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# Tax Reliefs and Exemptions as the Public Subjective Rights of the Taxpayer<sup>3</sup>

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## Abstract

The purpose of this article is to answer a handful of research questions. Can the numerous reliefs and exemptions provided for in tax law be qualified as the public subjective rights of the taxpayer?

Answering the question formulated in this way requires the verification of the research hypothesis, according to which tax reliefs and exemptions are, contrary to the judgments of the CT and the SAC, the subjective rights of the taxpayer.

Generally speaking, no publications in the tax law literature are devoted to the topic of interpreting tax reliefs and exemptions as the subjective rights of the taxpayer.

The main conclusion is that only systemic tax reliefs and only those systemic exemptions that jointly meet the two conditions can be considered the subjective rights of a taxpayer. First of all, they have a nature of disposable exemptions, i.e. the ones which involve the taxpayer's right to make a choice. Secondly, the use of an exemption cannot be subject to administrative discretion. In the case of systemic tax reliefs, the verification of the first condition is always positive because there is no doubt that all systemic reliefs regulated in tax laws are the subjective rights of the taxpayer.

**Keywords:** subjective rights, constitutional subjective rights of a taxpayer, taxpayer, tax reliefs, tax exemptions.

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## Ulgi i zwolnienia podatkowe jako publiczne prawa podmiotowe podatnika<sup>4</sup>

### Streszczenie

Celem niniejszego artykułu jest udzielenie odpowiedzi na pytanie, czy unormowane w prawie podatkowym liczne ulgi i zwolnienia można zakwalifikować do publicznych praw podmiotowych podatnika.

Udzielenie odpowiedzi na tak sformułowane pytanie wymaga weryfikacji hipotezy badawczej, w myśl której ulgi i zwolnienia podatkowe unormowane w przepisach prawa podatkowego są wbrew orzecznictwu TK oraz NSA prawami podmiotowymi podatnika.

W piśmiennictwie podatkowym nie ma w zasadzie publikacji poświęconych tytułowej problematyce postrzegania ulg i zwolnień jako praw podmiotowych podatnika.

Zasadniczy wniosek zaprezentowany w konkluzjach sprowadza się do stwierdzenia, że za prawa podmiotowe podatnika można uznać jedynie systemowe ulgi podatkowe oraz tylko te systemowe zwolnienia, które łącznie spełniają dwa warunki. Po pierwsze mają charakter zwolnień dyspozytywnych, czyli takich, gdy podatnikowi przysługuje prawo do dokonania wyboru. Po wtóre, skorzystanie ze zwolnienia nie może być uzależnione od uznania administracyjnego. W przypadku systemowych ulg podatkowych weryfikacja pierwszego etapu jest zawsze pozytywna, bez wątplenia bowiem wszystkie ulgi systemowe unormowane w ustawach podatkowych są prawami podmiotowymi podatnika.

**Słowa kluczowe:** prawo podmiotowe, konstytucyjne prawo podmiotowe podatnika, podatnik, ulgi podatkowe, zwolnienia podatkowe.

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## Introductory Remarks

A public subjective right is defined in the administrative law doctrine as a legal position of an entity in which it has a power, based on a legal norm (substantive or procedural), to demand specific action from a public authority.<sup>5</sup> The literature of the subject stresses that if a subjective right is encoded in substantive legal norms, the tax authority cannot rely on administrative discretion.<sup>6</sup> An entity equipped with a public subjective right cannot renounce it, but may decide not to exercise it. Such subjective rights constitute not only protection of the individual interest but also that of the public interest, and protecting the latter cannot depend decisively on the will of the entitled entity.<sup>7</sup>

This dichotomous understanding of public subjective rights is also present in tax law. Considering their fundamental objective, served by the constitutionally guaranteed execution and protection of the legitimate rights of the taxpayer, it is possible to classify subjective rights as:

- ❑ absolute (*sensu stricto*) – dependent only on the decision of the entity that possesses this right
- ❑ relative (*sensu largo*) – when a subjective right is limited by some condition (subject to administrative discretion).

The legitimacy of the proposed division is further confirmed by the fact that at the heart of the construction of subjective rights there is the desire to safeguard the realisation of fundamental, perennial human needs. Further justification comes from the fact that the legislator is not the creator of subjective rights, but only protects them and makes it possible to execute them by implementing them in the provisions of substantive law.<sup>8</sup>

<sup>5</sup> S. Kasznica, *Polskie prawo administracyjne*, Poznań 1946, p. 126; K. Tomaszewska, *Znaczenie i zakres ochrony publicznych praw podmiotowych a ochrona interesu jednostki*, pp. 113–134, [http://www.bibliotekacyfrowa.pl/Content/39984/06\\_Katarzyna\\_Tomaszewska.pdf](http://www.bibliotekacyfrowa.pl/Content/39984/06_Katarzyna_Tomaszewska.pdf) (accessed: 11.09.2020).

<sup>6</sup> A. Błaś, *Ochrona praw podmiotowych jednostki wobec decyzji administracyjnej uznaniowej niepodlegającej merytorycznej kontroli sądu administracyjnego*, [in:] E. Ura (ed.), *Prawne gwarancje ochrony praw jednostek wobec działań administracji publicznej*, Rzeszów 2020, p. 17.

<sup>7</sup> See: M. Stahl (red.), Z. Duniewska, B. Jaworska-Dębska et al., *Prawo administracyjne pojęcie, instytucje, zasady w teorii i orzecznictwie*, Warszawa 2009, p. 77.

<sup>8</sup> See M. Pyziak-Szafnicka, *Prawo podmiotowe*, SPP 2006, 1, p. 51.

The proposed concordance of public subjective rights is a premise for exploring the question of whether tax reliefs and exemptions constitute at all and what kind of public subjective rights, as provisioned in the applicable tax law.

The legal nature of these two structural elements of the tax and the issue of how to define them have already been repeatedly analysed in the tax law literature.<sup>9</sup> However, these studies have rarely concerned the perception of reliefs and exemptions in terms of the subjective rights of the taxpayer.<sup>10</sup> The present publication constitutes an attempt to fill this gap, even though the limits of the volume make this attempt a limited one. The need to undertake in-depth research on this issue is further confirmed by the judicature of the Constitutional Tribunal (hereinafter referred to as the CT), administrative courts and tax authorities, which has been issued over more than the past 20 years. One can easily observe a lack of uniformity of the judgments and their inconsistency with the latest legal-theoretical trends.

The aim of this article is to verify the hypothesis that the tax reliefs and exemptions provided for in the tax law *do* constitute the subjective rights of a taxpayer, contrary to the judicature of Poland's CT and Supreme Administrative Court (hereinafter referred to as the SAC).

## Theoretical and Legal Problems Concerning the Definition of Tax Reliefs and Exemptions

According to Poland's tax law (Tax Code), tax reliefs are exemptions, remissions, reductions or deductions provided for in tax law, the application of which results in a reduction of the tax base or the amount of due tax. It should be emphasised that according to these provisions, a relief is not effected through a reduction of the amount of due tax by the amount of input tax – as defined in the provisions of the Value

<sup>9</sup> W. Nykiel, *Ulgi i zwolnienia w konstrukcji prawnej podatku*, Warszawa 2002; W. Morawski, *Pojęcie ulgi podatkowej w Ordynacji podatkowej*, [in:] *Regulacje prawno-podatkowe i rozwiązania finansowe. Pro publico bono. Księga jubileuszowa profesora Jana Gluchowskiego*, Toruń 2002, pp. 175–188; Idem, *Ulgi i zwolnienia w prawie podatkowym*, Gdańsk 2003. Idem, *Ulgi i zwolnienia podatkowe*, [in:] B. Brzeziński (ed.), *Prawo podatkowe. Teoria. Instytucje. Funkcjonowanie*, Toruń 2009, pp. 249–264. The issue of tax exemptions was also raised by H. Dzwonkowski, *Elementy konstrukcyjne podatku w świetle art. 217 Konstytucji*, „Głosa” 1999, 6, pp. 1–6. See also A. Krzywoń, *Podatki i inne daniny publiczne w Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2011, pp. 75–117; M. Durczyńska, *Zakres ulg w polskim systemie podatkowym*, [in:] J. Kulicki (eds.), *Dylematy reformy systemu podatkowego w Polsce*, H. Dzwonkowski, Warszawa 2016, pp. 436–455.

<sup>10</sup> W. Morawski, *Charakter prawa do ulgi lub zwolnienia podatkowego*, [in:] E. Ura (ed.), *Prawne gwarancje ochrony praw jednostek wobec działań administracji publicznej*, Rzeszów 2002, pp. 371–387; J. Marusik, *Konstytucyjne zasady sprawiedliwości, równości i powszechności opodatkowania a system ulg, zwolnień, odliczeń, kwot wolnych i kosztów w podatku dochodowym*, „Studia BAS” 2018, 2(54), pp. 67–91.

Added Tax Act – or by other deductions are constitutive of this tax.<sup>11</sup> The linguistic interpretation of the aforementioned provisions indicates unequivocally that, acting on the grounds of the Polish general tax law, the legislator regards these two legal categories as identical<sup>12</sup>, even though in accordance with the provisions of the Constitution of the Republic of Poland, they constitute separate elements of tax construction.<sup>13</sup> In the tax literature and in the Constitution, reliefs and exemptions are treated as two different legal categories, which affect the legal and financial status of a taxpayer in two different ways. Generally speaking, tax reliefs and exemptions are divided into two categories: individual and systemic.

Individual tax reliefs, that is, reliefs in the settlement of tax obligations, are not structural elements of specific taxes, as they concern all types of taxes. The purpose of these reliefs is not to reduce the tax burden, but to postpone the date of payment of the tax or to eliminate a tax obligation altogether.<sup>14</sup> The most important feature of such reliefs is that their application is linked to tax proceedings, and thus to the discretion of tax authorities. Systemic tax reliefs, on the other hand, are of a general nature, as they are regulated by specific tax laws. Therefore, they constitute structural elements of the specific types of taxation. Hence, if a taxpayer meets the statutory requirements for the relief and wishes to make use of it, the tax authority cannot, in principle, deny such an entitlement. It is generally accepted in the doctrine that this type of relief represents an adjustment of the tax base, tax rate or tax amount, i.e. the quantitative elements of the tax construction.<sup>15</sup>

A tax exemption, as opposed to a relief, has the effect of excluding a certain category of entities from the subjective scope of a given tax (subjective exemption)

<sup>11</sup> Article 3 point 6 of the Act of 29 August 1997, Tax Code, i.e. Journal of Laws of 2020, item 1325, as amended (hereinafter referred to as the Tax Code).

<sup>12</sup> The literature of the subject exhibits attempts to clarify the definition by combining the concept of reliefs and exemptions, stating that this is a legislative effort to recognise that the concept of a 'tax relief' is also understood to mean tax exemption, and the latter concept is of a purely technical nature. The aim of the technical definition is to establish a collective term for various analytical categories in order to use this term in the content of a legal act, in order to avoid unnecessary repetition, increasing the volume of the legal act, B. Brzeziński, *Uwagi o znaczeniu definicji w prawie podatkowym*, [in:] *Księga jubileuszowa Profesora Marka Mazurkiewicza. Studia z dziedziny prawa finansowego, prawa konstytucyjnego i ochrony środowiska*, Wrocław 2001, pp. 225–226.

<sup>13</sup> In accordance with Article 217 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws. No. 78, item 483, as amended (hereinafter referred to as the Constitution). The Constitution stipulates that the imposition of taxes, other public levies, determination of entities, substance of taxation and tax rates, as well as the rules for granting reliefs and exemptions and categories of entities exempt from taxes, shall be effected by way of a statutory regulation (act).

<sup>14</sup> A taxpayer interested in granting a specific relief is obliged to apply to the competent tax authority, cf. W. Nykiel, *Ulgi i zwolnienia...*, op. cit., pp. 30–31, 35.

<sup>15</sup> W. Nykiel, *Ulgi i zwolnienia...*, op. cit., p. 29.

or of excluding certain categories of factual or legal situations from the material scope of a given tax (substantive exemption).<sup>16</sup> A direct consequence of applying the exemption is the non-payment of tax by the exempt entity or its non-payment on the exempt substance.<sup>17</sup> As is the case with reliefs, exemptions may be divided into individual and general. The application of individual exemptions depends on a decision of the tax authority, while general exemptions are those to which an entity indicated in tax law is entitled *ex lege*, or, alternatively, which cover the matters indicated in the tax law provisions. The tax exemption granted subjectively or substantively belongs to the so-called qualitative elements of the tax construction.<sup>18</sup>

To sum up, tax reliefs and exemptions represent essentially distinct technical components in the tax construction, which are context-dependent and optional. What is more, reliefs and exemptions do not represent uniform legal categories.<sup>19</sup>

## Tax Reliefs Interpreted as a Taxpayer's Subjective Rights

As mentioned above, individual tax reliefs are reductions in tax obligations for which a taxpayer makes a reasoned request.<sup>20</sup> In the case of such tax reliefs, the reduction does not concern the amount of tax due. On the contrary, a taxpayer needs to reckon with an additional cost, due to the obligation to pay a deferral fee. Therefore, individual tax reliefs offer a taxpayer an opportunity to benefit from deferred payment or the division of tax due or tax arrears in instalments.<sup>21</sup> A waiver from these rights does not bring about any negative legal consequences.<sup>22</sup>

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<sup>16</sup> The regulations may also provide for mixed subjective-substantive exemptions, see W. Nykiel, *Ulgi i zwolnienia...*, op. cit., p. 16 and the literature referenced there.

<sup>17</sup> W. Nykiel, *Ulgi i zwolnienia...*, op. cit., p. 21.

<sup>18</sup> *Ibidem*, p. 29.

<sup>19</sup> The same interpretation available in the PAC in Gorzów Wielkopolski, Judgment of 20 October 2009, Ref. No. I SA/Go 414/09, SIP LEX, No. 571253. The court found out that exemption and relief are two different institutions in the legal construction of the tax. Admittedly, the economic effects of the practical application of an exemption or relief may be the same, but at the legal level, they are completely separate institutions.

<sup>20</sup> See Articles 67a(1) and 67a(2) of the Tax Code.

<sup>21</sup> This concerns deferral of payment of tax arrears together with interest on arrears, tax deferrals, tax instalments, the right to cancel all or part of the tax arrears, interest on arrears or the payment of deferral fees, see Articles 48 and 67a par. 1 and 2 of the Tax Code.

<sup>22</sup> W. Nykiel, *Ulgi i zwolnienia...*, op. cit., pp. 70–71. SAC, Judgment of 17 December 2001, Ref. No. I SA/Ka 2043/00, unpublished.

The judicature on the qualification of tax reliefs unveils divergent interpretations as to whether such reliefs constitute property rights, and therefore, whether they are the subjective rights of a taxpayer. Unfortunately, this issue is not unequivocally settled in either administrative or court judicature. We can point to rulings which are in favour of this qualification<sup>23</sup>, as well as those which take the opposite view, according to which a tax relief is an intangible right and cannot be a subjective right.<sup>24</sup>

It seems that the tangibility or intangibility of rights cannot be seen as a relevant criterion in this case, as legal-theoretical arguments indicate that these reliefs undoubtedly constitute a kind of entitlement for taxpayers, but their application in practice depends on the administrative discretion of the tax authorities.<sup>25</sup> This latter fact is decisive in why these rights cannot be interpreted as a taxpayer's subjective rights. An additional argument against the status of tax reliefs as subjective rights is that public subjective rights merge the legal interest of an entity and its right to protect that interest, which manifests itself through the right to lodge a judicial complaint. However, the prerequisites allowing the tax authority to grant or reject a tax relief are general clauses of public interest or of a vital interest of a taxpayer, but not a legal interest that grants procedural legitimacy to acting as a party in tax proceedings. It should be stressed that the most recent literature of the subject expresses a view that the discretionary nature of such reliefs needs to be rejected.<sup>26</sup>

<sup>23</sup> See: SAC, Judgement of 22 December 1999, Ref. No. III SA 135/99; SAC, Judgement of 7 June 2000, Ref. No. III SA 1216/99, *Pravo Gospodarce*, No. 4/2001, p. 50; SAC, Judgement of 10 February 2005, Ref. No. III SA/Wa 1007/04, SIP LEX, No. 251241. Individual interpretation of 16 September 2013, Tax Chamber in Bydgoszcz, ITPB1/415-694c/13/WM. Also see: with respect to the so-called student tax relief: PAC in Łódź, Judgment of 13 January 2012, Ref. No. I SA/Łd 1427/11; PAC in Gliwice, Judgment of 20 November 2018, Ref. No. I SA/GI 653/18; analogously, among others, PAC in Gliwice, Judgment of 20 November 2018, Ref. No. I SA/GI 653/18; of 6 November 2018, Ref. No. I SA/GI 481/18; of 21 August 2018, Ref. No. I SA/GI 54/18; PAC in Poznań, Judgment of 14 October 2009, Ref. No. I SA/Po 610/09; PAC in Wrocław, Judgment of 18 March 2018, Ref. No. I SA/Wr 1552/17, CBOSA.

<sup>24</sup> See Individual Interpretation of the Director of the National Revenue Administration Information Centre of 18 November 2019, Ref.: 0111-KDIB1-1.4017.14.2019.1.BK.

<sup>25</sup> The tax law literature has long criticised these legal solutions as a space that allows the tax authorities to abuse their power, see R. Dowgier, *Uznanie w prawie podatkowym*, "Przegląd Naukowy Disputatio" 2011, XII, p. 77; R. Mastalski, *Pravo podatkowe*, Warszawa 2012, p. 47; M. Münnich, *Deklaracja Praw Podatnika*, [in:] B. Kucia-Guściora, M. Burzec (eds.), *Przywileje podatkowe*, Lublin 2013, pp. 9–10; P. Możyłowski, *Treść uzasadnienia decyzji w sprawie ulgi podatkowej – glosa do wyroku WSA z 3 września 2014 r., sygn. akt III SA/Wa 321/14*, „Studia Ekonomiczne Prawne i Administracyjne” 2015, 2, p. 74; M. Ślifirczyk, *Wykonanie, niewykonanie i nienależyte wykonanie zobowiązania podatkowego*, Warszawa 2018, pp. 184–186.

<sup>26</sup> M. Ślifirczyk, *Wykonanie...*, op. cit., pp. 186–187.

From the point of view of a taxpayer's financial status, the systemic tax reliefs provided for in the laws regulating personal<sup>27</sup> and corporate income taxes<sup>28</sup> are extremely important. A particular type of tax relief of this kind is the right of enterprise taxpayers to deduct from their tax base so-called qualified costs, incurred for research and development activities.<sup>29</sup> Another typical systemic relief is the so-called housing relief<sup>30</sup>, which is regulated in the inheritance and donation tax. It seems that the investment relief operating under the Act on Agricultural Tax<sup>31</sup> is also of a similar nature.

The above-mentioned reliefs are undoubtedly of a substantive nature, as they are linked to other taxpayers' rights protected by the Constitution, such as the family, the right to property and the right to conduct business. In the process of applying the law to these tax reliefs, the tax authorities are not entitled to administrative discretion, as these rights are executed *ex lege* by entities entitled to do so. This means that if a taxpayer meets all statutory requirements of a specific tax relief, they acquire a subjective right and are entitled to demand specific measures of the tax authority in relations with that taxpayer. These measures consist in the prohibition imposed on the tax authority against any restriction on a taxpayer's exercise of this right or on exerting any force on a taxpayer to make them exercise this right in case the taxpayer does not express a wish to do so.<sup>32</sup>

In the context of the presented deliberations on the classification of systemic reliefs in terms of a taxpayer's subjective rights, a problem arises with regard to the classification of these reliefs (but also of exemptions) as tax privileges. Such a classification – refuted by the authors of the present publication – has been introduced by judiciary decisions and literature. Systemic tax reliefs, especially those provided

<sup>27</sup> Individuals (natural persons) are entitled to reductions in the tax base (tax allowances), see Article 26(1)(6) and (9) and (5) to (13), as well as reductions in the final amount of tax, see Article 27f and Article 27g of the Personal Income Tax Act of 26 July 1991, consolidated text, Journal of Laws of 2020, item 1426, as amended (hereinafter referred to as the PIT Act).

<sup>28</sup> Legal persons are only entitled to reductions in the tax base, see Article 18(1) and (8) of the Act of 15 February 1992 on Corporate Income Tax, consolidated text, Journal of Laws of 2020, item 1406, as amended (hereinafter referred to as the CIT Act).

<sup>29</sup> See Article 26e of the PIT Act and Article 18d of the CIT Act. This deduction is commonly referred to as R&D tax relief.

<sup>30</sup> See Article 16 of the Act of 28 July 1983 on Inheritance and Donation Tax, consolidated text, Journal of Laws of 2019, item 1813, as amended (hereinafter referred to as the IDT Act). See also SAC, Judgments of: 18 January 2018, Ref. No. II FSK 3634/15; 30 April 2015, Ref. No. II FSK 848/13, CBOSA.

<sup>31</sup> See Article 13(3a) of the Act of 15 November 1984, consolidated text, Journal of Laws of 2020, item 333, as amended (hereinafter referred to as the Agricultural Tax Act). Such an interpretation is confirmed by the PAC in Gdańsk, Judgment of 9 January 2019, Ref. No. I SA/Gd 1004/18, SIP LEX, No. 2615368.

<sup>32</sup> Cf. PAC in Warsaw, Judgment of 7 March 2019, Ref. No. III SA/Wa 1202/18, SIP LEX, No. 2665538. The judgment concerned the so-called residency registration relief.

for in the PIT Act, but also those to be found in other tax regulations, have been the subject of numerous judgments of Poland's CT. Firstly, in all these judgments, the Tribunal put all the tax reliefs and exemptions on a par, defining them jointly as tax privileges<sup>33</sup>. Secondly, the Tribunal assumed that the right to tax exemption or relief understood as a privilege does not constitute a constitutional right of a subjective character. The general justification for these theses was that tax reliefs and exemptions constitute a derogation from the principle of universality of taxation and equality of taxation, as they are exceptional in nature, and their application and scope are subject to an independent decision by the legislator.<sup>34</sup> A similar position on the issue is presented by the judicature of Poland's SAC. In one of the judgements, the Court even recognised that there is a collision between the system of reliefs and exemptions and the principle of justice.<sup>35</sup>

In conclusion, it should be pointed out that the thesis set out in this article that systemic reliefs are the public subjective rights of a taxpayer contradicts the position of Poland's CT and administrative courts, which these bodies formulated over the past decades. If systemic reliefs are to be regarded as tax privileges, they are automatically excluded from the category of public subjective rights.

## Tax Exemption as a Subjective Right of a Taxpayer

The assessment how tax reliefs influence subjective rights must first and foremost result from the analysis of the definition of public subjective rights, as adopted in a given analytical approach. This definition can serve as an appropriate point of reference for such analyses. Secondly, a way must be explored in which the legislator constructs a specific legal norm, formulating its statutory text, and thus indicating the circumstances in which tax reliefs and exemptions are or may be applicable.

<sup>33</sup> Reliefs and exemptions as tax privileges are also commonly treated in the judicature of administrative courts, for instance, PAC in Szczecin, Judgment of 14 May 2015, Ref. No. I SA/Sz 185/15, SIP LEX, No. 1759787.

<sup>34</sup> See, inter alia, CT, Judgment of 25 April 2001, Ref. No. K 13/01, OTK ZU 2001, No. 4, item 81; CT, Judgment of 7 June 1999, Ref. No. K 18/98, OTK 1999, No. 5, item 95; CT, Judgment of 29 May 1996. The term *tax privileges or preferences* is also commonly used to describe reliefs and exemptions in the literature of the subject, see e.g. J. Marusik, *Konstytucyjne...*, op. cit., pp. 71–77.

<sup>35</sup> See: SAC, Judgments: of 4 October 2016, Ref. No. I FSK 878/14; of 7 April 2016, Ref. No. I FSK 1963/14; of 29 July 2005, Ref. No. I FSK 77/05; of 16 September 2015, Ref. No. I GSK 100/14; of 27 October 2011, Ref. No. II FSK 753/10, CBOSA; of 12 April 1992, Ref. No. SA/P 596/92, CBOSA. Similarly, see Individual Interpretation of the Director of the National Revenue Administration Information Centre 18 November 2019, Ref.: 0111-KDIB1-1.4017.14.2019.1.BK. Arguments contradicting the position contained in the cited judgments, see J. Marusik, *Konstytucyjne...*, op. cit., pp. 79–80.

Adjusting the scope of tax regulations with the use of reliefs (with regard to the subjects and the substance of taxation), the legislator applies such terms as<sup>36</sup>: *exempt from tax*<sup>37</sup>, *obligation is waived*<sup>38</sup>, *are tax-free*<sup>39</sup>, *are/are not subject to exemption*<sup>40</sup>, *are/are not subject to exemption*<sup>41</sup>, *can/cannot be subject to exemption*<sup>42</sup>, *are covered by exemption*<sup>43</sup>, *exemption is/is not applied/applicable/(ir)relevant*<sup>44</sup>, *the exemption-granting regulations are not used*<sup>45</sup>, *are eligible for tax exemption/tax exemptions are available to*<sup>46</sup>, *right for exemption/a taxpayer loses the right to exemption*<sup>47</sup>, *a taxpayer exercising the right to/benefitting from exemption*<sup>48</sup>, *use/benefit from tax exemption*.<sup>49</sup>

In view of the failure to exhaustively define the rules for the precise expression of the status and circumstances of exemption by the legislator, it must be determined whether the aforementioned concepts are synonymous or not. If they are not synonymous, then the question arises as to what grounds determine that the legislator

<sup>36</sup> When modifying the subjective or substantive scope of taxation in individual taxes, the legislator uses diverse wording patterns, with or without synonyms, depending on the context in which they are applied. From the point of view of the principles of correct legislation, this inconsistency should be approached with criticism. On the one hand, the legal text should be characterised by linguistic correctness (avoiding numerous repetitions of the same wording in the text), on the other hand, it is more important for the legislator to maintain the precision reconstructed on the basis of a given provision of the legal norm, see the Commission's Communication on the application of the law. See par. 7. of the Regulation of the Prime Minister of 20 June 2002 on the Principles of Legislative Procedures, consolidated text, Journal of Laws of 2016, item 283.

<sup>37</sup> See Article 6(1), Article 20(3), Article 21(3), Article 22(4), Article 24b(2) 2, Article 24h(1), Article 38d(1), Article 38ha of the CIT Act; Article 30dd(1), Article 30g(2), Article 52, Article 52a, Article 52c–Article 52i, Article 52pa, Article 52ua, Article 54(6) of the PIT Act; Article 4, Article 4a(1), Article 4b(1) of the IDT Act and Article 12(1) of the Agricultural Tax Act.

<sup>38</sup> See Article 38i of the CIT Act and Article 52q of the PIT Act.

<sup>39</sup> See Article 7(3)(1), Article 17(1), (3) and Article 27a of the CIT Act. Cf. Article 9(3a) (4), Article 21(1), Article 52m of the PIT Act.

<sup>40</sup> See Article 17(7) of the CIT Act and Article 21(19) of the PIT Act.

<sup>41</sup> See Article 17(1)(1, 1a, 1b, 1e, 7a, 11) of the CIT Act, also see Article 21(1)(28, 68, 37) of the PIT Act, also cf. Article 12(2) (1-1a), 12(4) of the Agricultural Tax Act.

<sup>42</sup> See Article 12(1)(7) of the Agricultural Tax Act.

<sup>43</sup> See Article 17(1a)(1) of the CIT Act.

<sup>44</sup> See Article 17(1e, 1f, 7b, 8, 10a, 10b, 12) of the CIT Act and Article 21(1)(39, 46b, 58a, 68a), Article 21(14–15), Article 21(20, 21, 23–24, 27, 31–32, 35–35a, 36, 38) of the PIT Act, cf. Article 4(4), Article 4a(2) of the IDT Act. and cf. Article 12(5, 7) of the Agricultural Tax Act.

<sup>45</sup> See Article 21(5cc) of the PIT Act.

<sup>46</sup> See Article 17(4) of the CIT Act and Article 21(5a) of the PIT Act, cf. Article 4b(2) of the IDT Act.

<sup>47</sup> See Article 17(5, 6d) of the CIT Act and Article 21(5b, 5cd) of the PIT Act and Article 13d(4) of the Agricultural Tax Act.

<sup>48</sup> See Article 17(6c)(3) of the CIT Act and Article 21(5cc) (3), Article 26e(6) of the PIT Act.

<sup>49</sup> See Article 23(1) (45a)(a)(3), Article 23b(2), Article 23z (point 1)(a) of the PIT Act and Article 4a(5), Article 4b(4) of the IDT Act.

uses this and not any other wording. That also leads to another question whether the particular verbal choices can have anything to do with encoding subjective rights in tax legislation. In one of the articles of the PIT Act, the same editorial unit of the provision exhibits the phrases *wolne od podatku* [tax-free] and *zwolnione od opodatkowania* [tax-exempt]. The legislator does not specify which categories are regarded as free of tax, and which as exempt.<sup>50</sup> The distinctive feature necessary to distinguish between these two separate categories is not specified, either.

The nature of tax exemptions as compared to reliefs is far more varied. Exemptions relate to the subject or substance of taxation, and they may also be of a mixed nature (subjective-substantive<sup>51</sup> exemptions). Some exemptions are unconditional, while others require specific measures (actions) from a taxpayer in order to evoke such legal circumstances where the exemption ultimately applies. This kind of action may be exemplified with an entrepreneur's (taxpayer's) application for a permit to conduct business activity in a special economic zone or simply a taxpayer's taking an independent decision in a given case not manifested in a material manner (through an appropriate implicit declaration of intent, e.g. with regard to the use of the revenue/taxable income for a specific purpose, by which a criterion for tax exemption is fulfilled<sup>52</sup>). At the same time, it should be noted that exemptions of an individual type are very rarely standardised in tax law.<sup>53</sup> Therefore, this article focuses to a larger extent on various types of systemic tax exemptions.

With systemic exemptions, if there are statutory grounds for including a given entity or substance of taxation within the scope of an exemption, by principle, the taxpayer has no right of waiver. This is because this type of exemption results from the applicable regulations, and the taxpayer is not legitimised to incur a tax obligation dependent on their own decision by giving up the 'right to exemption'. Such a tax exemption is a direct consequence of generally binding legal regulations and it results from the norms of publicly applicable law. The legislator is the one to decide that a given entity or substance is exempt from taxation. When legal circumstances justify a hypothesis that these circumstances satisfy the prerequisites of the activation of the legal norm regulating an exemption, the legislator usually

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<sup>50</sup> Article 25b(4)(1) of the PIT Act.

<sup>51</sup> See, inter alia, Article 17(1)(4a), (4b), (4d), (4k), (5a) of the CIT Act.

<sup>52</sup> Article 17(1)(4) of the CIT Act.

<sup>53</sup> As an example of an individual exemption, which is requested by a taxpayer at the tax authority, one can mention the exemption of a taxpayer from the obligation to collect the tax due, pursuant to Article 22 par. 2 of the Tax Code. Another specific type of individual exemption is that of a taxpayer from the obligation to pay tax in connection with compliance with a tax interpretation which has been amended, see Article 14m of the Tax Code. In this case, tax exemption is connected with the safeguarding and protective function of individual tax interpretations.

leaves a taxpayer no choice as to exercising the right to exemption or not; in other words, tax consequences are not dependent on a taxpayer's declaration of will. In this case, the taxpayer's declaration of will is irrelevant, which situates the case within the domain of public law. Even in circumstances where the legislator makes a tax exemption dependent on the taxpayer's decision as to the purpose of spending the taxable income, it is not an 'I can benefit from the exemption, but I will not' decision, but a decision as to whether or not to take action that, if effected, results in the tax exemption of a given entity or substance.

To sum up, if all formal legal conditions for an exemption are met, the exemption becomes a taxpayer's 'tax obligation', with no right of waiver. A non-occurrence of a tax liability as a result of the exemption may only result in the right to file an application for declaring an overpayment (subjective right), in a situation when a given taxpayer paid the tax despite the exemption. The choice of a taxpayer is *de facto* limited to fulfilling material legal prerequisites justifying the inclusion/exclusion of an entity or substance within/from the scope of an exemption.<sup>54</sup>

However, if a taxpayer pays the tax from which they are subjectively exempt or if a taxpayer that is not covered by a subjective exemption pays tax on an exempt item, such actions should be assessed as unauthorised, and the levy as unduly paid. Consequently, a potential administrative decision (specifying the amount of the tax liability) that marks an administrative approval of this state of affairs must be considered an event of the fundamental breach of the applicable provisions of tax law.

The above leads to the conclusion that the systemic tax exemption is not a subjective right, since as a result of the legislator's grant of an exemption, no right that could be waived by a taxpayer as a result of a declaration of intent arises.<sup>55</sup>

<sup>54</sup> However, a situation in which an entity that is statutorily exempt from taxation (e.g. a commune with respect to corporate income tax), as based on a misconceived subjective right, enjoys an 'opportunity' to pay income tax (mistakenly assuming that it exercises its subjective right in such a way that it 'does not benefit from' the exemption), may lead to a situation in which the material and legal conditions for exercising other subjective rights are fulfilled (e.g. the right to declare an overpayment). After all, with a tax exemption, the tax obligation has not transformed into a tax obligation, which in relation to unconditional subjective exemption means that it is completely impossible for a taxpayer to create an obligation to exercise a tax benefit.

<sup>55</sup> It is worth mentioning at this point that the process of economising tax law also results in solutions which are dictated by the need to safeguard the fiscal interests of the state. Hence, these regulations contain mechanisms which introduce a certain degree of discretionary decision-making by the tax authorities (the so-called 'small' anti-abusive clauses). See the standards introducing tax exemptions under Council Directive 90/434/EEC of 23 July 1990 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares of Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE from one Member State to Another Member State (Official Journal of the European Communities L 225, as amended), Council Directive 90/435/EEC of 23 July 1990 on the Common System of Taxation As Regards Parent Companies and Subsidiaries Resident in Different Member States (OJ L 225/1), Council Directive 2003/49/EEC of 3 June 2003

The administrative authority, as in the case of tax reliefs, although for different reasons, cannot require a taxpayer to make a declaration on whether or not to benefit from the tax exemption, as this exemption is based on the provisions of tax law, which the taxpayer is obliged to apply, and which, as a matter of principle, does not presume decision-making liberty for taxpayers.

Under regular circumstances, taxpayers behave conventionally and take actions that are accompanied by 'automatic' tax exemption. As a rule, the motive for the action is a specific non-tax objective (e.g. obtaining a subsidy for investment purposes), rather than the tax benefits resulting from these actions. This results, among others, from the neutrality of taxation, as postulated in the doctrine. Under these circumstances, the tax exemption is a consequence of a specific factual or legal situation. However, if the main motive for a taxpayer's action – without a significant modification to the 'normal' mode of the entity's functioning – is to bring about a state of affairs in which the premises for the exemption are fulfilled, then such an exemption may be considered a subjective right because such a taxpayer, through their specific actions, deliberately brings about a situation in which the exemption applies. In this case, a taxpayer's induction of the legal status covered by the scope of exemption is an 'aim in itself', and not a consequence of conventional actions of this taxpayer, undertaken for a purpose other than the exemption *per se*.

As a derogation from the rule that tax exemptions are not public subjective rights, one could point to a few exemptions which, because of the normative admissibility of different courses of conduct, depending on the decision of the taxpayer and leading to different tax consequences, can and should be considered public subjective rights. This kind of public subjective rights can be exemplified by the right of small and medium-sized entrepreneurs who are taxpayers of value added tax to resign from exemption from this tax, to which they are eligible due to failure to achieve a sales revenue threshold of PLN 200,000<sup>56</sup>. The legislator provides a taxpayer with an option to resign from the VAT exemption in order to

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on a Common System of Taxation with Regard to Interest and Royalty Payments Made by Subsidiaries of Different Member States (OJ L 225/1). It should be stressed here, however, that the condition for recognising that the indicated regulations may be used to restrict the subjective rights of taxpayers resulting from tax exemptions is the prior acceptance of the view that the indicated tax exemptions are classified as subjective rights, which is an incorrect assumption in this case. See also flawed interpretation: E. Prejs, *Nadużycie prawa podmiotowego w prawie podatkowym*, PP, No. 10/2006, pp. 29–40.

<sup>56</sup> Similarly, pursuant to Article 43(3) of the Act of 11 March 2004 on the VAT tax, consolidated text, Journal of Laws of 2020, item 106, as amended (hereinafter referred to as the VAT Act), a lump-sum farmer who supplies agricultural produce which is exempt from tax may resign from that exemption. Taxpayers who have resigned from tax exemption may reapply for the exemption after 3 years from the date of resignation. In this case, the subjective right consists in the taxpayer's right to resign from the exemption, which is the standard solution by the legislator.

simplify their tax settlements. Meeting certain substantive legal conditions is sufficient for a taxpayer to be able to make an unrestricted decision in this respect, and the tax authorities have to accept it.

It should be emphasised that the scope of a taxpayer's tax obligations varies depending on whether and what declarations of intent the taxpayer makes in respect of exemption. Thus, reference to the concept of public subjective rights opens up a wide range of possibilities for using this construction for tax optimisation processes.

The same applies to the opportunity for entrepreneurs to opt for exemption from taxation of income on operating in special economic zones (hereinafter referred to as SEZ). Operating in such zones, a taxpayer may, at their choice, conduct tax-exempt activity on meeting conditions concerning investment outlays or employment levels. They may also conduct business activity there without exemption.<sup>57</sup>

Another aspect to be highlighted when discussing tax exemptions is the issue of the 'complexity' of subjective rights. One of the components of 'complex' subjective rights is, for instance, the right of certain entrepreneurs to apply for the status of a sheltered workshop (hereinafter referred to as SW). Such a status is connected not only with certain tax benefits, but entrepreneurial units with this status are also entitled to other 'partial' subjective rights, such as the right to apply for co-financing of costs incurred.<sup>58</sup> The condition for obtaining the SW status is, among other things, the taxpayer's application for this status to the voivode (governor of a province). As in the case of SEZs, such an application should be treated as a declaration of the entrepreneur's willingness to choose, among others, a tax exemption.

In this context, the unequivocal qualification of a tax exemption as a public subjective right may give rise to theoretical problems. This is due to the fact that this right to tax exemption is only a component of a more 'complex' subjective right. If an entrepreneur applies for the SW status for other reasons than tax exemption, the tax exemption becomes the result of a decision based on considerations other than fiscal ones. It must then be assumed that a taxpayer, guided by these other considerations, without suggesting that they are exempt when making their decision, only 'tolerates' certain tax consequences, which irrevocably accompany their other choices. At the same time, this taxpayer cannot then waive these legal effects, i.e. the tax exemption.

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<sup>57</sup> See Article 12 of the Act of 20 October 1994 on Special Economic Zones, consolidated text, Journal of Laws of 2020, item 1670.

<sup>58</sup> See Article 28 of the Act of 27 August 1997 on Vocational and Social Rehabilitation and Employment of Disabled Persons, i.e. Journal of Laws of 2020, item 426, as amended.

In this context, a question seems justified whether such an automatic tax exemption, and thus the taxpayer's lack of decision-making liberty, precludes the occurrence of a subjective right in the tax exemption in question. Moreover, one could ask whether the subjective perception of a given legal solution by the addressee of a legal norm can affect the occurrence or non-occurrence of public subjective rights. The answer to these questions should be explicitly negative, and not only because the analysed issue concerns norms of the public law. The fact that the tax exemption leads to a defect in the nature of the premise for action (motive for choice), as is the case with 'complex' public subjective rights, does not cause the subjective right resulting from the tax exemption to cease to exist. It remains a valid right, however, with the difference that for a given taxpayer, it has a relatively lower value than other 'partial' public subjective rights that make up a 'complex' public subjective right.

In order for the reconstruction of a legal norm on the basis of a provision to allow the identification of a public subjective right encoded in it, the legislator should use a clear dispositional phrase indicating that a taxpayer (under certain circumstances and after meeting explicit or implicit legal requirements which condition a given right), e.g. 'has the right to opt for an exemption' or 'may choose an exemption'. Nonetheless, it is necessary that the relevant provisions allow an unambiguous interpretation that both these options are complementary alternatives.

## Conclusions

The normative analysis of the tax law provisions, regulating various types of tax reliefs and exemptions, presented in this article, leads to the conclusion that the hypothesis presented in the introductory section that these two legal categories are the subjective rights of the taxpayer, contrary to the judicature by Poland's CT and the SAC, is not unequivocally verified. The fundamental obstacle in formulating such a definitive assessment is the specificity of these legal categories. There is no doubt that the uncritical recognition of tax reliefs and exemptions as equivalent legal categories, which has long been a matter of fact in both the judicature and the literature of the subject, and then regarding them in terms of tax privileges *sensu stricto*, deserves criticism. At the same time, tax reliefs and exemptions cannot be unproblematically interpreted as representing generally understood subjective rights. The exemptions and reliefs provided for in tax law, due to their division into individual and systemic ones, escape such a clear qualification in this regard. There is no doubt that reliefs in settling a taxpayer's tax liabilities or exemptions cannot qualify as subjective rights if their exercise depends on the discretionary decisions of the tax administration.

Verifying the status of systemic exemptions in this regard is far more troublesome. It seems that when it comes to these types of exemptions, the analysis of whether or not they are public subjective rights should take place in two stages. First of all, it should be stated whether the tax exemption under analysis is 'available' (the taxpayer has the right to make a choice), and then whether the exercise of the exemption is not dependent on administrative discretion. Only the cumulative fulfilment of these conditions (availability of the exemption, lack of an administrative discretionary decision) justifies the claim that a given tax exemption constitutes a public subjective right. In the case of systemic tax reliefs, the verification of the first stage is always positive, as there is no doubt that all systemic reliefs regulated in tax laws are the subjective rights of a taxpayer.

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