawa*, "Annales Universitatis Mariae Curie-Skłodowska, sectio G (Ius)" 2016, 63(2), p. 291.

<sup>47</sup> *Ibidem*, p. 293.

<sup>48</sup> Judgment of the Constitutional Tribunal of 17.10.2000, SK 5/99, OTK ZU 7/2000, item 254.

the social environment in which they operate, in order to ensure legal certainty and trust in the bodies that make and apply the law.<sup>49</sup> At the same time, the potential negative effects of applying general clauses must be taken into account, as their use may pose a threat to legal certainty and may even violate the constitutional principle of fairness and equality in taxation.<sup>50</sup>

As previously indicated, the provisions introducing the concept of TDC constitute a legal definition; therefore, according to the views, opinions, and interpretations of legal scholars, academics, and researchers in Poland, their content is subject to interpretation in accordance with general interpretative principles, which means that linguistic interpretation takes precedence.<sup>51</sup>

One should fully agree with the view of Monika Münnich that linguistic interpretation of the concept of TDC does not allow for a clear and unambiguous indication of either specific goods or non-legal values belonging to the axiological, social, or economic sphere. The judiciary's treatment of provisions containing the concept of TDC as constituting a general clause, or as containing a general clause or being based on such a clause, is therefore erroneous and methodologically unfounded.<sup>52</sup> Moreover, introducing and naming a specific type of good or value that such a general clause would protect, e.g. the reasonable conduct of the taxpayer, would necessitate the removal of the lists of non-deductible expenses from tax regulations.<sup>53</sup>

## The Concept of Tax Deductible Costs as a General Anti-Avoidance Clause

It is also reasonable to mention here the occasional attempts by tax authorities to use the corporate income tax provision defining TDC as an instrument to counteract tax avoidance. However, both the NSA and the WSA consistently oppose such a qualification of the definition of the concept of TDC.

In its judgment of 4 March 2020, the NSA, while referring to Article 15 section 1 of the CITA, stated that the qualification of certain expenses as TDC should be considered from the perspective of determining the tax base, and not in the context of meeting the conditions not provided for in this provision. The court also stated

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<sup>49</sup> A. Hanusz, P. Krukowska-Siembida, *Ważny interes podatnika i interes publiczny w klauzulach generalnych Ordynacji podatkowej*, "Annales Universitatis Mariae Curie-Skłodowska, sectio G (Ius)" 2016, 63(2).

<sup>50</sup> *Ibidem*, p. 185.

<sup>51</sup> B. Brzeziński, *Wykładnia prawa podatkowego*, Gdańsk 2013, p. 67.

<sup>52</sup> M. Münnich, *op. cit.*, pp. 206–207.

<sup>53</sup> *Ibidem*, pp. 212–213.

unequivocally that this regulation does not replace instruments allowing tax authorities to counteract tax avoidance, including questioning the cost nature of an incurred expense, provided that the conditions specified in Article 15 section 1 of the CITA itself are met.<sup>54</sup> The NSA advanced analogous reasoning in its judgment of 29 May 2020.<sup>55</sup>

The WSA in Warsaw relied on a particularly noteworthy argument in its judgment of 13 March 2019, essentially agreeing with the taxpayer that if tax authorities were entitled to question the amount of the costs incurred and the circumstances in which they were incurred under Article 15 of the CITA, a rational legislator would not have introduced either any transfer pricing provisions or general anti-tax avoidance clauses.<sup>56</sup>

A more neutral position regarding the treatment of the definition of TDC as a clause against tax avoidance was adopted by the WSA in Bydgoszcz in its judgment of 7 July 2020. The court stated that the application of the provision of Article 15 of the CITA may indeed lead to a financial outcome similar to that obtained in a hypothetical situation involving the application of a general clause against tax avoidance; however, this does not mean that, in the case at hand, the provision was applied improperly, as the tax authority neither questioned the legality of the taxpayer's actions nor treated the achievement of a tax advantage as a negative condition for recognising a given expense as TDC.<sup>57</sup>

## Definitional Chaos of the Concept of Tax Deductible Costs

In some judgments of the NSA and the WSA, clear inconsistencies can be observed in the application, in the course of subsumption, of wordings of statutory provisions that did not correspond to the legal status in force at the time when the relevant tax obligation arose. The WSA in Poznań, in its judgment of 13 May 2010, dismissing the taxpayer's appeal against the decision of the Director of the Fiscal Control Office issued in July 2009 concerning the determination of personal income tax liability and default interest on advance payments for 2006, cited as relevant the content of Article 22 section 1 of the PITA from the consolidated text of the Act published in 2000 (i.e. containing the definition PITA 1992), but in the reasoning

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<sup>54</sup> Judgment of the NSA of 4.03.2020, II FSK 1550/19.

<sup>55</sup> Judgment of the NSA of 29.05.2020, II FSK 2900/19.

<sup>56</sup> Judgment of the WSA in Warsaw of 13.03.2019, III SA/Wa 1475/18.

<sup>57</sup> Judgment of the WSA in Bydgoszcz of 7.07.2020, I SA/Bd 120/20.

of the judgment cited the definition in force since 2007 (PITA 2007). This inconsistency did not have a direct impact on the outcome of the case, as the taxpayer's appeal was dismissed due to the questioning of VAT invoices that did not reflect the actual course of economic events.<sup>58</sup>

In its judgment of 3 December 2009, the NSA, considering the taxpayer's cassation appeal against the judgment of the WSA in Wrocław concerning the appeal against the decision of the Director of the Tax Chamber of December 2003 regarding corporate income tax for the year 2000, cited as relevant the content of Article 15 section 1 of the CITA in the wording applicable in 2000 (i.e. the definition from CITA 1993), but again relied in its reasoning on the definition applicable from 2007 (CITA 2007).<sup>59</sup> In this case as well, this inconsistency did not have a direct impact on the ruling, as the taxpayer's appeal was dismissed due to his irrational conduct consisting in incurring costs which, based on the legal relationship binding him with another entity, he could have transferred to that entity without any harm to himself. The definition from CITA 2007, instead of CITA 1993, was also cited in the NSA's judgments from 2013-2015 (the footnotes indicate, after the case number, the tax year to which the individual cases pertained).<sup>60</sup> It should be emphasised that in the tax years 2001, 2005, and 2006 the taxpayer could not have known – let alone complied with – a provision that entered into force only in 2007.

The NSA, in its judgment of 21 January 2020, considering the cassation appeal against the judgment of the WSA in Kielce concerning the appeal against the individual tax interpretation issued by the Director of the National Tax Information of 12 May 2017 in the field of corporate income tax, cited the definition from CITA 2018.<sup>61</sup> It should be noted that the Director of the National Tax Information, when issuing the tax interpretation in May 2017, could not have known – let alone applied – a definition that was amended only in October 2017 and entered into force in 2018. Nevertheless, even in its judgment of 29 September 2021, when considering the application to reopen the proceedings in the same case, the NSA, yet again, relied on the definition from CITA 2018 as applicable to the 2017 tax year.<sup>62</sup>

In some judgments issued after 1991 on corporate income tax – that is, after the word "any" had been deleted from the definition of TDC – this word continued to be included in *the definiens*. This occurred in some judgments from 2002–2011, concerning tax years 1997-2006, in which the word was added to the definition

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<sup>58</sup> Judgment of the WSA in Poznań of 13.05.2010, I SA/Po 71/10.

<sup>59</sup> Judgment of the NSA of 3.12.2009, II FSK 1019/08.

<sup>60</sup> Judgments of the NSA: of 6.12.2013, II FSK 72/12 (2001); of 29.05.2014, II FSK 1812/12 (2006); of 17.12.2015, II FSK 2806/13 (2005).

<sup>61</sup> Judgment of the NSA of 21.01.2020, II FSK 321/18.

<sup>62</sup> Judgment of the NSA of 29.09.2021, II FSK 1722/20.

from CITA 1993,<sup>63</sup> as well as in some judgments from 2013-2021, relating to tax years 2009-2019, in which it was added to the definition from CITA 2007.<sup>64</sup>

Finally, reference should be made to the judgment of the NSA of 4 August 2005 in a case in which the dispute concerned, among other things, the matter of whether expenses incurred by a taxpayer in 1999 and related to the general functioning of an entity could be recognised as tax deductible costs. The court repealed the challenged judgment in its entirety and remitted the case back for reconsideration, indicating e.g. that since it had ultimately been established that the taxpayer conducted business activity in 1999, it was incomprehensible to exclude expenses related to the functioning of a legal entity from tax deductible costs.<sup>65</sup> In this case, however, it must be recalled that the expression “costs of operating a legal person” appeared in the statutory definition of TDC only in 1992 (CITA 1992). As a result, the court’s qualification of disputed costs incurred in 1999 – when CITA 1993 was in force – as costs related to the operation of a legal person cannot be reconciled with the wording of the applicable statutory definition.

## The Law-Making Activity of Administrative Courts

In its judgment of 12 May 1999, case file reference I SA/Wr 482/97, concerning personal income tax for April 1994, the NSA formulated the thesis (headnote): “The tax deductible costs of obtaining revenues are all expenses incurred for the purpose of obtaining revenues, including those incurred for the purpose of maintaining or securing a source of revenues, so that this source will generate revenues in the future as well. In this approach, these costs include both costs directly related to the revenues earned and those indirectly related, provided that it is demonstrated that they were reasonably incurred for the purpose of earning revenues (including the purpose of ensuring the functioning of the source of revenues), even if, for objective reasons, revenues were not obtained.”<sup>66</sup> At the outset, it should be noted that, according to this thesis, tax deductible costs of obtaining revenues are expenses

<sup>63</sup> Judgments of the NSA: of 6.03.2002, I SA/Ka 2496/00, LEX no. 72292 (1997); of 2.04.2003, SA/Sz 1998/01, LEX no. 82394 (1998); of 25.06.2009, II FSK 217/08 (2006); Judgment of the WSA in Gdańsk of 27.09.2011, I SA/Gd 419/11 (2001), and Judgment of the WSA in Warsaw of 5.09.2006, III SA/Wa 1485/06 (2002).

<sup>64</sup> Judgments of the NSA: of 17.06.2013, II FSK 702/11 (2009); of 16.04.2014, II FSK 1163/12 (2010); of 15.01.2020, II FSK 477/18 (2011); of 19.02.2020, II FSK 3623/18 (2011); of 28.07.2020, II FSK 3266/19 (2015); of 16.12.2020, II FSK 2966/18 (2016); of 24.02.2021, II FSK 2966/20 (2019); Judgment of the WSA in Poznań of 18.07.2012, I SA/Po 479/12 (2010), and Judgment of the WSA in Warsaw of 22.03.2017, III SA/Wa 801/16 (2012).

<sup>65</sup> Judgment of the NSA of 4.08.2005, FSK 2044/04.

<sup>66</sup> Judgment of the NSA of 12.05.1999, I SA/Wr 482/97.

incurred for the purpose of obtaining revenues (a tautological formulation). Moreover, in 1999, the NSA classified as TDC costs incurred both for the purpose of maintaining a source of revenues and for the purpose of securing a source of revenues, despite the fact that these purposes were introduced into tax regulations only in 2007. In addition, the NSA identified as TDC a new category of expenses, namely “costs incurred for the purpose of ensuring the functioning of the source of revenues.” This thesis was subsequently cited by the NSA and the WSA in Gliwice, Gdańsk, and Warsaw in their judgments from 2009–2015,<sup>67</sup> and even by the Supreme Court in its resolution of 2002.<sup>68</sup>

Some adjudicating panels of the NSA and the WSA in Lublin, Warsaw, and Wrocław cited only the first sentence of the abovementioned thesis, modifying the wording by replacing the term “all” with the word “any.”<sup>69</sup>

The first sentence of this thesis was also relied upon by the Supreme Administrative Court and the Provincial Administrative Courts in Bydgoszcz, Gdańsk, Gliwice, Kraków, Olsztyn, Opole, Warsaw, and Wrocław in their judgments delivered in the period 2008–2012, but in the following modified wording: “tax deductible costs are any rational and economically justified expenses incurred in connection with the conduct of business activity aimed at creating, securing, and maintaining a source of revenues.”<sup>70</sup> As a result, the altered version of the NSA’s thesis of 12 May 1999 was cited, while simultaneously introducing another new category of TDC, i.e. costs incurred for the purpose of creating a source of revenues. In the judgments concerned, it was also indicated that the same wording regarding TDC as that contained in the thesis of the NSA judgment, file reference I SA/Wr 482/97, could

<sup>67</sup> Judgments of the NSA: of 3.12.2009, II FSK 1139/08; of 22.01.2013, II FSK 2056/12; of 28.05.2015, II FSK 865/13; Judgments of the WSA in Gdańsk: of 19.05.2009, I SA/Gd 918/08; of 18.06.2009, I SA/Gd 197/09; Judgments of the WSA in Gliwice: of 23.02.2009, I SA/Gl 1079/08; of 16.12.2010, I SA/Gl 671/10, and Judgments of the WSA in Warsaw: of 7.11.2008, III SA/Wa 1404/08; of 14.02.2013, III SA/Wa 2186/12; of 16.05.2013, III SA/Wa 3198/12; of 25.06.2013, III SA/Wa 3199/12.

<sup>68</sup> Resolution of the Supreme Court Sitting as a Panel of Seven Judges of 13.03.2002, III ZP 21/01.

<sup>69</sup> Judgments of the NSA: of 12.05.2016, II FSK 837/14; z 28.07.2020, II FSK 1420/18; of 28.07.2020, II FSK 3266/19; of 9.12.2020, II FSK 2014/18; of 16.12.2020, II FSK 2966/18; Judgment of the WSA in Lublin of 15.04.2015, I SA/Lu 1300/14; Judgments of the WSA in Warsaw: of 15.10.2015, III SA/Wa 442/13; of 6.10.2014, III SA/Wa 854/14; of 26.10.2016, z III SA/Wa 2489/16; of 22.03.2017, III SA/Wa 801/16, and Judgment of the WSA in Wrocław of 23.09.2020, I SA/Wr 1035/19.

<sup>70</sup> Judgments of the NSA: of 20.02.2010, II FSK 1450/08; of 12.04.2011, II FSK 442/11; of 14.04.2011, II FSK 440/11; Judgments of the WSA in Bydgoszcz: of 22.04.2008, I SA/Bd 73/08; of 29.12.2008, I SA/Bd 717/08; Judgment of the WSA in Gdańsk of 12.03.2009, I SA/Gd 814/08; Judgments of the WSA in Gliwice: of 10.02.2009, I SA/Gl 1024/08; of 13.06.2012, I SA/Gl 490/12; Judgments of the WSA in Cracow: of 3.03.2009, I SA/Kr 1446/08; of 23.04.2009, I SA/Kr 296/09; Judgment of the WSA in Olsztyn of 9.12.2009, I SA/Ol 671/09; Judgment of the WSA in Opole of 11.02.2009, I SA/Op 414/08; Judgments of the WSA in Warsaw: of 26.03.2008, III SA/Wa 2218/07; of 12.09.2008, III SA/Wa 873/08; of 6.10.2008, III SA/Wa 1420/08; of 16.04.2009, III SA/Wa 3413/08, and Judgments of the WSA in Wrocław: of 20.12.2012, I SA/Wr 1216/12; of 20.12.2012, I SA/Wr 1217/12.

allegedly be found in the judgment of the NSA of 13 March 1998, file reference I SA/Lu 230/97. However, in the latter judgment, the NSA formulated a different thesis (headnote), namely: "Tax deductible costs are all rational and economically justified expenses incurred in connection with the conduct of business activity, the purpose of which is to achieve, secure, and maintain a source of revenues."<sup>71</sup> In this way, the NSA introduced into judicial discourse yet another purpose for incurring TDC, namely achieving a source of revenues. This thesis was cited in the judgments of the NSA, the WSA in Warsaw, and the WSA in Lublin from 2006, 2007, and 2009.<sup>72</sup>

It should be noted, however, that the first judgment explicitly indicating the purpose of incurring an expense classified as TDC as being the achievement of a source of revenues appeared in the thesis of the NSA judgment of 21 March 1997.<sup>73</sup> The thesis formulated in that judgment, but later modified to read: "tax deductible costs are all expenses incurred for the purpose of earning revenues, including those incurred for the purpose of maintaining or securing a source of revenues," was subsequently relied upon by the NSA in the abovementioned judgment of 12 May 1999, by the Supreme Court sitting as a panel of seven judges in the previously mentioned Resolution of 13 March 2002, as well as by certain adjudicating panels of the NSA and the WSA in Gliwice, Olsztyn, Opole, and Wrocław.<sup>74</sup>

The foregoing judicial decisions clearly show that administrative courts, when interpreting the concept of TDC, developed their own normative content, irrespective of the statutory wording of the defining provisions in force at the relevant time, thereby exhibiting features characteristic of law-making activity.

## Conclusions

The judicial decisions of administrative courts are undoubtedly of key importance in determining the correct interpretation of the concept of tax deductible costs. In some cases, the interpretation of this concept provided by the NSA and the WSA may be considered as attempts to explain the essence of these costs.

<sup>71</sup> Judgment of the NSA of 13.03.1998, I SA/Lu 230/97, Lex nr 33832.

<sup>72</sup> Judgment of the NSA of 23.05.2007, II FSK 717/06; Judgment of the WSA in Warsaw of 5.09.2006, III SA/Wa 1485/06; Judgment of the WSA in Lublin of 14.07.2009, I SA/Lu 267/09.

<sup>73</sup> Judgment of the NSA of 21.03.1997, I SA/Łd 1243/96.

<sup>74</sup> Judgments of the NSA: of 12.05.1999, I SA/Wr 1813/97; of 18.05.1999, I SA/Wr 1357/98; Judgment of the WSA in Gliwice of 4.09.2012, I SA/GI 199/12; Judgment of the WSA in Olsztyn of 21.06.2006, I SA/OI 222/06; Judgment of the WSA in Opole of 14.05.2004, I SA/Wr 1252/02, and Judgments of the WSA in Wrocław: of 29.01.2004, I SA/Wr 3351/01; of 7.06.2006, I SA/Wr 388/05; of 7.06.2006, I SA/Wr 390/05.

In my opinion, declaring the definitions of TDC to be a general and comprehensive term, a general provision, or a general rule or formula discredits these definitions. Moreover, referring to the provision introducing the concept of TDC as a general definition suggests the existence of another definition alongside the statutory one.

I consider it incorrect to attribute the characteristics of a general clause to the definitions of the concept of TDC. Administrative courts, when adopting such an approach, failed to take into account that the defining feature of general clauses is the protection of a specific good or value, whereas the content of the definition of TDC lacks any word or phrase with axiological significance.

I positively assess the firm position of administrative courts regarding attempts by tax authorities to assign the features of a clause against tax avoidance to the definitions of the concept of TDC.

Based on the presented results of the analysis of the judicial decisions of administrative courts, the main conclusion is that they are highly inconsistent and non-uniform, and that courts sometimes lose orientation in successive amendments to the provisions defining the concept of TDC. This leads to the further conclusion that some adjudicating panels, in searching for arguments to justify their rulings, overlooked the fact that certain cases concerned periods in which a different wording of the provisions defining TDC was in force. As a result, the reasoning of many judgments relied on future definitions of the concept of TDC, which taxpayers could not have known at the time the relevant factual circumstances arose.

The repeated occurrence of the tautological error in certain judgments issued between 1999 and 2020, consisting in the assertion that the tax deductible costs of obtaining revenues are costs incurred for the purpose of obtaining revenues, deserves clear criticism. I also disapprove of the creation, in the reasoning for judgments, of such purposes for incurring costs classified as TDC as creating a source of revenues or achieving a source of revenues. Courts applying such reasoning, instead of strictly adhering to the statutory provisions defining the concept of TDC, uncritically reproduced formulations from other rulings, using terms and expressions that do not appear in those provisions. Likewise, the addition of the word "any" to the definition of TDC in rulings concerning corporate income tax issued after its removal from the statutory definition after 1991 cannot be approved. At the same time, the introduction into judicial decisions since 1999 of purposes such as securing and maintaining a source of revenues in relation to TDC bears, in my opinion, the hallmarks of law-making activity by administrative courts.

Furthermore, an analysis of the substance of the judgments examined in this article revealed that some of them cited modified fragments of other judgments, inconsistent with their original wordings.

In my opinion, the judicial activity of administrative courts in some cases involving the interpretation of the concept of TDC has introduced conceptual disorder concerning the purposes of incurring such costs, at times leading to cognitive dissonance.

The hypothesis concerning the existence of a discrepancy between the manner in which the concept of TDC is understood by the judiciary and the statutory wording of the provisions defining it has therefore been confirmed.

This also leads to the conclusion that the judiciary, by disregarding the statutory legal definitions of the concept of TDC, has developed its own understanding of that concept, independent of the wording of the provisions in force both at the time when the tax obligation arose in a given case and at the time of adjudication.

However, it should be strongly emphasised that the practical effect of this judicial activity was to draw the legislator's attention to the incompatibility of the statutory definitions of the concept of TDC with economic reality. This, in turn, resulted in the unification of these definitions in both tax acts as of 2007 and their supplementation with costs incurred for the purpose of maintaining or securing a source of revenues.

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