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The Concept of Subjective Rights in Tax Law²

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Abstract

The aim of this article is to answer the question whether taxpayers are entitled to any subjective rights that are overtly, unambiguously and legibly laid down in tax law. The author presents the title issue by analysing a broad base of judicature by Poland's CT, the EUCJ and Poland's administrative courts, also discussing the relevant literature concerning subjective rights as coded in the provisions of the Polish Constitution and tax law. Taxpayers' subjective rights may constitute an effective protection measure not only vis-a-vis the administrative discretion of tax authorities, but also in the event of their abuse of administrative power in relations with entities obliged to pay levies.

Keywords: subjective rights, constitutional subjective rights of a taxpayer, taxpayer, overpayment, statute of limitations, VAT refund.

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Pojęcie praw podmiotowych w prawie podatkowym³

Streszczenie

Celem niniejszego artykułu jest udzielenie odpowiedzi na pytanie, czy podatnikom przysługują unormowane w prawie podatkowym w sposób jednoznaczny, jasny i czytelny jakiegokolwiek prawa podmiotowe. Autorka dokonuje analizy szerokiej bazy orzecznictwa Trybunału Konstytucyjnego, Trybunału Sprawiedliwości UE oraz krajowych sądów administracyjnych i piśmiennictwa dotyczącego tytułowej problematyki praw podmiotowych zakodowanych w przepisach Konstytucji RP oraz prawa podatkowego. Analiza judykatury i literatury pozwala na przyjęcie tezy wobec licznych nieudanych prób wprowadzenia do prawa podatkowego Deklaracji lub Katy Praw Podatnika, że wykorzystywanie w relacjach z organami podatkowymi tak w postępowaniach podatkowych, jak sądowych praw podmiotowych podatnika jest alternatywną drogą poszukiwania możliwości wzmocnienia ochrony pozycji podatnika w relacjach z organami podatkowymi. Prawa podmiotowe podatnika stanowić mogą skuteczną ich ochronę nie tylko wobec uznania administracyjnego organów podatkowych, ale także wobec nadużywania przez nie ich władztwa w relacjach z jednostkami zobowiązanymi do uiszczania danin.

Słowa kluczowe: prawo podmiotowe, konstytucyjne prawo podmiotowe podatnika, podatek, nadpłata, przedawnienie, zwrot podatku VAT.

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Preliminary Remarks

A subjective right ensures that the holder of the right is free to decide on their behaviour, to carry out a planned action and to expect others to fulfil the obligations imposed on as an irrevocable criterion for the exercise of specific rights.⁴ Subjective rights are not based on the ambition to guarantee individuals some abstract sphere of freedom, the capacity to act or exercise willpower, but on the need to safeguard the fulfilment of basic, perennial human needs.⁵ The legislator does not create the subjective rights but only protects them and enables their implementation through the exercise of the provisions of substantive law.⁶

Although historically linked to civil law, the subjective rights no longer belong exclusively to the civil domain. This legal category functions in both private and public law. They also constitute a research area explored by the theory and philosophy of law.⁷ Despite the extremely frequent and multi-contextual application of the category of a subjective right – not to mention a certain tendency to abuse the term – no overt legal definition of the term has been formulated. The literature even argues that due to the diverse nature of the various branches of law, it is not possible, and should not even be desirable, to create a systemic, universally acceptable and uniform definition of this concept.⁸ Such a definition could lead to the emergence of an artificially hermetic language form which, in practice, would make the application of the law extremely difficult. As a result, it would limit the extent to which the benefits or rights of a particular entity addressed by a given subjective right are protected.

For these reasons, relying on the definitions of subjective rights offered by the doctrine and the judiciary seems to be a more effective and justified solution. As a matter of fact, each legal discipline can be said to be seeking its own, subject-specific formulation of the concept of subjective rights. This way of providing tangible content to the abstract concept – which de facto functions only in the legal discourse

⁴ T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2013, p. 94.

⁵ M. Pyziak-Szafnicka, *Prawo podmiotowe*, "Studia Prawa Prywatnego" 2006, 1, p. 51.

⁶ A. Napiórkowska, *Czy ktoś chroni podatnika?*, [in:] P. Borszowski, A. Huchla, E. Rutkowska-Tomaszewska (eds.), *Podatnik versus organ podatkowy*, Warszawa 2011, p. 146.

⁷ M. Pyziak-Szafnicka, *Prawo podmiotowe*, SPP..., p. 43; T. Chauvin, T. Stawecki, P. Winczorek, op. cit., p. 94.

⁸ M. Pyziak-Szafnicka, *Prawo podmiotowe*, SPP..., p. 43.

(legal writing) and is not an element of the language of the law – allows for its continuous development. Thanks to this approach, the concept can keep with the changes taking place both in the legal system and in the system of norms and axiological principles, which are extremely important for the understanding of subjective rights.

The aim of this paper is to answer the question whether taxpayers are entitled to any subjective rights that are overtly, unambiguously and legibly laid down in tax law. Answering this question consists in verification of the following research hypotheses:

- 1) Is it possible to talk at all about the existence of the constitutional rights of the taxpayer?
- 2) Are subjective rights encoded in the applicable tax regulations?

Subjective Rights in Legal Theory, Private and Public Law

According to the representatives of the judicature, subjective rights are a derivative of the legal status of an entity, designated for that entity by the legal norms of a given legal system. The phrase ‘to have a right’ may mean an attribute of having the so-called bilateral freedom, i.e. enjoying a situation where a given entity is both entitled to an action and its freedom is legally protected, and at the same time, the entity also has specific competences, such as making a claim.⁹

In civil law literature, on the other hand, subjective rights are seen as the sphere of the legal possibility for a given entity to act in a specific way, which are granted to that entity and protected by a legal norm in order to secure that entity’s interests (goods, benefits) resulting from the legal relationship. A subjective right understood in this way perseveres regardless of whether or not the holder of the right exercises it. Since it is derived from a legal relationship, each subjective right corresponds to an obligation on the part of another person or entity.¹⁰ Contemporary civil law literature emphasises that, of the two classic theories of subjective rights, it is the

⁹ S. Wronkowska, *Sytuacje wyznaczone przez normy prawne*, [in:] A. Redelbach, S. Wronkowska, Z. Ziemiński, *Zarys teorii państwa i prawa*, Warszawa 1994, pp. 62, 150–151; J. Kaczor, *Nadużycie prawa podmiotowego*, [in:] J. Helios (ed.), *Z zagadnień teorii i filozofii prawa. Autonomia prawa ze stanowiska teorii i filozofii prawa*, Wrocław 2003, p. 114.

¹⁰ Z. Radwański, *Koncepcja praw podmiotowych osobistych*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1988, 2, p. 4; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne*, Warszawa 2001, pp. 128–129; A. Kawałko, H. Witzak, *Prawo cywilne*, Warszawa 2008, p. 58; M. Pyziak-Szafnicka, *Prawo podmiotowe*, [in:] M. Safjan (ed.), *Prawo cywilne – część ogólna*, Vol. 1, Warszawa 2012, pp. 683–702; J. Kaczor, *Nadużycie prawa...*, pp. 113–116.

theory of interest that reflects its essence and purpose¹¹ better. Human interests are guaranteed in an absolute manner, which means that the legislator provides the entitled entities with legal means to protect their interests not only in relation between private law entities, but also *vis-à-vis* the legislator. One should, obviously, remember that this protection is not absolute, that it cannot exclude any interference by the legislator. As a matter of fact, respecting constitutional boundaries, the legislator still enjoys the right for two-level action: firstly, to shape the content of individual subjective rights, in order to reconcile the coexistence of rights of the same type that are vested in many entities (e.g. the interests of owners); and secondly, to enable diversification of rights (e.g. the interests of the owner vs the interests of the tenant). Also, sometimes the legislator restricts those spheres of interest that it has already bestowed on the subject in order to protect other values (e.g. expropriation, transformation of perpetual usufruct into property rights etc.). Yet, when acting in the latter way, the legislator is bound by the principle of proportionality.¹²

The civil law doctrine has not developed a uniform position on the classification of subjective rights. The literature contains different divisions of subjective rights and different classifications of individual prerogatives. According to the classical approach, three normative forms of subjective rights should be distinguished: (i) direct subjective rights (in other words, powers); (ii) claims and other unilateral modification clauses; and (iii) charges, which are a specific instance of (ii). Other divisions take into account the degree of protection of subjective rights – and therefore, they distinguish between absolute vs relative rights – or the type of legal relationship from which these rights derive. In the latter case, a distinction is made between property rights and non-property rights.¹³ For the discussion of subjective rights in tax law undertaken in this paper, the latter distinction is the most relevant.

The concept of public subjective rights in the administrative and legal doctrine is understood as this legal status of an entity in which it has the power, anchored in a legal norm (substantive¹⁴ or procedural), to claim a specific action against an

¹¹ The strongest advocate of this theory was A. Szpunar. See: idem, *Nadużycie prawa podmiotowego*, Kraków 1947; and idem, *Ochrona dóbr osobistych*, Warszawa 1979.

¹² M. Pyziak-Szafnicka, *Prawo podmiotowe*, SPP..., p. 51.

¹³ A. Wolter, *Prawo cywilne*, Warszawa 1972, pp. 114–121.

¹⁴ It should be kept in mind that public material subjective rights cannot overlap with administrative discretionary decisions, see: A. Błaś, *Ochrona praw podmiotowych jednostki wobec decyzji administracyjnej uznaniowej niepodlegającej merytorycznej kontroli sądu administracyjnego*, [in:] E. Ura (ed.), *Prawne gwarancje ochrony praw jednostki wobec działań administracji publicznej*, Rzeszów 2020, p. 17.

entity representing a public law body.¹⁵ It can therefore be said that the public subjective rights are a merger of legal interest protection with the right to claim. This means that the public subjective rights serve to protect an entity by granting it the right to lodge a judicial complaint.¹⁶ The list of the public subjective rights is neither exhaustive, nor is their nature of absolute type. They have to be enacted by a statute (state-level law), but their enforcement requires compliance with the principle of proportionality.¹⁷ In the case of the public subjective rights, a distinction should be made between the rights of individuals vis-à-vis the rights of entities, such as administrative authorities, or, to put it more broadly, public law entities. These subjective rights do not regulate relations between citizens, but between citizens and public authorities.¹⁸

An entity empowered by a public subjective right may not renounce it, still it may decide not to exercise it. Such subjective rights are intended to protect not only individual interests, but also public interests, the protection of which cannot depend on the will of the empowered entity.¹⁹

There is no uniform classification of public subjective rights. They are made from different points of view. Considering the subjective perspective taken in this article, one needs to mention the classification to be found in civil law literature, which includes the following items:

- ❑ rights to claim for issuing a particular legal act, e.g. a claim for a driving licence,
- ❑ rights to demand behaviour (but not decisions) from an authority designated by law – this group of rights is sometimes referred to as formal procedural subjective rights,²⁰
- ❑ rights to claim certain positive benefits (and not an administrative decision or not only a decision),²¹

¹⁵ S. Kasznica, *Polskie prawo administracyjne*, Poznań 1946, p. 126. K. Tomaszewska, *Znaczenie i zakres ochrony publicznych praw podmiotowych a ochrona interesu jednostki*, "Folia Iuridica Wratislaviensis" 2012, 1, 1, pp. 113–134, http://www.bibliotekacyfrowa.pl/Content/39984/06_Katarzyna_Tomaszewska.pdf (access: 11.09.2020); see also: P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane zagadnienia)*, Kraków 2003, pp. 130–142.

¹⁶ Therefore, public subjective law is a concept on which administrative judiciary is constructed. See the PAC in Warszawa, Judgment of 5 March 2013, Ref. No. II SA/Wa 2334/12; K. Tomaszewska, op. cit., pp. 117–118.

¹⁷ M. Stahl (ed.), Z. Duniewska, B. Jaworska-Dębska et al., *Prawo administracyjne pojęcie, instytucje, zasady w teorii i orzecznictwie*, Warszawa 2009, pp. 75–76, 79.

¹⁸ See *ibidem*, p. 77.

¹⁹ See *ibidem*.

²⁰ T. Kielkowski, *Nabycie prawa na mocy decyzji administracyjnej*, Warszawa 2012.

²¹ M. Stahl (ed.), Z. Duniewska, B. Jaworska-Dębska et al., op. cit., p. 78.

- ❑ a subjective right to require administrative bodies to intervene in a previously granted liberty or legal status,
- ❑ a subjective right to co-operate with administrative bodies in resolving public matters.²²

In the light of the above, one can observe that the difference between the private and the public subjective rights essentially concerns sources of legal regulations. Both types of subjective rights are rooted in the Constitution. This is all the more important because in current practice, subjective rights are interpreted as more closely related to fundamental human rights. Primary sources claim that it is difficult to search the Polish legislation for any right that is not rooted in the Constitution.²³

The Constitutional Subjective Rights of Taxpayers

The issue of the subjective rights of taxpayers is rarely addressed in the primary sources. By principle, representatives of tax doctrine focus on general taxpayer rights and their protection.²⁴ However, it has already been pointed out that the concept of the public subjective rights can be applied to the description of mutual, asymmetrical relations between the taxpayer and the tax authority.²⁵

Approaching the issue from the point of view of the hierarchy of the sources of law, analysing the subjective rights of taxpayers should begin with an analysis of the relevant constitutional provisions,²⁶ thus verifying the first research hypothesis about the constitutional subjective rights of a taxpayer.

According to the judicature of Poland's Constitutional Tribunal (hereinafter referred to as: the CT), constitutional rights and liberties can only stem from such

²² M. Kulesza (ed.), *Materiały do nauki prawa administracyjnego (z orzecznictwa sądowego)*, Warszawa 1989, pp. 123 et seq.

²³ M. Pyziak-Szafnicka, *Prawo podmiotowe*, SPP..., pp. 47, 52–53; B. Szczurek, *Koncepcja ochrony prawa podatkowego. Geneza, rozwój, perspektywy*, Warszawa 2008, pp. 155–160; A. Zieliński, *Ochrona praw podmiotowych*, [in:] Z. Radwański, A. Olejniczak (eds.), *Prawo cywilne – część ogólna*, Warszawa 2019, p. 853.

²⁴ B. Szczurek, op. cit.

²⁵ A. Napiórkowska, op. cit., pp. 146–147; H. Dzwonkowski, M. Duda, J. Gorąca, *Zakres i treści istniejących i pożądanej ochrony praw podatnika (ustalenia de lege lata i postulaty de lege ferenda)*, [http://orka.sejm.gov.pl/wydbas.nsf/0/A045899E99633E82C1257FB200456DB9/\\$File/Strony%20odDylematy%20reformy%20system%20podatkowego-12.pdf](http://orka.sejm.gov.pl/wydbas.nsf/0/A045899E99633E82C1257FB200456DB9/$File/Strony%20odDylematy%20reformy%20system%20podatkowego-12.pdf) (access: 8.07.2020).

²⁶ B. Szczurek, op. cit., pp. 157–158.

provisions of the Constitution that refer to subjective rights and are characterised by the following features:

- ❑ they indicate the addressee, i.e. the specific legal entity,
- ❑ they specify the addressee's legal status,
- ❑ they grant the addressee a choice of action.²⁷

Only two articles in the Constitution directly address the rights and obligations relating to levies, namely Articles 84 and 217 of the Constitution.²⁸ Some researchers claim that these constitutional articles regulate the constitutional and the subjective rights of taxpayers, as regards their protection against the imposition of levies in a manner other than that by a statutory solution. In other words, these provisions create an internally coherent framework of tax obligations, which means that a severe obligation to bear financial burdens in a democratic state of law must be accompanied by sufficient guarantees for the obliged taxpayers. These guarantees take the form of the taxpayer's guarantee to be subject only to such tax obligations that are justified by statutory laws.²⁹ A similar position was expressed by the CT in 1999, when it judged that issues relating to the collection of public revenue or public expenditure have a direct impact on the assets not only of the state, but also of the citizens, and hence, they affect the practical realisation of the principle of property protection. This principle is a permanent element of the contemporary constitutional order and derives from the principles of the democratic legal state. In tax law, guarantees of the constitutional protection of individual's rights to liberty, as well as those of other economic operators, are of utmost significance. They must not only be considered from the perspective the formal rule of law: i.e. activities of the state authorities in accordance with the imperative of legality and observance of the law. These rights must also be considered in the aspect of the material rule of law, related to the realisation of the values behind the binding legal regulations.³⁰ By analogy, in its another judgement, from 2004, the CT ruled

²⁷ As a matter of principle, a complaint cannot address a systemic, statutory principle unless the complainant uses this principle to derive their own subjective right from it; see S. Wronkowska, *Analiza pojęcia prawa podmiotowego...*, p. 2; A. Gomułowicz, *Ochrona wolności i praw ekonomicznych a granice opodatkowania – zasady i kontrowersje*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, 2, p. 23. A. Krzywoń, *Podatki i inne daniny publiczne w Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2011, p. 107; CT, Judgement of 26 June 2002, Ref. No. SK 1/02, OTK ZU 2002, No. 4A, item 53, pp. 763–764.

²⁸ Art. 84 and 217 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483.

²⁹ W. Sokolewicz, *Komentarz do art. 217*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 4, Warszawa 2005, p. 9, as cited in: A. Krzywoń, op. cit., pp. 107–108.

³⁰ CT, Judgement of 4 November 1999, Ref. No. SK 28/98, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19990921062/T/D19991062L.pdf> (access: 10.07.2020).

that the principle of imposing taxes only by way of statutory solutions is a fundamental principle of a democratic state. In accordance with this position, the Constitution legitimises the state's tax authority, but at the same time, it creates a guarantee that imposing taxes and other public levies will always be subject to the statutory procedure. To conclude, the aim of Article 217 of the Constitution is not only to create a guarantee of the rights of the taxpayer vis-à-vis the public authorities, but, above all, to strengthen the position of democratic representative structures and their political responsibility.³¹ The CT also pinpointed Article 217 in a judgment handed down in 2007 as an independent basis for a constitutional complaint to protect taxpayers' rights.³² This standpoint was further confirmed by the Supreme Court in 2003, in response to a legal query from the CT concerning the restriction of the right of taxpayers to settle tax on goods and services, as imposed by the Minister for Finance by way of a regulation.³³ The Tribunal judged that Article 217 of the Constitution is a provision which, on the one hand, regulates the constitutional principle of the power of the state to impose levies, whereas on the other hand, it endorses the subjective right of the taxpayer to a statutory regulation of their rights and obligations.³⁴

Critics of the interpretative position expounded above indicate that the provisions of the Constitution, as used in the above mentioned judgement, cannot be used to normalise the public subjective rights of taxpayers, since they cannot be directly applied by individuals. Hence, these provisions need to be specified on the statutory level as it is statutory acts that only give rise to specific subjective rights.³⁵ This position was also acknowledged by the CT in some of its rulings, stating that Article 84 of the Constitution does not express any overt constitutional subjective right, nor does it formulate either regulations or constitutional freedoms from which it could be viable to derive such rights. The content of those provisions clearly exhibits the universal obligation of every citizen to bear public burdens and levies, including

³¹ CT, Judgement of 27 December 2004, Ref. No. SK 35 /02, Journal of Laws of 2005 No. 1, item 4.

³² CT, Judgement of 2 April 2007, Ref. No. SK 19/06, Journal of Laws 2007 No. 69, item 468.

³³ See § 12 of the Regulation of the Minister of Finance of 21 December 1995 on the implementation of the provisions of the Value Added Tax and Excise Tax Act, Journal of Laws of 1995 No. 154, item 797.

³⁴ See the position of the Supreme Court in the case considered by the CT on 2 July 2003, Ref. No. P 27/02, OTK ZU 2002, No. 6A, item 59. In response to this question, the CT issued a judgment on 2 April 2003, Ref. No. P 27/02, OTK ZU 2002, No. 5A, item 59, devoid of any reference at all to the rights of taxpayers resulting from Art. 217, according to the Supreme Court. See the commentary to the judgments, P. Tuleja, *Wyroki interpretacyjne Trybunału Konstytucyjnego*, Poznań 2016, pp. 108–109.

³⁵ A. Bień-Kacała, *Zasada władztwa daninowego w Konstytucji RP z 1997 r.*, Toruń 2005, pp. 73–74. The author makes the occurrence of a subjective right directly dependent on the occurrence of a claim.

taxes, as specified in the relevant statutory regulations.³⁶ At the same time, Article 217 of the Constitution only states that imposing taxes and other public levies can be done exclusively by statutory acts, and defines the matters falling within the so-called sphere of statutory exclusiveness. Therefore, it is subjective and is addressed first of all to legislators. In this judgment, the CT also declared that the principle of appropriate legislation, as regulated in Article 2 of the Constitution, is not an independent source of constitutional freedoms or subjective rights.³⁷

A third position in the debate can also be pointed out, which can be called an in-between stance. According to this view, the bodies responsible for the execution of the constitutional provisions in the area of its regulatory power over the way in which taxes are imposed include not only state authorities, but also citizens, for whom these provisions create certain guarantees of their rights and freedoms.³⁸ Taxes and other public levies constitute, by their very nature, an interference in the right of ownership and other property rights of taxpayers, and may also have a restrictive effect on the sphere of economic freedom. However, the mere implementation of the principle of the universality of taxation does not in any way imply a violation of individual rights and freedoms. Such a violation can only be said to occur if the implementation goes beyond the constitutionally permissible limits, either materially or procedurally, in imposing levies and other public burdens. In conclusion, under the constitutional provisions referred to in this paper, taxpayers enjoy the right to expect that the manner in which taxes are imposed will guarantee them certainty, constancy and predictability so that their payment of the tax does not involve an excessive burden (confiscation of property)³⁹ or uncertainty as to the consequences of previously paid levies, or the emergence of new tax obligations that do not take account of the already established and on-going interests.⁴⁰

³⁶ CT, Judgement of 12 April 2011, Ref. No. Sk 62/08, Journal of Laws of 2011 No. 87, item 492.

³⁷ CT, Judgment: of 5 November 2008, Ref. No. SK 79/06, OTK ZU 2008, No. 9, item 153; of 18 November 2008, Ref. No. SK 23/06. This position was also shared by the Speaker of the Polish Parliament in his letter to the CT, Ref. No. SK 3/18, BAS-WAKiU-841/18 of 17 January 2019;

³⁸ ²⁹¹ T. Dębowska-Romanowska, *Dylematy interpretacyjne artykułu 217 Konstytucji*, [in:] A. Gomułowicz, J. Małecki (eds.), *Ex iniuria non oritur ius. Księga ku czci profesora Wojciecha Łączkowskiego*, Poznań 2003, p. 213. A. Gomułowicz, *Ochrona wolności...*, op. cit., p. 30.

³⁹ The CT has repeatedly emphasised that the provisions governing public levies must be consistent with all applicable constitutional norms and principles. They must not lead to a violation of the values covered by constitutional protection. In particular, they must not create tax obligations in such a way that it would become an instrument of confiscation of property, see the judgments: of 7 June 1999, Ref. No. 18/98, OTK ZU 1999, No. 5, item 95; of 5 January 1999, Ref. No. 27/98, OTK ZU 1999, No. 1, item 1; of 25 November 1997, Ref. No. K. 26/97, OTK ZU 1997, Nos. 5–6, item 64.

⁴⁰ T. Dębowska-Romanowska, op. cit., pp. 213–214 et seq.

The tax law literature has long recognised the constitutional guarantees resulting from Articles 217 and 84, and connected them with the guarantees resulting from articles concerning economic freedoms and rights (Articles 20, 21, 22, 64), the right to privacy (Article 47), the principle of equality (Article 32), the principle of a democratic state of law (Article 2), and the principles of operation of public authorities on the basis and within the limits of the law (Article 7). The Constitution, which defines standards in protecting the taxpayers' subjective rights, institutes solutions in which the CT is a guarantor of the principle of constitutionality of taxes.⁴¹

In the context of the position discussed in this paper, it should be pointed out that as a rule, the Tribunal ruled Article 64 of the Constitution to be a model of constitutional control, protecting the subjective right, i.e. the right to property, in connection with Articles 84 and 217 of the Constitution. In one of the judgements, the Tribunal pointed out that the duty to pay levies, which is regulated in the Constitution, is a universal and not only civic principle. Therefore, the provisions of tax law have their own, independent constitutional basis, related to the validity of a constitutional provision explicitly authorising the establishment of statutory provisions to specify this obligation. Notwithstanding the above, the CT did not opine that the provisions concerning an individual's financial obligations towards public law entities could be treated as separate and not linked to the constitutional provisions on human and civil liberties and rights, regardless of the content of these provisions. On the contrary, it should be assumed that the provisions of the Constitution, guaranteeing or granting certain freedoms and rights, may also be an adequate model of control for provisions imposing public obligations, provided that there is a real connection between the realisation of a given obligation and the interference of the legislator in the sphere of a specific freedom or right of an individual, as proclaimed by the Constitution.⁴²

All in all, as regards the matter of interpretation of the provisions of Articles 84 and 217 of the Constitution in the context of whether they are a source of the public subjective right of the taxpayers, neither the doctrine nor the CT take a uni-

⁴¹ A. Gomułowicz, *Ochrona wolności...*, op. cit., p. 23.

⁴² CT, Judgments: of 11 December 2001, Ref. No. SK 16/00, Journal of Laws 2001 No. 144, item 1621; of 3 October 2003, Ref. No. Ts 108/03, OTK-B 2004, No. 4, item 239; of 25 October 2004, Ref. No. SK 33/03 Journal of Laws 2004 No. 237, item 2382; of 30 November 2004, Ref. No. SK 31/04 OTK ZU 2004, No. 10A, item 110; of 5 November 2008, Ref. No. SK 79/06 OTK ZU 2008, no. 9A, item 153; of 17 November 2010, ref. no. SK 23/07 OTK ZU 2010, no. 9A, item 103. For an analysis of these judgments, see A. Krzywoń, op. cit., pp. 110–111. This line of judiciary rulings was upheld in the judgment of the complete CT of 16 February 2009, Ref. No. Ts 202/06, OTK ZU 2009, No. 1B, item 23; also see the CT Judgments: of 31 May 2011, Ref. No. Ts 295/10, <https://www.saos.org.pl/judgments/110787>; of 8 June 2011, Ref. No. Ts 41/07, OTK-B 2011, No. 3, item 194; of 13 December 2017, Ref. No. SK 48/15, Journal of Laws of 2017, item 2432.

form position. At the same time, in the wake of the judgment issued by the complete Tribunal in 2009, the third of the above-mentioned positions on the matter at hand should be considered the dominant judiciary doctrine in this respect.

Controversies Over Subjective Rights in Tax Law

At this point, the paper needs to focus on verifying the second research hypothesis posed above, i.e. whether the existing provisions of tax law codify subjective rights. In tax law, just like in civil law, subjective rights may be of a proprietary or non-proprietary nature. However, in the case of property rights, it does not matter whether the property has any market value or not because, for instance, property rights always concern property law, irrespective of the property's worth. The property rights affect the economic interest of the entity which enjoys them. They affect the scope of tax obligations or induce tax exemptions.⁴³ Non-proprietary rights are primarily personal and family rights, which are an element of relations between spouses, relatives, adoptees and affinities.⁴⁴

The source of the said public subjective rights – i.e. the source of an entity's ability to act – is a legal norm. Yet, not all legal norms constitute a source of subjective law, even if they evoke a favourable status of the subject.⁴⁵ With regard to tax law, it seems that the inclusion in this group of overt property rights of a taxpayer, regulated in specific tax regulations,⁴⁶ does not raise any doubts. Under tax law, similarly to the civil law, the subjective rights include such property rights as

⁴³ PAC in Gliwice, Judgment of 20 November 2018, Ref. No. I SA/GL 653/18; PAC in Lublin, Judgment of 4 November 2015, Ref. No. I SA/Lu 651/15.

⁴⁴ PAC in Warsaw, Judgment of 10 February 2005, Ref. No. III SA/Wa 1007/04, SIP LEX, No. 251241. See also: S. Babiarz, *Majątkowe i niemajątkowe prawa i obowiązki w systemie praw, cz. 2. Majątkowe i niemajątkowe prawa i obowiązki w prawie podatkowym, Teza nr 1*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2006, 2, p. 21.

⁴⁵ PAC in Warsaw, Judgment of 2 March 2013, Ref. No. III SA/Wa 1606/12.

⁴⁶ Article 7b(1)(6)(a) of the Act of 15 February 1992 on Corporate Income Tax, Journal of Laws of 2020, item 1406. (hereinafter referred to as: the CIT Act), and Articles 17 and 18 of the Act of 26 July 1991 on Personal Income Tax, Journal of Laws of 2020, item 1426 as amended (hereinafter referred to as: the PIT Act). As regards personal income tax, see the individual interpretation of the Director of National Revenue Administration Information Centre of 23 November 2018, 0113 – KDIPT2-3-4011.526.2018. ID. The judicature indicates that the term 'in particular', used in the said article, indicates that the definition of income from property rights is open-ended. The legislator's listing of property rights in the above-mentioned provision covers only intellectual property rights, and can therefore be regarded as an example only. Therefore, it is possible to include other rights not mentioned anywhere in this Act in the income from property rights under Article 18 of the PIT Act; see SAC, Judgment of 28 May 1997, Ref. No. I SA/Ka 102/96, SIP LEX, No. 29829; PAC in Szczecin, Judgment of 3 March 2016, Ref. No. I SA/Sz 1408/15, SIP LEX, No. 2014108.

material property rights (in rem) (ownership, perpetual usufruct and limited property rights), obligations-related rights (e.g. tenancies, leases, contractual pension, receivables from participation in a company), rights related to intangible assets of a proprietary nature (e.g. copyright), family property rights (e.g. right to alimony) or inheritance rights.⁴⁷ However, of interest to this article are analyses concerning whether a tax legal solution protecting taxpayers' rights can be considered subjective rights. Due to the space limitations of the paper, the discussion can only cover three selected legal categories.

According to a uniform position displayed in judicature, the taxpayer's property rights include:

- ❑ overpayments,
- ❑ tax refund or a refund of the overpaid VAT,
- ❑ settlement of loss in subsequent accounting periods,
- ❑ the classical right to investment discounts and bonuses, as defined in the CIT Act.⁴⁸

However, the qualification of tax reliefs⁴⁹ and other tax preferences⁵⁰ as property rights evoke divergent interpretations. It is equally possible to find judgments which use this qualification,⁵¹ as well as those according to which tax relief is an intangible right.⁵²

The former case, i.e. overpayment, is a model example of a subjective right. The scope of its definition is determined in substantive law, while the taxpayer's claim

⁴⁷ PAC in Szczecin, Judgment of 3 March 2016, Ref. No. I SA/Sz 1408/15, SIP LEX, No. 2014108.

⁴⁸ SAC, Judgment of 22 December 1999, Ref. No. III SA 135/99; SAC, Judgment of 7 June 2000, Ref. No. III Sa 1216/99, "Economic Law" 2001, 4, p. 50; PAC in Warsaw, Judgment of 10 February 2005, Ref. No. III SA/Wa 1007/04, SIP LEX, No. 251241. Individual interpretation of the Tax Chamber in Bydgoszcz of 16 September 2013, Ref. No. ITPB1/415-694c/13/WM. See also: M. Zdebel, [in:] H. Dzwonkowski (ed.), *Ordynacja podatkowa. Komentarz*, Warszawa 2006, p. 539.

⁴⁹ Article 67(a) of the Law of 29 August 1997. Tax Ordinance, Journal of Laws of 2018, item 800 as amended (hereinafter referred to as: the Tax Ordinance).

⁵⁰ This is primarily a matter of tax reliefs and exemptions provided for in income taxes, but also in other tax regulations.

⁵¹ See the judgements in footnote 49 and with regard to the so-called student relief, see, among others: 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; 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. The right to a housing allowance is also a property right: see SAC, Judgment of 30 April 2015, Ref. No. II FSK 848/13, and of 18 January 2018, Ref. No. II FSK 3634/15.

⁵² Individual Interpretation of the Director of National Revenue Administration Information Centre of 18 October 2019, Ref. No. 0111-KDIB1-1.4017.14.2019.1.BK.

for its refund is coded in procedural law. The tax authorities cannot exercise administrative discretion with regard to overpayment duly proved by the taxpayer but they must act within their competences.⁵³ This is all more so because, as the judicature indicates, the protection of the overpaid tax, to which a taxpayer is entitled, is also ensured by enforcement provisions. As indicated by the judgments of the CT and the Supreme Administrative Court (hereinafter referred to as: the SAC), the refund of tax overpayment is a statutory procedure enabling a taxpayer to carry out a property restitution claim, subject to constitutional protection, under Article 64(1) of the Constitution. The claim is about the possibility to demand restitution to the taxpayers' assets of the funds which came out of those assets (were elicited) directly as a result of the tax regulation in force, which then turned out to be burdened with a legal defect.⁵⁴ The doctrine of tax law also points out that the constitutional protection covers a separate, overtly expressed subjective right of the taxpayer to the refund of tax overpayment, including overpayment of VAT, resulting from the ruling of the CT or the CJEU.⁵⁵

The right to a refund of the input VAT is also a public subjective right.⁵⁶ Such a qualification may be indirectly interpreted by the judicature of Poland's CT which indicated that the right (or entitlement) of a taxpayer to a refund of input tax is regulated in the VAT Act and that the right to this refund is a key structural element of the subject matter and the legal basis of the tax.⁵⁷ In another judgment, the CT argued that the right to a refund of input tax marks an implementation of the principle of the neutral impact of the tax on goods and services, not a cascade impact, and hence it must be exercised in accordance with the law and the constitutional order of the state, including particularly the principle of proportionality.⁵⁸ The taxpayer's right to a refund of VAT is much more clearly a subjective right,

⁵³ Articles 72–77(e) of the Tax Ordinance, see also J. Gorąca-Paczulska, [in:] H. Dzwonkowski (ed.), *Ordynacja podatkowa. Komentarz*, Warszawa 2020, pp. 588–589.

⁵⁴ CT, Judgment of 6 March 2002, Ref. No. P 7/00, OTK ZU 2A/2002, item 13. SAC, Judgment of 22 June 2011, Ref. No. I GPS 1/11, ONSAiWSA, No 5/2011, item 93.

⁵⁵ A. Szymczak, *Nadpłata podatku powstała w wyniku orzeczenia Trybunału Konstytucyjnego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2013, 2, pp. 107–118.

⁵⁶ Article 86(1) in conjunction with Article 88(3)(a) and Article 88(4)(a) of the Act of 11 March 2004, Journal of Laws of 2020, item 106 as amended (hereinafter referred to as: the VAT Act). Moreover, in 2016, the VAT Act was expanded to cover the concept of abuse of law (public subjective law). See A. Bartosiewicz, *VAT. Komentarz*, SIP LEX 2018, part 40.

⁵⁷ CT, Judgment of 11 December 2001, Ref. No. SK 16/00, Journal of Laws 2001 No. 144, item 1621.

⁵⁸ CT, Judgment of 21 June 2004, Ref. No. SK 22/03, OTK-A, No. 6/2004, item 59.

provided that the taxpayer retains good faith in the rulings of administrative courts⁵⁹ and the CJEU.⁶⁰

The taxpayer's right to deduct input VAT may be questioned by the tax authorities only if it is proven on the basis of objective evidence that the exercise of that right involved a criminal offence or an abuse of law by the taxpayer.⁶¹ The CJEU ruled that the recovery of interest on a tax refund withheld in breach of the EU law constitutes a subjective right and that the withholding of interest is an infringement of the EU law and the principle of effectiveness.⁶²

One of the most intriguing and vital research problems concerning taxpayers' subjective rights is the issue of the statute of limitations on tax liabilities. The institution of the statute of limitations itself is one way of eliminating the effects of a particular legal relationship. The statute of limitations is to be found in civil, criminal, administrative and tax law, as well as in other areas of the substantive law. The common feature of the statute of limitations is the loss of the ability of a creditor to effectively claim from a debtor the performance of a specific obligation.⁶³ The tax law literature recognises an interpretative position under which the statute of limitations protects the subjective rights of a taxpayer and guarantees the ineffectiveness of the enforcement of a tax obligation when a five-year period, counted in the manner indicated in the Tax Ordinance, expires.⁶⁴ The passiveness of the tax body may lead to a situation where a tax obligation, even though effective, will not be executed and will expire.⁶⁵ At the same time, the CT ruled that the

⁵⁹ See, among others, SAC, Judgments: of 9 October 2014, Ref. No. I FSK 664/14, SIP LEX, No. 1587428; of 27 September 2016, Ref. No. I FSK 676/15, SIP LEX, No. 2142881; of 26 August 2016, Ref. No. I FSK 2011/14, SIP LEX, No. 2118529; of 3 June 2016, Ref. No. I FSK 1865/15, SIP LEX, No. 2116884; PAC in Lublin, Judgment of 7 November 2017, Ref. No. I SA/Lu 574/17, SIP LEX, No. 242424.

⁶⁰ As repeatedly stressed by the Tribunal, the right to tax deduction, provided for in Article 167 et seq. of Directive 2006/112, forms an integral part of the VAT mechanism and by principle is not subject to limitation. It is immediately available for all the input VAT on relevant transactions, as evidenced by the judgements of the CJEU of 21 March 2001 in Joined Cases C-110/98 to C-147/98, p. I-1577, paragraph 43; of 6 July 2006 in Joined Cases C-439/04 and C-440/04, ECR I6161, paragraph 47; of 30 September 2010 in Case C-392/09, ECR I8791, paragraph 34; of 21 June 2012, in Joined Cases C-80/11 and C-142/11.

⁶¹ CJEU, Judgments: of 3 March 2005 in case C-32/03, paragraphs 33, 34; of 6 July 2006 in Joined Cases C-439/04 and C-440/04, paragraph 55; of 29 March 2012 in case C-414/10, paragraph 32; of 21 June 2012 in Joined Cases C-80/11 and C-142/11.

⁶² Article 183 of the VAT Directive and CJEU, Judgment of 23 April 2020, in Joined Cases C-13/18 and C-126/18.

⁶³ S. Bogucki, K. Winiarski, *Instytucja przerwania biegu terminu przedawnienia w ordynacji podatkowej (ewolucja poglądów judykatury)*, [in:] R. Dowgier (ed.), *Ordynacja podatkowa. Stan obecny i kierunki zmian*, Białystok 2015, pp. 113–147, https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/7405/1/S_Bogucki_K_Winiarski_Instytucja_przerwania_biegu_terminu_przedawnienia.pdf (access: ...).

⁶⁴ Article 70 par. 1 of the Tax Ordinance.

⁶⁵ A. Gomulowicz, *Zapłata podatku a przedawnienie zobowiązania podatkowego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2008, 3, p. 64.

statute of limitations, irrespective of how it is legally coded, constitutes exclusively an expression of the legislator's policy, and therefore cannot be treated as a subjective right of an individual taxpayer protected by the constitution, or as an eviction of such a right.⁶⁶ With regard to the statute of limitations in tax law, the CT assessed this institution in the light of Article 84 of the Constitution, which imposes a universal obligation to bear public burdens and benefits, as well as Article 217 of the Constitution, which legitimises the financial competences of the state. As judged by the Tribunal, the principles coded in the relevant tax regulations leave no room for interpretation as for the fact that whatever kind of expiry of tax obligation cannot be regarded in terms of a constitutional subjective right.⁶⁷ The doctrine highlights the fact that determining the expiry period is left to the sole discretion of the legislator. It cannot either be too short or too long. In the former case, it would exclude ensuring the implementation of the principle of universality and tax fairness, whereas in the latter case, it would make the institution of the statute of limitations essentially illusory.⁶⁸

Concluding Remarks

Taxes, by their very nature, always affect the personal rights of a tax debtor as they affect the taxpayer's property, property rights, as well as economic and profit-driven activities, gross and net income and profits.⁶⁹ This intrusive and oppressive nature of tax law is closely related to the implementation of the fiscal function of taxes, guaranteeing the financial security of the state and local government units. In this contradiction of two sources of interests, unquestionably regarded as equal, i.e. of the taxpayer and of the public domain, the former is, however, in a weaker position,

⁶⁶ CT, Judgments: of 25 May 2004, Ref. No. SK 44/03, OTK ZU, No. 5/A 2004, item 46, point 4; of 25 May 2004, Ref. No. SK 44/03, OTK ZU, No. 5/A/2004, item 46; Ref. No. P 26/10; of 19 June 2012, Ref. No. P 41/10; of 7 September 2009, Ref. No. Ts 389/08, OTK ZU, No. 5/B/2009, item 431. An analogical stance is taken by the SAC, issued in judgments: of 2 July 2002, Ref. No. II KK 143/02, SIP LEX, No. 55526; of July 2012, Ref. No. P 30/11, OTK-A 2012/7/81. See also: T. Kolanowski, *Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego*, "Glosa" 2014, 1, p. 111.

⁶⁷ B. Dauter, *Wpływ przedawnienia na rozstrzygnięcie w sprawach podatkowych, ze szczególnym uwzględnieniem możliwości wydawania decyzji określających po upływie terminu przedawnienia*, [in:] R. Dowgier (ed.), *Ordynacja podatkowa. Rozstrzygnięcia organów podatkowych i skarbowych*, Białystok 2014, pp. 59–60, https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/7490/1/B_Dauter_Wplyw_przedawnienia_na_rozstrzygnięcie_w_sprawach_podatkowych.pdf and Constitutional Tribunal's Judgment of 10 July 2012, Ref. No. P 30/11, OTK-A 2012/7/81.

⁶⁸ *Ibidem*, p. 60.

⁶⁹ A. Gomułowicz, *Ochrona wolności...*, p. 29.

and this is for obvious reasons. It seems that in the face of numerous unsuccessful attempts to introduce the Declaration or Charter of Rights of the Taxpayer,⁷⁰ using the subjective rights of a taxpayer in relations with tax authorities both in tax proceedings and in court remains an alternative way to seek opportunities to strengthen the protection of the position of the taxpayer in relations with the tax authorities. Referring to the hypotheses put forward at the beginning of the paper, it should be stated that the subjective rights of a taxpayer may be derived directly from the Constitution and decoded from the content of tax regulations. There is no doubt that they may constitute effective protection for taxpayers not only in the face of the administrative discretion of the tax authorities, but also in the face of their abuse of competences in relations with individuals obliged to pay levies.

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⁷⁰ B. Brzeziński, *Koncepcja praw podatnika i ich ochrony jako przedmiot badań naukowych*, "Kwartalnik Prawa Podatkowego" 2005, 1, pp. 9–34; idem, *Deklaracja Praw Podatnika (propozycja systematyzacji tez)*, "Kwartalnik Prawa Podatkowego" 2008, 2, pp. 111–121; M. Münnich, *Deklaracja Praw Podatnika*, [in:] B. Kucia-Guściora, M. Burzec (eds.), *Preferencje podatkowe*, Lublin 2013, pp. 13–28; M. Sęk, *Karta Praw Podatnika w polskim systemie podatkowym w świetle doświadczeń zagranicznych*, "Kwartalnik Prawa Podatkowego" 2018, 1, pp. 71–96; M. Wilk, *Potrzeba wprowadzenia Karty Praw Podatnika w Polsce*, "Kwartalnik Prawa Podatkowego" 2018, 1, pp. 97–104; *Projekt ustawy Karta Praw Podatnika z uzasadnieniem*, "Kwartalnik Prawa Podatkowego" 2018, 1, pp. 105–127; H. Dzwonkowski, M. Duda, J. Gorąca, op. cit.; *Karta Praw Podatnika – nowy instrumentem ochrony dla podatników*, <https://www.rpo.gov.pl/pl/content/rpo-za-wprowadzeniem-karty-praw-podatnika> (access: 8.07.2020).

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