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A few reflections on current tax law¹

Kilka refleksji na temat obecnego prawa podatkowego

Streszczenie. W artykule omówiony został obecny stan słowackiego ustawodawstwa podatkowego, w szczególności pod kątem cech jakościowych. Podkreślono niektóre negatywne jego cechy, zwłaszcza wysoką częstotliwość zmian w prawie, niejasność przepisów, brak podejmowania wysiłków na rzecz właściwej interpretacji oraz stosowania zasady sprawiedliwości podatkowej, a także destabilizujące efekty upolitycznienia procesu tworzenia prawa podatkowego.

Słowa kluczowe: prawo podatkowe; ustawodawstwo podatkowe; polityka podatkowa.

Abstract. The paper deals with the current state of Slovak tax legislation in terms of its qualitative attributes. It emphasizes some of the negative features, especially the high frequency of amendments to the law, lack of clarity of legislation, lack of effort on the appropriate application of the criteria of fairness and ability

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to pay taxes, as well as excessive political influence on the tax law-making process and its destabilizing effect.

Keywords: tax law; tax legislation; tax policy.

1. Introduction

*Aequum ius est non quo omnes uti sunt,
sed quod omnibus latum est.*

*(The equitable law is not the one that is
used by everyone, but rather the one that
has been provided for everyone.)*

Seneca the Younger

It is important to recall the quotation from the above-cited author especially today. It is important to mention the fact that the law itself is not perceived in a positive way, even if this claim represents only one side of the coin. On the other hand, some factors by which society meets particular needs must be present. Apart from other instruments, the law is particularly an instrument which should fully represent a guarantee of the required formation, presumed development, as well as the cessation of every social relation that is based on the legal norms.

A legal order is a regulatory mechanism *sui generis*. Legal norms mostly serve as regulatory instruments in the entire process². Legal norms are perceived normally as conditional and generally binding rules of behaviour which are expressed in a form determined or recognized by the state, compliance with which may be enforced by state authority³.

² See more: J. Krecht, *Právní systémy a jejich hloubková struktúra*, "Právnik" 2002, No 5, p. 584.

³ A. Bróšťl, I. Kanárik, G. Dobrovičová, *Teória práva*, Košice 2004, p. 68.

2. Taxes and tax policy

Tax policy is a part of the budgetary policy of a state. It serves as an instrument of the economic policy of a state as well. We could point out the fact that tax policy is rather a collection of measures by which the state modifies taxes which it has imposed. Tax policy has its aims – economic, political, and social, and the tax system represents an instrument for their achievement. Tax policy should be rather stimulating for the development of an economy, and entrepreneurship should be supported. When applying a tax policy, peculiarities of a certain state should be taken into account. It is impossible to apply automatically tax policies from foreign countries. This is quite obvious, since every state has its peculiarities regarding the level of its development, social composition, geographical location, and a lot of other peculiarities and characteristics, which tax policy has to respect at the end of the day.

Tax policy is a very broad and complex phenomenon. Issues of taxation are often discussed and are themselves one of the most frequent public concerns in every single market economy. Particularly, in order to achieve the prosperity of a country, a reasonable economic policy of state and a pragmatic financial policy of state are needed. The focus of the economic policy of a state on the particular area may be achieved by a particular aim-oriented policy, which constitutes a part of the economic policy of the state. Tax policy is derived from economic policy when it comes to its focus and aims. It plays, therefore, a role that cannot be substituted⁴. Tax policy represents an essential part of economic policy the object of which is defined by some authors as the “application of tax principles and measures in such a way that taxes will serve to fulfil the economic, social and political needs of the state”⁵. According to the opinion of Schultzová, tax policy is connected with the use of taxes and their instruments by which macroeconomic and microeconomic processes in economy are influenced⁶. In general terms, tax policy is derived from an

⁴ E. Beňová et al., *Financie a mena*, Bratislava 2005.

⁵ A. Schultzová et al., *Daňovníctvo*, Bratislava 2007, p. 117.

⁶ *Ibidem*, p. 117.

application of economic policy. For instance, in the case of a restrictive economic policy, growth of the tax burden is expected. On the other hand, in the case of an expansive economic policy, decrease of the tax burden is expected. Therefore, tax policy aims at applying tax principles and measures in such a way that taxes serve to fulfil the economic, social, and political needs of a state⁷.

In the view of Sivák, the most important part of the public income comes from taxes, and therefore it is crucial to identify the entire tax income of a state. In order to achieve the most efficient income, mainly the definition of the object of a particular tax, the way of calculating a tax base and other essential elements of taxes should be taken into account when applying tax policy⁸. Economists do not perceive the role of taxes only as a source of financial income for public budgets, and they emphasise the active influence of taxes on taxpayer's behaviour and the whole economic system.

These introductory remarks have been intentionally presented at the very beginning of the article, mostly owing to two reasons. The first of them is the fact that the issue of taxes and tax law in their general aspects is significantly analysed mostly in the economic literature. The second reason is the fact that taxes, tax law, and tax order represent attributes which should earn the special attention of tax law jurisprudence. I am aware of the fact that the above-mentioned attributes of law are bounded by economic features and they coexist together, which should be the particular reason for their correct understanding and perception, as well as for the decision-making process.

Taxes have existed practically from the period of the creation of organized forms of society. Their evolution is connected with the development of a state and with strengthening of a fiscal economy. The evolution of taxes is a reflection of changes in the whole of society, particularly the reflection of changes in the functioning of a state, the functioning of the

⁷ A. Schultzová et al., *Daňovníctvo – Daňová teória a politika I*, Bratislava 2011, p. 11–12.

⁸ R. Sivák et al., *Verejné financie*, Bratislava 2007, p.181.

economy and trade, and is a reflection of understanding the concepts of equity and fairness⁹.

Taxes represent social phenomena, which include economic, legal, social, sociological, moral, and psychological aspects¹⁰. Sources of public budgets are determined mainly through taxes. If we take into account the fact that tax law (as a separate branch of law) still does not possess proportionate status, then there is a need to point out ways of implementation of the law. Thoughts on its important place within financial law unfortunately are only marginal. If we realize its importance, then its particular institutions should be inevitably defined and justified. There is a strong need at the same time to point out that the current period of consolidation of public finance is represented by permanent changes brought by the tax law to daily life.

The law as a phenomenon is substantially connected with a society. Besides the conditionality of law determined by the social contexts of its existence, we may identify the conditionality of the development of social relations by valid and efficient group of legal norms that are realised. The result is demonstrated by the mutual coexistence of law and society, which should be respected by their more detailed analysis. The current worldwide financial crisis has shown, however, the important interference with the area of tax law policy as well. The Slovak Republic went through turbulences in the area of tax law, which – as a consequence – had a negative impact on our economy and our legal system.

Following the basic definition of a tax, the basic attributes of a tax could be defined. They point out, mainly, issues which could not have been solved by the law, or which could provide too complicated a solution and which could not achieve the expected results (or results which could significantly influence the legal status of particular subjects of a tax law relation).

⁹ J. Medveď, J. Nemeč et al., *Verejné financie*, Bratislava 2011, p.185.

¹⁰ V. Babčák, *Slovenské daňové právo*, Bratislava 2012, p. 24.

The concept of a tax is defined (or characterized) in the contemporary tax law jurisprudence by the following features¹¹.

1. Tax is a monetary payment (no other forms of fulfilment of tax duty are currently allowed).
2. Tax is of an irreclaimable character. This means, that a tax-payer has no claim (of any kind) in return.
3. Tax is a payment of a non-equivalent character. This means that by payment of a tax the assets of the obliged taxpayer decrease with no equivalent refund from the state.
4. Tax as a payment may be imposed by law, or under the law (in the conditions of the Slovak Republic), as can be directly derived from the Constitution of the Slovak Republic. Every tax has to have a legal ground, without which no tax collection is admissible.
5. Tax is devoted to state and other public needs, which means that tax is an element of a public budget revenues.
6. Tax is determined as a certain levy and has to be paid by the due date (which is known in advance).

All these features of the term “tax” (as defined in its basic concept) reflect in particular mainly its legal aspects. The law in itself is an instrument by which a duty of a state in fulfilment of its functions is required. Every government tries to achieve the highest possible tax income, which guarantees the financing of the inevitable public needs of the state through public expenses. Tax law regulation that is devoted to achieving outputs OR identifying financial sources should be of such a kind as to render this aim to be at least approached, if not fully achieved.

3. The development of tax policy and legislation

Since 1989 tax legislation has brought various changes and efforts in its stabilisation in the Slovak Republic (at the very beginning they were made

¹¹ See more: V. Babčák, *Slovenské daňové právo*, Bratislava 2012, p. 26–27; M. Bujňáková, *Je v Európe potrebná harmonizácia daní?* [in:] K. Červená, A. Románová, M. Karabinoš, M. Kočíš (eds.), *Vybrané otázky daňovej politiky Európskej únie a jej členských štátov*, Košice 2013, p. 32.

by – to use the “terminology of medicine”: a try-failure approach). The first radical and important change had been performed during 1992–1993 by the adoption of new legal norms, which at least partially reflected economic and social changes. Regarding this, it is important to stress that legal acts that had been adopted in 1992 and which were entering into force from 1992 were prepared and adopted during the time of the common state (the Czech and Slovak Federative Republics). An independent Slovak Republic was established on 1st January 1993. Tax law acts were adopted on the non-system basis, which led to their permanent novelizations (not to mention that even subordinate legislations were sometimes contrary to the legal acts). Legal norms from the area of tax law became complicated owing to frequent novelizations made by legal acts from other branches of the law. Permanent changes and partially non-system regulations, as well as exceptions which were involved in legal regulations, were often amended even before the moment of their entry into force. The acceptance of a limitation between public and private finance and between the search for optimal tax fairness and the economic development of society was not easy to identify within the process of transformation of the whole economy.

A very significant change for an entire tax policy concept in the Slovak Republic was performed in 2003. It was especially needed not only because of the complexity of tax law, but it was rather connected with the accession of the Slovak Republic to the European Union. As I stressed in the introduction to this article, a tax policy is the reflection of an economic policy of a state. Therefore, it is important to mention at the same time that a tax policy is a reflection of a political representation as well. The above-mentioned concept complies with the fact that legislative powers are held by the national council, where “politics and political decisions” are realised. By a “tax reform” considered as an aim of a law-maker in constituting and improving a modern tax system, the following aims have been presented:

1. transparency of tax law norms;
2. decrease of direct taxes;
3. introduction of the equal tax;

4. strengthening of own tax revenues of municipalities;
5. defining own tax revenues of municipal districts;
6. introduction of a new system of financial compensation;
7. safeguarding the strict, direct, fair, and efficient collection of taxes;
8. limiting tax evasions;
9. simplification of tax law norms (tax law legislation);
10. revaluation regarding an application of tax rates on property taxes;
11. tax stimulation introduced in order to support the issue of housing projects.

The presented aims were precisely defined, but their realization was rather complicated. In this respect it is important to mention that tax law did not become either more simple or more clear. It also did not become more transparent. Moreover, the practice of the application of tax law became even more demanding because of an increased bureaucracy. Legislative changes were focused mostly on the introduction of a unified tax rate. From the legal and economic point of view in connection with legislative changes, no tax reform was brought about at the end of the day.

4. Requirements with respect to the quality of a piece of tax legislation

It is not my aim to evaluate tax legislation in a complex way, since I am not entirely competent at the every level, but I want to stress mainly the legal aspects of tax legislation. According to my opinion, tax legislation should be, as far as possible, clear, short, and stable. These basic attributes are of such importance that tax law could be improved by taking them into account. Four tax canons of Adam Smith are well known, expressing the principle of fairness, certainty, comfortable payment, and effectiveness¹². The so-called “principle of utility” had been emphasized by the first canon. Smith emphasizes that the principle of fairness sets-out the requirement that no difference should be made between particular kinds of income. The principle of certainty is perceived by Smith as follows: tax

¹² A. Smith, *Pojednání o podstatě a původu bohatství národu*, Praha 1958, p. 392–394.

that has to be paid by every individual has to be certain and not arbitrary. The taxpayer and everyone else has to know all of the details on due date of a tax payment, the method of tax payment, as well as the amount of payable tax. The principle of comfortable payment is perceived by Smith as follows: every tax should be collected at a time and in a way that is acceptable to the taxpayer. The fourth tax canon points to the fact that every tax should be thoughtfully considered, so that citizens do not pay more than what is inevitable to pay in favour of a state budget. Adam Smith (1723–1790) considered these four canons as the best solution available in those days. Despite the fact that development of the state and the economy has brought new challenges to a tax system, it is important to mention that the tax canons of Adam Smith have their solid ground up to today, as is declared by economists and lawyers around the world. To sum up, they still should be “the alpha and omega issue” for the adoption of tax law legislation.

Finding the optimal and efficient compromise in the realisation of a tax policy (presenting an interests of the public and the state) is a rather complicated and sometimes even unreal task. All of the factors which might influence a particular piece of tax legislation have to be taken into account. The essential factors that influence tax legislation are represented mostly by a tax system and by particular taxes in a state. These two terms are different, but connected at the same time. The term “tax system” is however of a broader sense compared to the term “tax scheme”. Tax system includes in itself:

- a tax scheme (particular taxes),
- a legally and organizationally regulated system of authorities, which safeguard the performance of tax administration and other related activities,
- a system of instruments, methods, and techniques that are performed by tax authorities¹³.

Under the regulation of legal norms we can distinguish substantive and procedural tax law. The scheme of particular taxes is a part of a tax

¹³ V. Babčák, *Slovenské daňové právo*, Bratislava 2012, p. 33.

system and it represents in itself all taxes that are imposed in a particular state. A tax scheme represents a certain group of taxes that are imposed and collected in a particular state.

The short definition of a tax scheme mentions that the current scheme of taxes in its form follows the law on the scheme of taxes¹⁴. This law has its unofficial name “tax constitution“, which certainly had advantages as regards stability in imposing new taxes. This law was however repealed in 1999, by law No 219/1999 Coll., which amended law No 511/1992 Coll. on the administration of taxes and fees, and on changes of local financial authorities which amends the other laws. Such a legal regulation was a typical example of changes of tax law legal acts, which had been often amended in an indirect way. As we mentioned “tax constitution“, from the application point of view, no other taxes, except those taxes directly involved in the law, could have been imposed by the national council. The above-mentioned law in itself was a guarantee and legal certainty specifying what kind of taxes may be lawfully imposed and collected within a state. Abolition of the law meant that new taxes could be imposed by separate legal acts, which was fully in accordance with the Constitution of the Slovak Republic.

A particular tax system is usually influenced by many factors that are decisive for the issue of complex taxation. One of the important factors is currently represented by the phenomenon of globalization which intrudes into every area of life. The Slovak Republic inevitably has not only to reflect on current conditions within the state, but also has to take into account international initiatives (apart from membership in the European Union). As we have already mentioned above, the tax canons of Smith will nowadays still be considered as an expectation for good tax legislation.

Slovak tax law is unfortunately stigmatised by the conflicts between political representations which are especially visible in the national council, where good and simple tax laws should be created. This article does not provide space for all the argument that are not respected in a law-making process (or by amendments). From the point of view of a tax law,

¹⁴ The law No 212/1992 Coll. on the scheme of taxes (“tax constitution”).

there is a need to stress that we should try to adopt legal regulations which would help the state, which would be fair and simple for citizens, and which would make the Slovak Republic more competitive compared to other states as well. It is clear that some restrictions and limits were defined by our accession to the European Union, though the area of direct taxes does still offer an opportunity in fulfilling the aims of a well-constructed tax law.

Tax laws (whether substantive or procedural) should be focused on the fulfilment of the requirements of efficiency, fairness, simplicity, transparency, and legal certainty in the first place. These basic attributes of tax laws would certainly safeguard sufficient sources for the functioning and fulfilment of the state's functions.

The effectiveness of taxes is a significant attribute which should already be under consideration at the stage of preparation of the legal act. The task of a state is to ensure the administration of a tax agenda as well as collection of taxes. Currently, constantly criticised tax evasions (mostly in an area of indirect taxes) show weaknesses within the processes of a tax administration. By the adoption of tax laws it is necessary to assume all the expenses connected with their imposition, administration, and collection. Such expenses are defined by economists as direct administrative costs and indirect administrative costs¹⁵. Direct administrative costs are paid by a state for the organization of a tax system. These direct costs are increasing in a proportional way because of the complexity of a tax system, and because of the number of various taxes, tax rates, various exceptions and reliefs when it comes to payment, and other circumstances. Indirect costs represent a burden imposed on the private sector (they represent a so-called "activated costs", since they are a consequence of a legal regulation). Indirect costs represent the costs that are connected with the tax duty of the taxpayer or the person obliged to pay tax. Their levying depends on complex legal regulations as well. These costs could be minimised by simple and transparent tax laws. For instance, these costs could be made minimal by a lump sum (flat-rate tax). On the other hand, with

¹⁵ See more: K. Kubatová, *Daňová teorie a politika*, Praha 2010, p. 45 et seq.

a complicated income tax related with an administration agenda, both of the costs (direct and indirect) are higher.

The requirement of a tax fairness is a very complicated and demanding issue of a tax law and is subject to ongoing discussions which had already started in ancient and medieval times. Already in those times the issue of tax fairness was considered as a most important tax problem. Adam Smith dealt with these issues in a complex way. He presented canons, which did not follow only the fairness between taxpayers (based on the levy of tax), but the unfairness which had been caused by uncertainty of the law¹⁶. It could be presumed that there is no fairness in a tax law at all. Under the later view of law, what might be fair for a state as a public authority, does not necessarily have to be fair for the obliged subjects – taxpayers. Tax fairness is therefore a relative term, which leads us at the end of the day to the idea that there is no fairness in tax law. Fairness in tax law is perceived in the context of equal conditions for an equal group of taxpayers or obliged persons. Historically, the best known principle of a fair taxation is “the principle of utility” and “the principle of ability to pay tax”¹⁷. Even within the context of this principle, fair taxation does not exist, since taxes, which are part of a budget, are redistributed to cover the needs of the state and are diffused into many public expenses, which are often connected with social allowances. Principle of fair taxation is considered as the most elaborated. In this respect, the ability to pay tax is understood (in principle) at both a horizontal and vertical level. At the horizontal level, the principle means that two subjects, which are on a similar basis and operate under the same conditions, should pay the same tax. Fairness at the vertical level means that the subject who is financially more successful should pay higher (more) tax. Tax fairness as it is presented above is however currently not applicable at all, even if some

¹⁶ A. Smith, *Pojednaní o podstate a původu bohatství národů*, Praha 1958, p. 392–394.

¹⁷ Prof. Kubatová perceives the principle of utility in the way that individuals should be taxed under the amount of utility that flows from the public expenses enabled by taxes. To simplify the issue, the principle of fairness could be characterized as everyone according to his/her contribution to the state budget. K. Kubátová, *Daňová teorie a politika*, Praha 2010, p. 45.

elements are involved within the novelization of current law on income tax¹⁸.

5. Concluding notes

Simplicity and transparency of tax laws, whether substantive or procedural, together with the issue of legal certainty, have been considered as the most vulnerable part of tax law up today. The previous part has shown some problems caused by the complexity of a tax regulation. The more simple the law is, the easier and better is its application. Apart from that, the law is much more accepted by tax subjects. Complicated tax law with non systematic changes does not create the conditions for its correct application, and leads, unfortunately, often to tax avoidance. Finding the optimal and efficient compromise in implementation of the entire tax policy (ensuring that the interests of the public are sufficiently represented) is not even possible. Taxes have always been and always will be touched by economic development as well as by political approaches of those who decide about them in the everyday life.

Bibliography:

- Babčák V., *Slovenské daňové právo*, Epos, Bratislava 2012.
- Beňová E. et al., *Financie a mena*, Iura Edition, Bratislava, 2005.
- Bróstl A., Kanárik I., Dobrovičová G., *Teória práva*, UPJŠ v Košiciach, Košice, 2004.
- Bujňáková M., *Je v Európe potrebná harmonizácia daní?* [in:] K. Červená, A. Románová, M. Karabinoš, M. Kočíš (eds.), *Vybrané otázky daňovej politiky Európskej únie a jej členských štátov*, UPJŠ v Košiciach, Košice, 2013.
- Krecht J., *Právni systémy a jejich hloubkova struktúra*, "Právnik" 2002, No 5.
- Kubátová K., *Daňová teorie a politika*, Wolters Kluwer, Praha 2010.
- Medveď J., Nemeč J. et al., *Verejné financie*, Sprint, Bratislava 2011.

¹⁸ For example by novelization of the law No 595/2003 Coll. on income tax as amended by the law No 395/2012 Coll., which has entered into force from 1. January 2013.

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Sivák R. et al., *Verejné financie*, Iura Edition, Bratislava 2007.

Smith A. *Pojednaní o podstate a púvodu bohatství národů*, SNTL, Praha 1958.

Schultzová A. et al., *Daňovníctvo*, Iura Edition, Bratislava 2007.

Schultzová A. et al., *Daňovníctvo – Daňová teória a politika I*, Iura Edition, Bratislava 2011.