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CONSEQUENCES OF THE IMPOSSIBILITY OF FULFILLING TAX OBLIGATIONS

Abstract

The impossibility of fulfilling tax obligations may have many causes, but nowadays the importance of potential impossibility increases significantly due to the historically unprecedented dependence of the tax system on factors of technical and IT nature. The author, for the purposes of tax law, adapts various types of impossibility of performance established in civil law. He also finds it acceptable to use the concept of impossibility both in relation to the obligation to pay a tax and in relation to the so-called instrumental tax obligations. He discusses the ways in which cases where tax obligations could not be fulfilled have been dealt with to date, taking into account both the jurisprudential concepts of the Polish administrative courts based on the principle of *impossibilium nulla obligatio est* and the legislative solutions introduced in Ukraine in connection with the 2022 invasion by the Russian Federation, in Poland in connection with the war started in 1939 by the German Third Reich, as well as the regulations introduced into the legal systems of various countries in connection with the COVID-19 pandemic and the new regulations on the Polish National Electronic Invoice System enacted on 16 June 2023. In addition, the author analyses the possibility of using, in the scope discussed, the provisions of the present Tax Ordinance on reliefs in payment of tax obligations. The study indicates the need to introduce general provisions on the impossibility of fulfilling tax obligations. In the author's opinion, these should address cases of impossibility differently depending on their nature and whether they relate to obligations to pay tax or to instrumental tax obligations.

KEYWORDS

impossibilium nulla obligatio est, tax obligation, tax payment, fulfilment/performance of a tax obligation, reliefs in tax payment

SŁOWA KLUCZOWE

impossibilium nulla obligatio est, zobowiązanie podatkowe, zapłata podatku, wykonanie zobowiązania podatkowego, ulgi w spłacie zobowiązań podatkowych

Accepted authority rests first of all on reason. If you ordered your people to go and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable.

Antoine de Saint-Exupéry, *The Little Prince*

I. INTRODUCTION

As a matter of principle, laws are enacted to regulate future events. This is also the basic logic of tax legislation, which is designed to generate public revenue in the future. The assumptions and calculations made on their basis are then used to plan budget revenues. The correctness of these activities affects the proper functioning of public finances. However, this model system of interdependencies can, and in practice is, subject to various distortions. These distortions can have different causes. They may be related to the defectiveness of legal regulations (e.g. the presence of legal loopholes of structural nature, regulations being repealed due to their unconstitutionality or incompatibility with EU law), the incorrect functioning of the tax administration (e.g. strikes of tax administration employees whose work is necessary for the fulfilment of certain taxpayers' obligations), or the actions or omissions of passive subjects of tax law, in particular taxpayers (e.g. various reactions to the tax burden). They may also be the result of other circumstances that affect the ability of (both active and passive) tax law subjects to take certain actions. Such situations can be referred to as impossibility of fulfilling tax obligations. A special type of such impossibility is the impossibility of tax performance.

It is worth noting that the impossibility of fulfilling tax obligations is not sufficiently regulated, and the problem is generally overlooked in tax law writings and commentary. This is especially incomprehensible as the potential scale

of the phenomenon seems to be very large today. Recent years have provided even more evidence in this regard. A notable example is the SARS-CoV-2 virus epidemic, which caused significant disruption in the life and operation of both the population and the public administration in many countries. However, the impossibility of fulfilling tax obligations does not necessarily be the result of an epidemic. Historically, the situation has been caused, for example, by wars or some other disturbance of similar nature. The ongoing conflict in Ukraine confirms that such events are not purely theoretical possibilities, even in geographically peaceful areas like Europe. It is important to note that there is now another potential source of events leading to the impossibility of fulfilling tax obligations. Linking the fulfilment of said obligations to the use of specific technical and IT resources may result in the impossibility of fulfilling them in the absence or failure of those resources. Attention should be drawn to the growing legal obligation on passive tax law subjects to use IT tools made available via the Internet. The difficulties in using them are not just hypothetical scenarios. For example, there have been numerous failures of Internet services provided by the public administration, such as ePUAP, Twój e-PIT, e-deklaracje, CEIDG and others.¹ There are no grounds for assuming that further expansion of IT tools and the Internet used for the fulfilment of tax obligations will be accompanied by a decrease in the number of failures. On the contrary, it is more probable that these problems will multiply. It is not only the reliability of the IT solutions that matters but also the fact that their operation is affected by, for example, the energy or telecommunications infrastructure. In fact, the proper functioning of the tax system today depends on a number of factors of technical and IT nature, and the extent of this dependence is unprecedented in history. It is, therefore, appropriate to examine the legal consequences of the impossibility of fulfilling tax obligations. Findings in this regard should be the starting point for possible new legislation on these issues. This, in turn, should facilitate the assessment of possible consequences of the impossibility of fulfilling the aforementioned obligations for the collection of budget revenues.

Within the framework outlined above, situations in which passive subjects of tax law are unable to fulfil their obligations due to circumstances beyond their control appear to be of particular interest. The study will, therefore, concentrate on these cases. Moreover, the discussion will generally be limited to issues of

¹ See e.g.: <www.gov.pl/web/cyfryzacja/awaria-systemow>; <www.podatki.gov.pl/komunikaty-techniczne>; <<https://spidersweb.pl/bizblog/program-500-plus-awaria-empatia-banki-zaswiadczenia-zarobkach>>; <www.money.pl/podatki/awaria-systemu-e-pit-problemy-na-finishu-rozliczen-6891848557259360a.html>; <<https://tvn24.pl/biznes/pieniadze/twoj-e-pit-awaria-w-e-urzedzie-skarbowym-strona-nie-dziala-7007479>>; <www.money.pl/gospodarka/profil-zaufany-nie-dziala-awaria-serwisu-6624297689185216a.html>; <<https://spidersweb.pl/bizblog/awaria-jpk-vat>>; <www.komputerswiat.pl/awaria-e-deklaracje>; <www.rp.pl/polityka/art37963831-problemy-z-systemem-ruszylo-rozliczenie-pit-za-2022-r> accessed 2 October 2023.

substantive law. This is an area which has not yet been the subject of in-depth analysis.² Procedural matters will be addressed to a limited extent only, as long as they relate to the main subject at hand.

II. CLASSIFICATION OF CASES WHERE FULFILLING TAX OBLIGATIONS IS IMPOSSIBLE

The impossibility of fulfilling tax obligations can be viewed – similarly to civil law³ – as objective impossibility (when no one can fulfil the given obligation)⁴ and subjective impossibility (when a specific entity cannot fulfil the given obligation)⁵. Subjective impossibility, where no one but the debtor can perform, is generally equated with objective impossibility.⁶ A broad understanding of objective impossibility also includes economic impossibility, i.e. a case in which performance is possible but becomes extremely difficult due to a change in circumstances.⁷ Impossibility can also be categorised into primary (antecedent) and subsequent impossibility.⁸ The former exists from the outset, from the moment the obligation should have arisen. The latter occurs after the obligation has arisen.

The above does not mean that the concept of impossibility is identical in civil and tax law. For example, the differences are due to the fact that in civil law impossibility is governed by legal provisions with a specific role in the comprehensively regulated law of obligations. The situation is different in tax law. A narrow view of impossibility would, therefore, exclude from examination a number of important problems mentioned at the beginning. For this reason, in this paper, impossibility is understood in a broader sense than in civil law, covering both permanent and temporary impossibility.⁹

² For issues of tax procedure, see e.g. Tomasz Burczyński, Tomasz Nowak and Kamil Szczęsny, *E-postępowanie podatkowe w praktyce* (Presscom 2017).

³ See in particular Kazimierz Kruczałak, *Nieemożliwość świadczenia w prawie zobowiązań* (Uniwersytet Gdański 1981) 15–19.

⁴ See e.g. Fryderyk Zoll, ‘Wykonanie i skutki niewykonania lub nienależytego wykonania zobowiązań’ in Adam Olejniczak (ed), *System Prawa Prywatnego: Prawo zobowiązań – część ogólna*, vol 6 (CH Beck 2014) 1142.

⁵ See e.g. Tomasz Pajor, *Odpowiedzialność dłużnika za niewykonanie zobowiązania* (Państwowe Wydawnictwo Naukowe 1982) 96–97.

⁶ *ibid* 96–97.

⁷ *ibid* 98.

⁸ Kruczałak (n 3) 12–14.

⁹ In civil law, the impossibility of performance is considered permanent (not temporary) in nature. See e.g. Kruczałak (n 3) 26–31; Bartłomiej Gliniecki in Małgorzata Balwicka-Szczyrba and Anna Sylwestrzak (eds), *Kodeks cywilny: Komentarz aktualizowany*, LEX/el. 2023, art. 387;

There are various kinds of tax obligations. The fundamental obligation is undoubtedly the obligation to pay a tax. In other words, it is an obligation to make a pecuniary settlement.¹⁰ This raises a question of whether it is possible to speak of impossibility in relation to the fulfilment of a tax obligation understood in this way. Since Roman times, it has been accepted that there can be no question of impossibility of performance of a pecuniary obligation. This approach emphasises the issue of responsibility for solvency and places it on the debtor. At the same time, it is based on the assumption that the lack of financial means is a situation that can be changed. This is because debtors can, in a way known only to them, increase their financial resources.¹¹ Today, this concept seems outdated. First of all, it should be noted that bankruptcy law has largely introduced the possibility of declaring bankruptcy for natural persons. With a subjective understanding of the impossibility of performance, this leads to the conclusion that the legislator has accepted the impossibility of performance in the case of pecuniary obligations.¹² It should also be noted that nowadays the fulfilment of a tax obligation often does not consist in the mere delivery of cash to the cash desk of a tax authority. This is because, as a rule, the payment of taxes involves the use of non-cash resources and the interaction of a number of entities using complex technical and IT solutions.¹³ Moreover, in certain cases, tax law requires that a tax obligation be paid exclusively using non-cash means.¹⁴ A disruption in the functioning of the systems that allow the use of this type of money may, therefore, make it impossible to fulfil the tax obligation. What follows, it is perfectly reasonable to consider cases when fulfilment of such tax obligation is impossible. A similar assumption should also be made with regard to other tax-related obligations from which a pecuniary obligation arises, such as the obligation of the withholding agent and the collector to pay the collected tax to the tax authority.

Apart from the fundamental obligation to pay tax, tax law imposes a number of other obligations on passive tax law subjects. These are called instrumental tax obligations. Their purpose is to ensure proper fulfilment of the fundamental obligation mentioned above.¹⁵ Based on the assumption that both the withholding

Roman Trzaskowski and Czesława Żuławska in Jacek Gudowski (ed), *Kodeks cywilny: Komentarz. Zobowiązania – część ogólna*, vol 3 (2nd edn, Wolters Kluwer Polska 2018) art. 387.

¹⁰ For a broader discussion of the performance of a tax obligation and the relation of this concept to a pecuniary performance, see Maciej Ślifirczyk, *Wykonanie, niewykonanie i nienależyte wykonanie zobowiązania podatkowego* (1st edn, Wolters Kluwer Polska 2018) 39–40, 63–67.

¹¹ See judgment in I ACa 737/13, 27 February 2014 Court of Appeal in Białystok LEX 1437900, and the literature cited therein.

¹² Zoll (n 4) 1146–147.

¹³ See more extensively in Ślifirczyk (n 10) 211–41, 312–39.

¹⁴ See, for example, Art 61 of the Polish Tax Ordinance of 29 August 1997 as amended (Tax Ordinance).

¹⁵ Paweł Miłkuła, *Obowiązki dokumentacyjne i formalne w prawie podatkowym* (1st edn, Wolters Kluwer Polska 2019) 74.

agent and the collector are parties to separate obligational relationships of legal and tax nature, which give rise to the obligation to make a pecuniary payment of the collected tax to the tax authority, it should be assumed that in these cases, too, there are specific instrumental obligations that serve the proper fulfilment of the obligation to pay the collected tax. Moreover, it is not possible to limit the group of subjects with instrumental obligations to taxpayers, withholding agents and collectors.

Instrumental obligations include a number of different types of tax obligations. A distinction is sometimes made between obligations of informational or evidentiary nature and instrumental obligations of a different type,¹⁶ although it may be difficult to assign an obligation to only one of these categories. Instrumental obligations include, for example, the obligation to file a registration declaration, the obligation to file tax returns, the obligation to make the notifications required by tax law, the obligation to provide certain information and reports, the obligation to issue invoices, the obligation to keep tax records, including by means of special equipment (e.g. cash registers, which entail a number of specific additional obligations), the obligation to hold certain documents (e.g. the confirmation of purchase of goods), or the obligation to appoint a tax representative.¹⁷ In some cases, the fulfilment of certain instrumental obligations is a condition for the exercise of legal rights. Many of the above instrumental obligations can or must now be fulfilled electronically, using the Internet.

The legal construction of instrumental obligations is not entirely clear, and in particular it is not certain whether they can be regarded as a structural element of separate obligational relationships.¹⁸ It seems that in many cases it can indeed be assumed that they are associated with separate obligational relationships where the consideration is not pecuniary. However, it is also possible to identify cases in which the construction of such a separate obligational relationship does not make much sense because the performance or non-performance of a particular instrumental obligation will affect, for example, the tax settlement rules or the tax amount in a fundamental tax obligation relationship. Therefore, in such a situation, there is no reason to regard the fulfilment of an instrumental obligation as the performance and to grant the tax authority a separate right to claim it. There

¹⁶ *ibid* 255.

¹⁷ *ibid* 255–366.

¹⁸ Such a view is sometimes presented directly or indirectly in the literature. For example, Mikuła (n 15) 30 (footnote 1) states: ‘it is certainly correct to assume ... that the instrumental tax law relationship between the tax authority and the tax debtor may consist in the fact that the debtor is obliged to fulfil an instrumental obligation and the authority has the power to demand the fulfilment of such an obligation’. The association with an obligatory relationship is also created by distinguishing among instrumental obligations the obligations to act, not to act and to endure. See Marek Kalinowski, *Podmiotowość prawna podatnika* (TNOiK 1999) 134. This distinction is similar to the traditional division of performance into *dare* (giving something), *facere* (doing something), as well as *non facere* (not doing something) and *pati* (enduring something).

is also no consensus in legal writings as to the classification of instrumental obligations into substantive or procedural obligations.¹⁹ It seems that instrumental obligations can be identified as both. Their legal classification depends on the provisions of the law applicable to a particular case.

The non-fulfilment of instrumental obligations may have various legal consequences, which are, in principle, obviously negative for the subject who is obliged to fulfil them. Apart from passive obligations (non-action or endurance), undoubtedly there may be situations in which the fulfilment of instrumental obligations will be impossible for the already mentioned reasons. This is particularly the case where the fulfilment of such obligations depends on the cooperation of the tax administration or on the efficient operation of the technical and IT infrastructure.

III. LEGAL RESPONSE TO THE IMPOSSIBILITY OF FULFILLING TAX OBLIGATIONS

1. GENERAL REMARKS

The starting point for assessing the legal situation in the case of impossibility of fulfilling tax obligations should be a reference to the Roman law principle of *impossibilium nulla obligatio est* (there is no obligation if its performance is impossible).²⁰ It is traditionally applied to civil law obligations.²¹ It should be noted that this principle presupposes the existence of an initial and objective impossibility of performance which has prevented the obligation to arise.²² On the other hand, the debtor could be released from an obligation that has already arisen only if the impossibility has resulted from circumstances for which the debtor is not responsible.²³ It is pointed out that the modern understanding of impossibility of performance in civil law differs from that of Roman law and that the *impossibilium nulla obligatio est* ‘must have undergone both conceptual and semantic evolution in the course of legal development’.²⁴

¹⁹ Cf. Mięka (n 15) 31–48.

²⁰ Digesta 50,17,185; Celsus 8 dig.

²¹ As noted in the literature, it is not certain under what circumstances the Roman jurists invoked this principle. In this respect, one can only rely on more or less plausible hypotheses. Nevertheless, an analysis of the sources indicates its use in the field of contractual obligations. See Dagmara Skrzywanek-Jaworska, ‘Nieważne zobowiązania *ex stipulatione*. Znaczenie “*impossibilium nulla obligatio est*” Celsusa (D. 50,17,185) w prawie rzymskim’ (2011) 83 *Studia Prawno-Ekonomiczne* 205–06.

²² *ibid* 209.

²³ *ibid* 214.

²⁴ *ibid* 230.

Nowadays, the principle in question is derived from Article 2 of the Constitution of the Republic of Poland. The Polish Constitutional Tribunal, in its judgment of 13 March 2007,²⁵ when considering the allegation of a violation of the principle of good legislation and the possibility of a violation of the said provision of the Constitution of the Republic of Poland in this context, stated that ‘the legislator may not impose impossible obligations on the addressees of the law. The principle of *impossibilium nulla obligatio est* should also be an important directive for the legislator in the legislative process’. Although the quoted statement did not apply to tax legislation, it has such a universal scope that its validity is undeniable in tax law. As a result, the principle in question is currently applied not only to civil law but also to tax law obligations,²⁶ even though tax law does not contain any general legal provisions directly relating to it. This principle has been repeatedly invoked by administrative courts. For example, in its judgment of 30 November 2011,²⁷ the Polish Supreme Administrative Court stated: ‘Although the above legal maxim derives from contract law and has no normative reflection in public law, it should nevertheless be treated as an important element of the rule of law and an interpretative guideline. The legislator may not introduce legal solutions that establish obligations that are impossible to fulfil, let alone attach negative legal consequences to the subject in question’. Relying on the principle of *impossibilium nulla obligatio est*, the administrative courts have held that tax provisions that create impossible obligations are not applicable.²⁸ In particular, it is claimed that tax consequences are not generated by situations in which it is not possible to determine all the essential elements of the hypothesis of the tax norm (e.g. the amount of income). Interestingly, situations in which it would be theoretically possible to determine the necessary elements of the hypothesis of the tax norm by appropriate actions of taxpayers, but these actions would be very seriously impeded, have also been qualified in this way.²⁹ Such an understanding brings the accepted concept of impossibility of obligations closer to economic impossibility. A reference to the principle of proportionality may also provide some basis for this type of reasoning.

²⁵ K 8/07, OTK-A 2007/3/26; see similarly in the judgment in U 8/08 of 7 July 2011, and in the judgment in K 15/08 of 6 March 2012.

²⁶ An argument for this is also the principle of protection of citizens’ trust in the State and the law enacted by it, derived from Article 2 of the Constitution of the Republic of Poland. See, for example, the judgment in II GSK 51/12, 23 April 2013 Polish Supreme Administrative Court.

²⁷ II FSK 1096/10.

²⁸ See, for instance, judgment in III SA/Wa 2245/22, 4 April 2023 Voivodeship Administrative Court in Warsaw; judgment in I SA/Kr 197/22, 26 September 2022 Voivodeship Administrative Court in Kraków.

²⁹ This applies in particular to situations involving the determination of income from various types of gratuitous performance provided by employers to employees. Cf. e.g. judgments of the Polish Supreme Administrative Court in: II FSK 1531/09, 11 January 2011; II FSK 1724/10 and II FSK 1730/10, 11 April 2012; II FSK 1356/10, 20 January 2012; II FSK 1256/11, 20 February 2013.

As can be seen from the above, the possibility of relying on the principle of *impossibilium nulla obligatio est* in tax law can no longer be questioned. Although the concept presented by the jurisprudence is not completely clear and complete, it seems that so far it has been used mainly in the area of primary and objective impossibility. On the other hand, it has been rejected in situations of subjective impossibility.³⁰

When analysing the problem of the impossibility of fulfilling tax obligations, it should be noted that in the legal systems of various countries it is linked, directly or indirectly, to force majeure. However, whereas the principle of *impossibilium nulla obligatio est* refers directly to such effect as the absence of an obligation, the reference to force majeure in fact indicates a cause that may affect the ability to fulfil a tax obligation in various ways. Such a reference has a potentially far-reaching consequence and can also be linked to subjective impossibility.

A good illustration of the above is the practice of applying law in Ukraine in the context of the ongoing war. These solutions are worth looking at because of their highly topical and dynamic nature. Shortly after the start of the invasion of Ukraine by the armed forces of the Russian Federation, the Chamber of Commerce and Industry of Ukraine issued a document dated 28 February 2022,³¹ in which it declared the occurrence of force majeure in the form of the Russian Federation's military aggression against Ukraine and the subsequent declaration of martial law. At the same time, the aforementioned document stated that these circumstances of 24 February 2022 until their official end constituted extraordinary, unavoidable and objective circumstances with respect to the tax obligations that should have been fulfilled and the fulfilment of which became impossible due to the occurrence of the aforementioned extraordinary circumstances (i.e. force majeure).³² The said document was a confirmation of an announcement that appeared earlier (26 February 2022) on the social media of the Chamber of Commerce and Industry of Ukraine.³³ Taking this into account, on 27 February 2022 the State Tax Service of Ukraine issued a statement³⁴ announcing that, due to the occurrence of force majeure, taxpayers were exempted from financial responsibility for tax offences and violations of other regulations whose observance is

³⁰ Cf. e.g. judgment in II FSK 1778/16, 21 June 2018 Polish Supreme Administrative Court.

³¹ No. 2024/02.0-7.1.

³² Pursuant to Arts 14 and 14¹ of the Law on Chambers of Commerce and Industry of Ukraine (uk. Закону України 'Про торгово-промислові палати в Україні'), the Chamber of Commerce and Industry of Ukraine is entitled to certify the occurrence of force majeure. Force majeure itself, in turn, is understood as extraordinary and irreversible circumstances that objectively make it impossible to fulfil obligations under statutory and other regulations.

³³ <www.facebook.com/1780981079/posts/10216868915793444/?d=n> accessed 25 September 2023. The purpose of posting the document was to facilitate the procedure. Any interested party could use a printout of this document for confirmation of force majeure.

³⁴ <<https://tax.gov.ua/media-tsentr/novini/576179.html>> accessed 25 September 2023.

controlled by supervisory authorities.³⁵ Taxpayers were exempted from responsibility if they were unable to fulfil their tax obligations on time. At the same time, it was stated that these obligations must be fulfilled immediately after the end of the force majeure. It was also stated that during the period of force majeure no tax audits would be initiated and those already initiated would be suspended. The described approach was subsequently replaced by provisions introduced into the Tax Code of Ukraine as of 27 May 2022.³⁶ The new provisions set a deadline of six months from the end or lifting of martial law in Ukraine for the fulfilment of tax obligations (other deadlines applied to taxpayers who had previously regained the ability to fulfil their obligations). The previous moratorium was also cancelled for those taxpayers who were able to fulfil their obligations on time. It should be noted that, under the provisions in question, the mere fact of the occurrence of force majeure does not automatically mean an exemption from tax law obligations. It is only a circumstance that may lead to it in a particular case. However, it is necessary to demonstrate a causal link between the occurrence of force majeure and the impossibility of fulfilling a tax obligation.³⁷

The measures described above in Ukraine largely resemble solutions introduced into Polish law during World War II.³⁸ The Decree of the President of the Republic of Poland of 26 January 1940 on a moratorium on public dues³⁹ suspended, for the duration of the exceptional circumstances caused by the war, the payment and collection of public tributes, taxes, stamp duties and other dues payable to the state, municipal unions and units of economic and professional self-government, which were due in the period up to and including the date of the entry into force of the said Decree, regardless of whether and when the assessment of such dues took place. In a similar manner, the obligations relating to the filing of returns and the assessment of the aforementioned dues for economic or tax periods expiring on the date of entry into force of the decree were suspended, as well as the legal force of payment orders, reminders, summonses and all other documents relating to payment, and enforcement proceedings relating to the dues

³⁵ The legal basis was Art 112 of the Tax Code of Ukraine (Податковий кодекс України) on criminal and fiscal liability.

³⁶ Law of Ukraine dated 12 May 2022 ‘On Amendments to the Tax Code of Ukraine and other laws of Ukraine regarding the peculiarities of tax administration of taxes, fees and single contributions during martial law state of emergency’ (Закон України від 12 травня 2022 р. ‘Про внесення змін до Податкового кодексу України та інших законів України щодо особливостей податкового адміністрування податків, зборів та єдиного внеску під час дії воєнного, надзвичайного стану’).

³⁷ Cf. the judgment in 826/9302/17, 27 January 2022 Supreme Court of Ukraine; see also Юлія А Коваль, ‘Особливості звільнення від фінансово-правової відповідальності за порушення податкового законодавства під час карантину’ (2022) 3 Нове українське право 75, 80–81.

³⁸ However, due to the occupation of the country by enemy troops, they had little practical significance.

³⁹ [1940] JoL 4.

listed in the decree. On the other hand, the Decree of the President of the Republic of Poland of 21 February 1940 on the stopping and suspension of the running of time periods⁴⁰ stated that, with retroactive effect from 1 September 1939, for the duration of the exceptional circumstances caused by the war, the time limits prescribed by all laws, decrees, regulations and orders in force throughout the territory of the state or in individual parts thereof for, inter alia, the performance of acts necessary for the creation or preservation of claims, receivables and rights, as well as for limitation and preclusion, and all time limits in general, the non-observance of which results in the extinction or modification of claims, receivables and rights, should be suspended. With effect from 1 September 1939, for the duration of the exceptional circumstances caused by the war, the running of the administrative procedural time limits prescribed by all laws, decrees, regulations and orders in force in the entire territory of the state or in certain parts thereof, as well as the time limits prescribed by all decisions and orders of the state and municipal offices and authorities, which had not yet begun, were stopped and those which had already begun were suspended.

Also in contemporary Polish tax law, the occurrence of fortuitous events or force majeure is treated as a circumstance that may exclude fault (where this premise may be relevant to the liability of the tax law subject⁴¹ or the timeliness of the fulfilment of its obligations)⁴² or constitute an important element that is taken into account when assessing whether the prerequisites such as an important interest of the taxpayer or the public interest,⁴³ conditioning the granting of reliefs in payment of tax obligations,⁴⁴ have been met. However, the existence of these prerequisites is not determined automatically.⁴⁵ Sometimes, the occurrence of force majeure may be of such a general nature and its connection with the impossibility of fulfilling tax obligations will be so obvious that proving the existence of the aforementioned prerequisites will be very simple (e.g. a long-lasting power cut in a certain region of the country resulting in the impossibility of fulfilling instrumental obligations that should be fulfilled via the Internet). These situations seem to be close to objective impossibility. For the applicability of fortuitous events or force majeure, it is also irrelevant whether the impossibility is primary or subsequent.

⁴⁰ [1940] JoL 9.

⁴¹ E.g. Art 116 § 1(1)(b) of the Tax Ordinance.

⁴² E.g. Art 162 § 1 of the Tax Ordinance.

⁴³ E.g. judgment in II FSK 1007/10, 8 December 2011 Supreme Administrative Court.

⁴⁴ Cf. Chapter 7a Section III of the Tax Ordinance.

⁴⁵ A good illustration of this is the judgment in I SA/Gl 1631/21, 17 March 2022 of the Voivodeship Administrative Court in Gliwice, in which the taxpayer invoked the occurrence of force majeure related to the COVID-19 pandemic, and yet both the tax authorities and the court found that the prerequisite of an important interest of the taxpayer or the public interest did not occur.

The general solutions described above are sometimes supplemented by specific regulations. They are not comprehensive and provide only a limited response to the problem. For example, it is possible to refer to the regulation on the National Electronic Invoicing System (KSeF), enacted on 16 June 2023.⁴⁶ The new wording of Article 106ne of the Polish Goods and Services Tax Act stipulates that the Minister of Public Finance shall publish notifications on the occurrence and termination of the KSeF failure in the Public Information Bulletin on the website of the Ministry's office (or, if this is not possible, in the social media). Information on the duration of the KSeF unavailability shall also be published in the said Public Information Bulletin. In addition, provisions are made for the way in which invoices are to be issued during periods of KSeF failure and unavailability, and for the case when a taxpayer is unable to issue a structured invoice for a reason other than the KSeF failure.⁴⁷ While these solutions certainly address many cases of impossibility to comply with invoicing obligations, they do not address some extreme cases.⁴⁸ They also impose additional obligations on taxpayers, although taxpayers are not necessarily responsible for the occurrence of the KSeF unavailability. Moreover, the KSeF failure may be caused by the tax administration. Despite these regulatory shortcomings, it is positive that certain problematic issues have been provided for, although this does not obviate the need for more general solutions.

One should also mention the legislation introduced in response to the COVID-19 pandemic. Both the pandemic and the various types of related restrictions introduced may have made it difficult, and in some cases even impossible, to comply with tax obligations. In many countries, tax law solutions were adopted to remedy this situation. In particular, the extension of time limits for fulfilling the obligations in question was widespread, or waiving of sanctions for exceeding these time limits, and reductions or exemptions from certain payments were introduced.⁴⁹ The fact that the vast majority of these solutions were adopted during the

⁴⁶ The National Electronic Invoicing System was introduced in Poland much earlier, but it is the cited legislation that makes its use mandatory for a wide group of taxpayers.

⁴⁷ Arts 106nf–106nh of the Polish Goods and Services Tax Act of 11 March 2004 [2004] JoL 54 535.

⁴⁸ For example, it is assumed that it will be possible to issue electronic invoices during a KSeF failure (Art 106nf(1)) and that the taxpayer will be able to send an invoice in electronic form to the KSeF no later than on the working day following the day on which it was issued if the taxpayer is unable to issue a structured invoice for reasons other than a KSeF failure (Art 106nh(2)2). It is not clear how to proceed if these assumptions do not correspond to reality.

⁴⁹ See European Commission, Directorate General Economic and Financial Affairs, Policy measures taken against the spread and impact of the coronavirus – 20 August 2020, *passim*. In this context, the Irish solutions are worth mentioning; they also addressed the situation where, due to the pandemic, key personnel to calculate the tax due were not available on the taxpayer's side. In such a case, it was advisable to file a return on the basis of 'best estimates'. For the solutions adopted in different countries, see e.g. KPMG, *COVID-19 Global Tax Developments Summary* (as of 1 September 2021) <<https://assets.kpmg.com/content/dam/kpmg/us/pdf/2020/03/covid-19->

pandemic and for a limited period of time shows that the national legal systems of many countries do not have adequate regulations in place for such situations.

2. IMPOSSIBILITY OF FULFILLING FUNDAMENTAL TAX OBLIGATIONS

As it follows from the preceding sections, it is fully justified to consider the case when fulfilment of an obligation to pay a tax is impossible.⁵⁰ In this respect, several situations can be distinguished based on different types of impossibility.⁵¹

In the case where the legislator has introduced strictly defined ways of settling a tax liability, their actual and objective unavailability makes the fulfilment of the tax obligation impossible. In such a situation, it does not seem permissible to assume that the debtor should fulfil his obligation by a means which, although available, is not provided for by the law. Indeed, this would be contrary to the principle that tax relationships are governed by law. In view of the fact that, as a rule, an essential element of the construction of a tax is at issue,⁵² the use of analogy in this respect also seems inadmissible.⁵³ On the basis of the discussed principle of *impossibilium nulla obligatio est*, it could be assumed that no obligation arises. This is a very radical conclusion, given that the impossibility in question will normally be temporary or even short-lived. It is easy to imagine a situation in which it is not possible to perform an obligation at the time when it should have arisen, but such a possibility opens up after only a few days. It is, therefore, difficult to draw the conclusion that in such a case the obligation does not arise at all. It should also be noted that, even in normal circumstances, it is not usually possible to fulfil a tax obligation at any time during the payment period. For example, if

tax-developments-summary.pdf> accessed 29 September 2023. The Polish provisions in this area were mainly included in the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them (Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych). However, these were not covered by the original version of the Act but through amendments. Not all of the adopted provisions can be considered successful, given the discrepancies in their application in case law.

⁵⁰ I have already addressed this issue in my book (see Ślifirczyk (n 10) 95–99). In this paper, I do not analyse the issues related to the insolvency of tax debtors, which are comprehensively provided for in special provisions, such as bankruptcy law.

⁵¹ Strictly speaking, it should not be characterised as an impossibility of fulfilling an obligation in a situation where the construction of a given tax is incomplete and its amount of tax attributable to a taxpayer cannot be determined and therefore cannot be paid (e.g. there is a legal loophole concerning the substance, subject, rate or basis of taxation). In such a case, the prerequisites for the effective imposition of the tax and the creation of an obligation relationship in this respect have not occurred and, therefore, there is no obligation to pay.

⁵² For more on this topic, see Ślifirczyk (n 10) 52–55.

⁵³ Bogumił Brzeziński, *Wykładnia prawa podatkowego* (ODDK 2013), see e.g. 146–47.

someone wants to make a payment order at a bank branch, they will not be able to do so on bank holidays. In addition, electronic systems have planned technical interruptions during which it is not possible to place orders. On this basis, it is impossible to assume that the tax obligation has lapsed. Rather, it seems more reasonable to conclude that when the tax factual situation (the hypothesis of the tax-legal norm) is actualized and the impossibility of providing the payment ceases, the tax obligation should be fulfilled. On the other hand, prior to the cessation of the impossibility, the taxpayer cannot be held liable for the non-fulfilment of the obligation. The same should be assumed in the case of a subsequent objective impossibility. In such a situation, it does not seem justified to conclude that the tax obligation expires. Rather, it should be considered that it continues to exist, even though it cannot be fulfilled. The effect of non-establishment or expiry of the tax obligation as a result of the impossibility of its fulfilment can, therefore, only be accepted if the objective impossibility is permanent.⁵⁴

However, the above does not solve all the problems. After all, if, due to the impossibility of fulfilling the tax obligation, the obligation did not expire but could not be fulfilled within the original payment period, by what date, from the end of the impossibility, should the payment be made? Should the fact that it was not possible to fulfil the tax obligation during part of the payment period not lead to an extension of such payment period? Existing legislation does not make the creation of a tax obligation directly dependent on the availability or non-availability of the legally prescribed means of fulfilment.⁵⁵ The time limit for payment is also independent of this.⁵⁶ Given that Polish tax law currently links the existence of tax arrears to mere failure to meet a payment deadline,⁵⁷ one would have to conclude that even if the debtor is unable to fulfil the obligation, the tax arrears arise on his part, with all the negative consequences of such a situation. This conclusion is difficult to accept in the case of impossibility of an objective nature, independent of the debtor. However, if it is considered that an objective impossibility results in postponement of the deadline for fulfilling the obligation, this conclusion would also have negative consequences for the taxpayer, since the limitation period for the obligation would be extended for reasons beyond his control. This is due to the fact that the limitation period for a tax obligation is, in principle, calculated from the end of the calendar year in which the deadline for payment of the tax has passed.⁵⁸ It might be postulated that a period of objective impossibility of fulfilling an obligation, independent of the taxpayer, should be treated in the same way as postponement or extension of the payment deadline

⁵⁴ The conclusions are, therefore, parallel to those in a similar case under civil law. See Arts 387 and 475 § 1 of the Civil Code.

⁵⁵ Cf. Art 21 § 1 of the Tax Ordinance.

⁵⁶ Cf. Art 47 of the Tax Ordinance.

⁵⁷ Ślifirczyk (n 10) 404.

⁵⁸ Cf. Article 70 § 1 of the Tax Ordinance.

provided for under tax law, but only for the purpose of assessing whether the obligation has been duly fulfilled.⁵⁹ On the other hand, the limitation period of a tax obligation would be calculated as if the impossibility of fulfilling a tax obligation did not exist.⁶⁰

In the case of objective impossibility, the impossibility may, by its very nature, affect large groups of taxpayers in a similar situation, so an individual decision in each case could place an excessive and unnecessary burden on the tax administration. Therefore, it seems advisable to introduce legal solutions to deal with such situations in a general way. Cases of subjective impossibility should be treated differently. They require an individual examination, for which the procedure for the application of relief in payment of tax obligations may be an appropriate solution.⁶¹ At present, however, the application of these reliefs is generally associated with a discretionary power of the tax authorities, which does not lead to the expected result. This means, for example, that a tax authority may refuse to grant relief in the payment of a tax obligation, even though there is a public interest in granting it and force majeure makes it impossible for a particular taxpayer to fulfil the obligation. Therefore, the postulate that discretion in the application of these reliefs should be abandoned remains valid.⁶²

A situation in which several means of fulfilment are legally permissible and the impossibility concerns only one of them requires separate attention. Undoubtedly, a taxpayer is entitled to use any of the legally permissible ways of fulfilling

⁵⁹ *De lege lata*, such an effect can be achieved through the application of appropriate reliefs in payment of tax obligations, although there is a problem with the widely accepted discretionary nature of these reliefs, as discussed later in this text.

⁶⁰ In a similar manner, the resolution of 7 judges of the Polish Supreme Administrative Court of 27 March 2023, I FPS 2/22, resolved the problem of the application the statute of limitations to tax obligations based on Art 15zrz(1)3 of the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them, although the argumentation used by the court was multifaceted. The aforementioned provision stipulated that the running of the limitation periods provided for by administrative law did not begin, and that those that had begun were suspended during the period of the epidemic emergency. However, the reasoning formulated in the resolution for the understanding of administrative law may generate doubts as to whether the said Art 15zrz could be applied to the deadlines provided for in the provisions of tax law to the remaining extent (excluding the limitation periods). It is correct and in line with the concept presented in this text to resolve doubts related to the interpretation of Art 15zrz in favour of the taxpayer, i.e. to assume that, on this legal basis, there is no starting or suspension of the time limits laid down in Art 15zrz other than the limitation period. This was done, for example, in the judgment in I SA/GI 100/23, 22 June 2023, of the Voivodeship Administrative Court in Gliwice.

⁶¹ However, the declaration of impossibility alone is not sufficient for granting such relief. The prerequisites of the important interest of the taxpayer or the public interest also require an examination of other issues, such as the origin of the impossibility. In addition, the state aid rules constitute a certain limitation for the application of relief in the payment of tax obligations.

⁶² I have argued more extensively in favour of this claim in my book, see Ślifirczyk (n 10) 183–88.

a tax obligation, and the elimination of any of them for reasons beyond the taxpayer's control limits the taxpayer's rights. If this leads to unfavourable tax consequences (e.g. delays in payment, which in turn result in the need to pay interest on tax arrears), a certain solution may be the application of reliefs in payment of tax obligations, although here, too, the problem is the discretionary nature of these reliefs. On the other hand, if the situation in question involves additional costs of another kind for the taxpayer and the impossibility is the result of an action or omission by a public authority, it may be permissible to seek protection by filing a claim for damages against the State Treasury or a local government unit.⁶³

The foregoing discussion concerning the impossibility of fulfilling a tax obligation imposed on taxpayers may be applied *mutatis mutandis* to the impossibility of fulfilling other tax obligations involving pecuniary performance. Nevertheless, it should be noted that the application of certain reliefs in payment of tax obligations is excluded in relation to withholding agents and collectors.⁶⁴ In this respect, they will not be able to provide a legal solution to the problem of impossibility of fulfilling obligations by these subjects.

3. IMPOSSIBILITY OF FULFILLING INSTRUMENTAL TAX OBLIGATIONS

It follows from the above that impossibility may concern not only the fulfilment of a fundamental tax obligation but also the fulfilment of instrumental tax obligations. In cases where the fulfilment of instrumental tax obligations actually consists in meeting a specific non-pecuniary liability, the findings made above regarding the impossibility of fulfilling a fundamental tax obligation apply *mutatis mutandis*. This means that in this case, too, an extension of the deadlines for the fulfilment of instrumental obligations should be postulated if the impossibility is beyond the control of the subject obliged to fulfil them. It may be added that the penalties for failure to comply with the original deadline should not apply in this case, either. This seems easy to be achieved in any case where the application of penalties depends on proof of fault on the part of the obligated subject. Indeed, the occurrence of an impossibility to perform of an objective nature will generally exclude fault. It should also be noted that the reliefs in payment of tax obligations do not apply to instrumental obligations. Therefore, at present, they cannot constitute a remedy for the impossibility of fulfilling these obligations. Instead, they can be replaced with the institution of postponement of the deadline provided for in Article 48 of the Tax Ordinance⁶⁵ and the institution of extension of the deadline, the application of which is based on Article 50 of the Tax Ordinance.

⁶³ Cf. Art 417 of the Civil Code.

⁶⁴ This is a conclusion *a contrario* under Art 67c § 1 and Art 67d § 3 of the Tax Ordinance.

⁶⁵ Here, too, the widespread acceptance of the discretionary nature of decisions is a problem.

On the other hand, if the fulfilment of instrumental obligations takes place within the framework of tax proceedings, it will be possible to apply the institution of reinstatement of a time limit, if it is possible to substantiate that the time limit has been exceeded without fault of the subject of the obligation.⁶⁶

However, the above conclusion does not solve all the related problems. Sometimes, the fulfilment of instrumental obligations conditions a specific legal qualification, influences the amount of tax or otherwise shapes the legal situation of the taxpayer. It may also condition the exercise of certain rights by the taxpayer. In such a case, when applying the principle of *impossibilium nulla obligatio est*, it should be assumed that a condition that is objectively impossible to be fulfilled is not applicable. As a result, the taxpayer could act as if the condition had been fulfilled (i.e. as if he had lawfully performed an instrumental obligation), as long as he proves he intended to do so. If this opened the way to different legal qualifications, it would be up to the taxpayer to decide, according to the principle of resolution of legal doubts in favour of the taxpayer,⁶⁷ which legal qualification applies to him. However, this reasoning can only be accepted if the impossibility existed during the entire period in which the obligation should have been fulfilled, or during the entire period in which the taxpayer could realistically have fulfilled it,⁶⁸ or if the taxpayer could, for legitimate reasons, erroneously assume that he had actually fulfilled the obligation imposed on him. In the latter case,

⁶⁶ Art 162 of the Tax Ordinance.

⁶⁷ See in particular Art 2a of the Tax Ordinance.

⁶⁸ However, it should be noted that case law sometimes overlooks the importance of temporary technical problems. The Polish Supreme Administrative Court, in its judgment in II FSK 3054/16, 14 November 2018, referred, inter alia, to problems related to the functioning of the ePUAP platform and the effectiveness of deliveries made as part of tax proceedings. It concerned the recognition of a decision that had not been received in the form of an electronic document as delivered. Although it was demonstrated that there had been technical problems with the operation of the said platform during the period set for the receipt of the document, the court found that ‘the technical problems on the ePUAP platform were temporary and did not result in the inability to receive the decision in the form of an electronic document’, which in effect entitled the authority to assume that the decision had been delivered in accordance with the then applicable Article 152a § 3 of the Tax Ordinance. Leaving aside the context of this case, it should be noted that such a position essentially means that, in the event of technical problems, a party to the proceedings must, in principle, constantly try to use the electronic platform in order to avoid the allegation that it could have done so at some point and failed to do so. This view, therefore, places the full responsibility for the malfunctioning of the IT infrastructure on the party to the proceedings and ignores the costs that the party incurs for the additional obligations arising from this. In my opinion, this is not a correct standpoint. It should be noted, however, that there is also a visible line in the Supreme Administrative Court case law, according to which the consequences of difficulties, errors or irregularities in the design and operation of official systems for communication with public administration authorities cannot be transferred to the users of these systems (see e.g. the Polish Supreme Administrative Court judgments in: III OSK 2624/21, 17 March 2023; I OSK 708/17, 1 March 2019; I OSK 1876/15, 17 February 2017; decision I OZ 1414/15, 5 November 2015, LEX no 1915487).

this refers in particular to the situation of malfunctioning web services provided by the tax administration which appear to operate correctly.⁶⁹ In practice, it may be difficult to prove such a circumstance if it is not officially confirmed by the competent administration. Therefore, it seems necessary to reduce the rigour of proof and to open the possibility of a mere prima facie proof of the occurrence of such events by those obliged to fulfil instrumental obligations.

The situation in which an instrumental obligation can be fulfilled in several ways and the impossibility relates to only one of them is to be assessed in a similar way to the parallel case of the impossibility of fulfilling a fundamental tax obligation, except that, as already mentioned, the institution of postponement or extension of the deadline may be applied instead of reliefs in payment of tax obligations.

A variant of the impossibility of fulfilling instrumental obligations is a situation in which they can be fulfilled but not properly. This is the case, for example, when the online service provided by the tax administration does not allow the tax return to be completed in a way that complies with the law and the taxpayer's will. It seems obvious that in such a situation the taxpayer should not bear the negative consequences of possible irregularities, nor should he be deprived, for example, of interest on an overpayment that he could not properly declare.⁷⁰ In such a case, it should also be irrelevant that it is possible to fulfil the said obligations in another way (e.g. by bypassing the online services provided). To conclude otherwise would mean that the taxpayer's right to take advantage of certain opportunities offered by the tax administration is fictitious or even a kind of trap, and that the taxpayer would have to bear all the negative consequences resulting therefrom. The use of public services cannot be a kind of lottery, and moreover one in which there can only be loss.

The above remarks should be applied *mutatis mutandis* to the impossibility of fulfilling instrumental obligations imposed on passive tax law subjects other than the taxpayer. However, it should be noted that the institution of postponement provided for in Article 48 of the Tax Ordinance refers only to taxpayers, withholding agents and collectors. Therefore, its application to other subjects will be problematic. Therefore, it should be postulated that relevant regulations should be introduced to solve the problem of impossibility of fulfilling instrumental obligations in a more comprehensive manner also with respect to subjects.

⁶⁹ Situations of this kind were described, for example, in the articles: Jarosław Królak, 'Przedsiębiorcy wpadli w cyfrową pułapkę' *Puls Biznesu* (11–15 August 2023) and Przemysław Wojtasik 'Jak udowodnić, że zmieniliśmy formę rozliczeń' *Rzeczpospolita* (8 May 2023).

⁷⁰ The author of this paper is in possession of a tax decision in which the first instance authority took the opposite view. This decision was overturned by the second instance authority.

IV. CONCLUSION

As can be seen from the carried out analysis, the impossibility of fulfilling tax obligations is not a purely theoretical situation but occurs frequently in practice. It concerns both subjective impossibility and objective impossibility. The impossibility of fulfilling obligations may concern the fulfilment of the tax obligation by the taxpayer, the fulfilment of the obligation to pay the collected tax by the withholding agent and the collector, as well as the fulfilment of instrumental obligations.

Although the impossibility of fulfilling tax obligations should not, in principle, have an immediate effect on the level of budget revenues (it does not lead to the automatic expiration of obligations), it may cause disruptions in the functioning of the tax system and delay the collection of revenues. It may also be a source of various disputes concerning the consequences of those events for the legal situation of tax law subjects. Therefore, it is necessary to properly regulate this matter in tax law.

The current legal regulations in this area are quite fragmentary or provisional; they respond to specific events that interfere with the ability to fulfil the aforementioned obligations. Neither the reference to the principle of *impossibilium nulla obligatio est*, nor the application of the legal institutions provided for in the current tax law, such as, in particular, reliefs in payment of tax obligations, produce a satisfactory effect. Therefore, it is necessary to postulate the introduction of comprehensive legal regulations on the impossibility of fulfilling tax obligations. They should fairly distribute the burden of the negative consequences of the said impossibility between the tax administration and the passive subjects of tax law. This is particularly important in the case of objective impossibility. In this respect, it seems advisable to introduce the principle that all time limits for the fulfilment of the obligations affected by the impossibility are extended by the period of the said impossibility. This extension should not be accompanied by an extension of the limitation periods for obligations where the public administration is liable for the impossibility to perform. In such a situation, there is also no reason to impose penalties on the obligated subjects. If the fulfilment of an instrumental obligation conditions a certain legal qualification, the exercise of certain rights, or affects the amount of a tax or otherwise determines the legal situation of a passive tax law subject, it can be assumed in certain cases, in accordance with the principle of *impossibilium nulla obligatio est*, that an objectively impossible condition does not exist. This is the case if the impossibility existed during the entire period in which the obligation should have been fulfilled, or during the entire period in which a passive tax law subject could realistically have fulfilled it, or if the passive tax subject could, for legitimate reasons, erroneously assume that it had effectively fulfilled the imposed obligation.

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