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Tax and financial law and their penetration into private law

Prawo podatkowe i finansowe a jego przenikanie do prawa prywatnego

Abstract. The paper concentrates on the link between tax law and financial law as well as commercial law. The primary goal of the Author is to stress the intersections of these branches of law and to direct the reader's attention to specific concepts of law which markedly penetrate into private law via the rules of public law.

Keywords: public law; private law; tax law; financial law; interconnection of branches of law.

Streszczenie. Artykuł koncentruje się na połączeniu prawa podatkowego i finansowego z prawem handlowym. Podstawowym celem autora jest uwypuklenie punktów styku rzeczonych gałęzi prawa i skierowanie uwagi czytelnika na poszczególne koncepcje prawa, które w znaczący sposób przenikają do prawa prywatnego poprzez przepisy prawa publicznego.

Słowa kluczowe: prawo publiczne; prawo prywatne; prawo podatkowe; prawo finansowe; powiązania między gałęziami prawa.

1. Introduction

The law is usually viewed as a guarantee of the required creation, presumed existence and also termination of every social relation which is guaranteed by a legal rule. The moment at which law was formed in society cannot be precisely historically determined. Law has existed from time immemorial as an inevitable instrument, which maintains certain order in social relations[1].

Legal writings do not provide an unequivocal answer to the question of what law is: various authors perceive and define law differently. The division of law into public law (*ius publicum*) and private law (*ius privatum*) is considered as the most important mode of differentiation of positive law. Its genesis in the European continental legal culture can be traced back to Roman law. *Publicum ius est, quod ad statum rei Romanae spectat: privatum, quod ad singulorum utilitatem pertinet* – Public law benefits the state, private law benefits the individual. This statement derives from the famous Roman jurist – Ulpianus. We can briefly state that public law is to protect the interests of the public, and private law concerns the interests of individuals. This distinction remains on its historical grounds and despite its long history, no better and clearer idea has been propounded in legal theory so far. Thus, the ideas of the Roman jurist Ulpianus will continue to serve as a point of departure for the division of law into public law and private law.

The current theory of law addresses the issue of the division of law into private law and public law, no further than by a mere statement and the focus of legal theoreticians shifts more to different branches of the law[2].

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1 In: V. Knap, A. Gerloch, *Právní propedeutika*, Pilzno 2012, p.10.
2 B. Spáčil, *Teorie finančního práva ČSSR*, Praga 1970, p. 36.

2. Public law *versus* private law

Every state needs to have at its disposal instruments which aim at ensuring state's functions which should and must be executed. In order for a state to effectively and especially systemically satisfy its social needs and functions, a state (a complex and highly developed social organism) must have a sufficiently stable and firm economic base. The organic element of the operation of the state resides in its legal order which is understood as a system, which in its historical context substantiated its reliability as a fundamental all-society regulatory factor connected with the proclaimed stabilising and democratic elements in unifying, decision-making, and organizing civil society.

In every society, the law serves both as the institutional framework through which the policy and priorities of the state are to be ensured, and also as a tool used for the protection of a citizen. Every individual lives in a specific community, a society that is subject to certain power exercised in a certain territory. Every individual wishing to pursue and fulfil his/her ideas must experience certainty, freedom, and a choice of alternatives. Not even in a developed democratic society attempting to guarantee legal certainties one can state that the exercise and enforcement of certain intentions, principles, and ideas is always necessary and appropriate for the whole of society. It is primarily the law that should serve as a tool to safeguard the universal protection of the interests of the state and of the citizen. The evolution of opinions on the understanding of the functions of the law is grounded on the philosophical question (*quid iuris?*). We can state that the law is a means of expressing certain needs and interests, a method by which these are communicated. Owing to the law and its rules, social relations can exist and be regulated.

As has already been mentioned, the division of law into public and private law ranks among the most significant modes of classification of positive law[3]. The public-law nature also extends to the branch of finan-

[3] Š. Luby, *Základy všeobecného súkromného práva*, Šamorín 2002, p. 287.

cial law, and undoubtedly, also to the newly-created branch of tax law[4]. These branches of the law constitute the integral part of the legal order of the Slovak Republic. However, we must add that it is not always considered as such by the whole community of lawyers, especially on the part of academia, but the autonomy of these branches of law is also the result of the economic policy of the state and the acceptance by society as such. These branches of law are not codified despite the fact that their internal structure and legal regulation reveal their complex nature. These branches of law develop in a dynamic way and comprise many legal rules what is a consequence of the intricacy and complexity of socio-economic relations they regulate. In view of the theory of law, the internal differentiation of financial and tax law is based on the criterion of the specificity of the nature of the regulation which comprises several subsystems. These concern the frequently discussed issues of financial relations and tax relations viewed not only from the perspective of jurists, but which are also at the centre of the attention of citizens of every state[5].

As has already been noted, in view of the relations which are the subject-matter or the outcome of legal regulation, the most notable is the division of the law into public law and private law. To explain it simply, public law demonstrates the superiority of public authority towards other parties to legal relations in cases stipulated by the law, whereas in private law the entities (including the state) are placed on an equal footing[6].

The existence of the concept of public law must be emphasized when superiority of public authority in cases stipulated by law and its legitimate exercise comes to the light in a state guaranteeing democratic principles and the rule of law. This superiority cannot be viewed as some kind of a global superiority of a public authority. Superiority must always be delimited by law and exercised in accordance with the law. The sphere of

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4 V. Babčák, *Daňové právo na Slovensku*, Bratysława 2015, p. 142;. M. Bujňáková, *Opodstatnenosť daňového práva ako samostatného odvetvia práva v právnom poriadku Slovenskej republiky* [in:] „Mezinárodní a srovnávací právní revue" 2005, No 14, pp. 4–12.

5 V. Babčák M. Štrkolec, K. Prievozníková, *Finančné právo na Slovensku a v Európskej únii*, Bratysława 2012, p. 111.

6 J. Boguszak, J. Čapek, A. Gerloch, *Teorie práva*, Praga 2004, p. 100.

public law may thus be defined as relations in which at least one party to legal relations acts in the position of a public authority. This definition concerns exclusively external relations of public authority. However, there are cases within internal relations, when parties to legal relations exercise public authority reciprocally and in such instances no superiority of public law exists.

In legal writings one may frequently encounter the opinion that the concept of public law is perceived as general law and private law is viewed as special law, or alternatively – as peculiar[7]. Such a perception is substantiated by the explanation that in a democratic state respecting the rule of law, public bodies may bind the parties to legal relations and determine their subjective rights and duties, but only in cases stipulated by the law, and this authorization always derives from the law. Apart from that, on the grounds of their private acts, the parties to legal relations have discretion to determine and stipulate their mutual entitlements and obligations. It must be said, though, that similarly to public law which is regulated by legal rules, private law is a collection of legal rules that regulate relations between individuals reciprocally, irrespective of their relation to public authority.

The current classification of public law is grounded on the division of the law into public law and private law. The basis of public law is formed by constitutional law, administrative law, financial law, criminal law, and public international law. On the other hand, private law is constituted by civil law, commercial law, labour law, and international law[8]. Such classification of law cannot be perceived as something exact and unchangeable. In line with the development of the state and society, reasons may justify the creation of new areas of legal practice. Certain categories of public law display elements of private law and vice versa. The economic system also necessitated the formation of areas of law which are connected with the societal needs, or alternatively, with development that must be regulated, for example, medical law, environmental law, transport law, IT law, etc. In this view, the current approach to the division of law into private

[7] See also: Š. Luby, *Základy všeobecného súkromného práva*. Šamorín 2002, p. 287.
[8] J. Boguszak, J. Čapek, A. Gerloch, *Teorie Práva*, Praga 2004, p. 347.

law and private law no longer seems so obvious: these branches must always be viewed in their complexity, and it is understood that the individual concepts of public law influence the private law and its perception.

3. Tax and financial law

In society, law functions as a regulatory system. It operates in such a way that people conform to what is a socially acceptable behaviour. The aims which law seeks to pursue, be it those which reside in certain required behaviour or those which are to prevent undesirable conduct, are regulated by respective branches of the law. This paper concentrates on a connection of tax law and financial law versus commercial law. Our primary goal is to pinpoint the intersections of these branches of law and to direct our attention to individual concepts of law which markedly penetrate into private law via rules of public law.

Public finances represent one of the crucial concepts in financial law. This concept, or term as such, has gradually been brought to the forefront of attention, not only in the legal community, but also within a broader circle, especially during political debates. The public sector plays a significant and constructive role, not only because it interferes with the market, but also because it creates conditions to support the business environment. A budget is an important element of public finances that is viewed as a product of regularities of societal development closely connected with the state and expressed through the law. It is the basic element of public finances and occupies an important place in the system of instruments of national financial policy[9]. The state budget is understood as the fundamental financial tool, or alternatively, as a financial plan of the state which must be adopted annually as legislation, and which serves for pooling the finances of the society and for their non-refundable distribution to accomplish designated tasks, especially, to execute the functions of the state[10].

[9] V. Háčik, *Finančná propedeutika*, Bratysława, 1969.

[10] For more information: M. Pancák, *Finančný slovník*, Bratysława 1967; A. Slovinský et al., *Základy česko-slovenského finančného práva*, Bratysława 1992; K. Engliš, *Finanční věda: Nástin theorie hospodářství veřejných svazků*, Praga 1929; V. Babčák,

The legal regulation of the budget is, from the formal point of view, represented by a collection of legal rules governing material and procedural relations. The normative part of the act on the state budget provides general delimitation of individual rights and obligations. Taken from the perspective of jurisprudence, these rules are specific rules, made for this purpose only. These rules provide for the attainment of certain economic aims without specifying the method of implementation. The parties to legal relations on whom this budget act imposes certain obligations must on their own choose the method of the implementation. The methods for the attainment of the aims stipulated in the budget act are usually embodied in special rules issued before the act on the state budget is adopted. With regards to the above, the budgetary legislation is sometimes also referred to as formal legislation due to the fact that these rules merely resemble or presume legal regulation which is carried out via different legal acts. For example, the obligation to pay taxes and other payment obligations of natural persons and legal entities are specified in the legal rules of tax law.

The comparison of the formal (for-purpose) budget act with the legal rules (material) which are binding implies that the individual provisions should not collide with legal rules. The concepts of public law have certain intersections with the rules of private law, for instance of commercial law and civil law. The internal differentiation of financial law is founded primarily on a coherent set of legal rules which are grouped together, based on their affinity in content and relations governed by them. Previous decades of development in the field of financial law and its subsystems are subject to frequent changes which are also reflected in legal rules. Moreover, it is also due to the influence of European law and the conditions the Slovak Republic must fulfil in connection with its membership to the European Union[11], not to mention the economic and political problems

M. Štrkolec, K. Prievozníková, *Finančné právo na Slovensku a v Európskej únii*, Bratysława 2012; Ľ. Grúň, J. Králik, *Základy finančného práva na Slovensku*, Bratysława 1997.

11 For more information: K. Červená, *Business environment in the Slovak republic after the accession of the SR to EU – legal and economic aspects*, [in:] B. Kołosowska, P. Prewysz-Kwinto (scientific eds), G*ospodarka i finanse w warunkach globalizacji:*

which development daily brings about both within the European area and in the world. The Slovak legal regulations must observe all acts which the Slovak Republic is bound by in connection with the tasks resulting from the membership of the Slovak Republic in the European Union. The resolution of disputes in relation to public-law and private-law interests in respective spheres of financial-legal relations appear to be particularly serious and significant for our legal regulations.

Another complex issue that draws particular attention is the concept of the financial market. This represents an intricate set of social relations, not only in the domain of the economy, but also in social sphere, cultural sphere, and other areas of social life. The basic division of the financial market into capital market and money market represents a whole spectrum of instruments, parties to legal relations which are to regulate the relations of private-law and public-law nature. It is a rather complex issue relating to manifold types of state aid, various investment incentives, and public-private partnerships. It must be added, though, that it concerns numerous types of state aid, investment incentives, various reductions, etc. In such cases public finances are granted from the state budget or from other public resources which are subsequently allocated to parties in the area of private law[12].

The intersections of private law and public law are indisputable especially in the domain of tax law. We can state that our perception of tax law is that of a separate branch of public law[13]. The tax system of every country has been formed in the longstanding context of its historical development for several decades and reflects both the historical aspects, and the

international scientific conference. Tom I, Toruń 2008, pp. 101–109; K. Červená, R. Hučková, *Slovensko pod vplyvom ekonomickej európskej integrácie (vybrané aspekty)* [in:] G. Dobrobičová, S. Sagan (scientific eds), *Implementacja prawa unijnego do systemów prawa krajowego w Polsce i na Słowacji po dziesieciu latach członkostwa w Unii Europejskiej*, Rzeszów 2015, pp. 55–63.

12 K. Klíma et al., *Evropské právo*, Pilzno 2011, p. 37; J. Olszewski, *Nadzór nad koncentracja przedsiebiorców jako forma prewencyjnej ochrony konkurencji*. Rzeszów 2004.

13 V. Babčák, *Daňové právo na Slovensku*, Bratysława 2015, p.110; M. Bujňáková, *Postavenie daňového práva v systéme práva* [in:] M. Štrkolec (ed.), *Aktuálne otázky finančného práva a daňového práva v Českej republike a na Slovensku*, Koszyce 2004, pp. 41–51.

current status in the framework of the economic policy of the state, and the policy of the European Union. It is no different in the conditions of the Slovak Republic.

Tax law by means of legal rules stipulates the range of rights and obligations of natural persons and legal entities towards the state budget, or, alternatively, towards territorial self-governance. The subject-matter of tax law as regards the obligations giving rise to the creation, alteration, or cessation of tax-law relations, is in the first place, a tax obligation of a concrete party. It is an obligation which is laid down by law, it is always of a monetary nature, it is non-equivalent, and all parties to private law are subject to it[14].

The relation of tax law and commercial law is predominantly perceived through the legal rules of these branches of law. A commercial code as the fundamental source of commercial law regulates the relations with regard to business undertakings and business entities, their activities, legal status, statutory bodies, etc. As for tax law, it is concerned with the issue of the taxation of these entities which appears fundamental, especially for the creation of an environment for business activities[15]. To put it simply, it is frequently stated that tax laws creates conditions for business activities. Every business undertaking is prepared in advance with the aim of pursuing the business plan which must contain, or, alternatively, must be grounded on, certain conditions. The specification of these conditions originates in tax-law rules. Individual provisions of tax-law rules create certain projections for the successful business entity.

The following part of the paper will be devoted to certain concepts of tax law which have an impact on companies which derive their legal basis from the commercial code. Taxes can be divided into direct and indirect taxes, based on the legal regulation of tax law and method of taxation. The category of indirect taxes comprises VAT tax and excise duties. These

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[14] See also: A. Kicová, *Daňová politika ako regulačný mechanizmus štátu vplývajúci na podnikateľské prostredie* [in:] J. Suchoža, J. Husár (ed.), *Právo – obchod – ekonomika*, Koszyce 2011, pp. 437–451.

[15] For more information: A. Románová, *Chapter 17: Daňové aspekty existencie a činnosti orgánov obchodných spoločností a družstva* [in:] P. Strapáč et al., *Orgány obchodných spoločností a družstva s judikatúrou*, Bratysława 2013, pp. 533–557.

taxes are imposed on all products and services of natural persons and legal entities conducting business activities with the exception of those that are exempted from this duty by virtue of law. These taxes are not imposed on a property or an income of a person paying the tax. The tax burden with indirect tax is borne by the buyer as a part of the purchase price. Value Added Tax is a type of general indirect consumption tax. This indirect tax was included among the priority areas of an approximation of our law with the law of the European Union, and its incorporation into our legal order demonstrated the determination of our country to join the economic and legal structures within the European integration process. This tax generates crucial revenues for the state budget. This fact is embraced in the very nature of this tax, but also in the range of its tax base. The valid legal regulation of VAT[16] is accommodated to the law of the European Union which regulates the imposition of this tax[17]. The provisions of the Act on VAT delimitate the subject of tax, lay down the definitions of individual terms, but, it must be emphasized here, only for the purposes of this tax. The concept of a „taxable person" and „economic activity". Is one of the key terms that is stipulated in this Act. These terms, in their essence, significantly affect the entrepreneurial activities of the respective parties to legal relations. Further, the law enumerates cases when public authorities are not taxable persons with certain exceptions, which, however, lacks clear and precise definition and in practice may create significant problems. It interferes with economic competition which is difficult to prove. Moreover, as for economic activity, a „business undertaking", which is characterized as any activity from which an income is accrued, is defined in very broad terms and fails to fully correspond with the provisions regulated by commercial law. In relation to the status of the entrepreneur, the rules of commercial law regulate the fundamental attributes of an entrepreneur and of a business undertaking, especially the category of enterprise and business property, the organization of the enterprise,

[16] Act No 222/2004 on value-added tax as amended (hereinafter referred to as "Act on VAT").
[17] Council Directive 2006/112/EC of 28 November 2006 on the common system of valued-added tax.

business name, acting of the entrepreneur, procuration, trade secret, and business undertakings of foreign persons[18].

The rules of tax law, be they either substantive or procedural, quite explicitly define special regulations in their provisions. One such example is the definition of the concept of taxable transactions which must always be viewed in correlation with commercial law, because it is evident that it concerns business activities that are carried out by parties to legal relations regulated by commercial law. The considerable impact of tax law on the concepts of commercial law can be also compared with other concepts of tax law, such as registration obligation, assessment of tax base, VAT exemption, obligations of parties with liability to pay VAT, and also special regulations concerning VAT refunds.

A special category within indirect taxes is that of excise duties, which have a special position with respect to customs authorities owing to the specific nature of their administration. The legal regulation of excise duties is rather complex and it must be emphasized that, in comparison with other business entities, in case of entrepreneurs with tax liability for excise duties, legal definitions relatively precisely define individual concepts of tax law. These indirect taxes clearly exemplify the evident intersection of public and private law. Public law to a great extent influences and directly regulates the parties to legal relations, and the individual provisions of public law are frequently the determining criterion or rather a practical guide to what private (commercial) law presumes.

What follows are several remarks on another important component of tax law, namely direct taxes and their influence on trade relations. It is generally known that the sphere of direct taxation at present falls within the competence of the member states of the European Union. On the other hand, the efforts of the EU to harmonize direct taxes fail to receive a proper understanding and appreciation of individual member states, not to mention the fact that the problems the EU faces at the moment do not create an adequate environment for understanding the harmonization of direct taxes. Harmonization of direct taxes is closely connected with the

[18] J. Suchoža, J. Husár et al., *Obchodné právo*, Bratysława 2009, p. 340.

issue of the tax authorization of the EU, where the member states frequently arrive at dissenting or almost opposing attitudes. Partial efforts to harmonize direct taxes are evident in the adopted directives, which were, at least partially, aimed to approximate the legal regulations of individual member states. However, there is no indication that the implementation of these directives will bring the desired outcome. This harmonization was carried out to a certain extent indirectly through the case-law of the Court of Justice of the European Union. This case-law should help individual member states to remove the discrepancies in application and interpretation of the law. One of the fundamental aims of the case-law of the Court of Justice of the European Union is to prevent tax evasion[19]. Income tax, as our legal order provides, belongs to the group of direct taxes and is imposed on natural persons and legal entities. The Act on income tax is a key enactment and creates makes it possible to tax differently different types of incomes. In relation to parties to legal relations that conduct business activities, it is frequently a legal rule which to a large degree influences the entrepreneurial environment and business plans. The provisions of the Act separately regulate the taxing procedure of natural persons and legal entities, but on the other hand, common provisions concern both natural persons and legal entities. We may add here that the legislation itself is not very systematic, not to mention its alterations, be they direct or indirect.

Maybe no other rule has such a noteworthy impact on the entrepreneurial environment and interconnection with trade relations as the Act on income tax. Certain provisions of the Act separately regulate, or alternatively, provide space for adjustment of business activities in alignment with the legal rule. The concept of tax exemption, be it for natural persons or legal entities, has a remarkable influence on the acts of the parties to legal relations in their attempt to use the provisions of the Act in such a way that the party can avoid its obligation to pay income tax. The determination of the tax assessment base plays a vital role in calculating tax

[19] For more information: K. Červená, A. Románová, M. Karabinoš, M. Kočiš (eds), *Vybrané otázky daňovej politiky Európskej únie a jej členských štátov*, Koszyce 2013, p. 448.

liability, and the determination may take into account all relevant adjustments for its reduction. It appears important to refer to several provisions of the Act which concern certain groups of taxpayers, for example taxpayers who are dissolved with liquidation, those in bankruptcy proceedings, further, taxpayers that are dissolved based on the dismissal of a bankruptcy petition due to the insufficiency of the bankrupt's estate, but also asset management companies, pension fund management companies, taxed incomes of public companies, limited partnership companies, and other special provisions in the Act on income tax.

Tax law in its entirety has a significant impact on trade relations, not only with regard to substantive tax law, but to a large extent also as regards procedural tax law. The practice of tax authorities has a remarkable influence on business activities and on the implementation options of individual parties to legal relations. Both substantive and procedural legal rules, as rules of public law, influence private law to a large degree. The intersections we have foreshadowed above help us to validate our opinion that the perception and division of law into private law and public law is no longer the only perspective that should affect our approach to the classification of law. The emerging economic, political and social climate provide space for the classification of law into national law and the European law. Globalization has a large impact on the evolution of legal regulation, and it is important to state that the geopolitical situation in Europe and its current development adumbrate that it is legitimate to raise the question about the status of the law and its application under current conditions.

4. Conclusion

The legal orders of individual states differ significantly from each other. When we refer to the national character of law, it is predominantly positive law that we have in our mind. The more we mention the legal orders of individual states, the more exigent the need to bring to the fore the perception of law at supranational level. All the processes that regulate economic relations must be addressed comprehensively and should be trans-

posed into legal form. The law is a part of the national culture and it is indispensable that it be perceived as the reflection of the identity of each state of a certain community. In conclusion, the internal division of law in Slovakia into private law and public law need not necessarily be the only one; despite certain traditions serve as a point of departure, the current development indicates that theoretical knowledge and traditional evaluation, or alternatively classifications must accommodate themselves to the conditions in society.

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