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SPECIAL REGIMES OF POLISH BANKS – LEGAL ANALYSIS

Abstrakt

The aim of this article is to present polish banks in the context of accountancy rules and regulations in the act of 11 March 2004 on the Goods and Services Tax. Among the financial institutions, banks take a special place, therefore their significance and role will be stressed. Bank accountancy rules are also discussed.

1. Accountancy rules in Polish legal system

Bank accountancy, like any other kind of accountancy, is unitary accounting, regarding a defined economic entity, which is why the character of a given entity's activity should be taken into account while constructing the system of such accountancy. Activities of entities of financial intermediary nature, the earliest form of which are banks, are connected with the functioning of the money- and capital markets. These markets are parts of the financial market, which may be described as the whole of transactions with securities (which are an instrument for granting loans). Current definitions of accountancy

describe this branch of knowledge as the process of identification, measuring and communicating of economic information in order to enable its users to formulate justified opinions and decisions.

The accountancy politics is connected with the increasing meaning of the norms regulating the way of conducting accountancy and producing financial reports. As market relations in a country-, regional- and world scale are created, the meaning of regulations regarding producing reports and disclosing information included in them increases. This also applies to the bank system and what occurs in it.

In Poland, the central bank and a network of commercial banks create a bank system, in which financial operations are carried out. The system of description and identification of those operations with file, settlement, calculation and reporting should be considered as bank accountancy which in Polish practice is regulated in legal acts. One of the most important regulation in this matter - the Accounting Act of 29 September of 1994.[1] is, to a considerable extent, attuned with the EU directives and the International Accounting Standards (hereinafter: IAS). Financial reporting of banks was regulated mainly by IAS 30, until being replaced by the IFRS 7, a standard including the whole of the requirements regarding disclosure of information connected with financial instruments. It must be noted that many organizations take steps to standardize accounting rules in order to harmonize provisions in different countries. Supranational regulation of accounting is described in table 3.

[1] Journal of Laws 2016, item 1047.

Table. Supranational regulation of accounting

Organisation formulating the regulations	**Type of regulation**	**Meaning of the regulation**
Organization for Economic Co-operation and Development (OECD)	Reports regarding: Accounting terminology Construction and consolidation of reports Rules for accounting in different countries Comparability of standards	Encouraging effort in order to co-ordinate the activities of organizations establishing accountancy standards.
United Nations (UN)	Reports regarding progress of work in the field of accountancy standards	Co-ordination of activities and direction of work in the field of standardization.
International Accounting Standards Committee (IASC*)*	International Accounting Standards as general guidelines, among other things, in the field of financial reporting, rules of valuation, terms of accounting, depreciation accounting, accounting under the conditions of inflation and others.	Formulating and promoting IAF in order to improve and standardize accounting around the world.
European Union (UE)	Directives aimed at directing Member States in formulating domestic legislation regarding rules for conducting accountancy, producing of yearly accounting closures, their consolidation, persons responsible for conducting auditing of accounting documents.	Harmonization of laws and standards of accounting in member states.

Source: T. Kiziukiewicz,Rachunkowość. Zasady prowadzenia w jednostkach gospodarczych wg polskiego prawa bilansowego od 1995 roku, Wrocław 1995 r, p. 11.

The Accounting Act, mentioned before, is of essential importance in the context of the analyzed problem.

According to this statute an entity's accounting shall include:

1. The adopted accounting principles;
2. The books of accounts, kept on the basis of accounting documents and recording the entries of the events in a chronological and systematic manner;
3. A periodic determination or verification through a stocktaking of actual balances of assets, liabilities and equity;
4. Measurement of assets, liabilities and equity and determination of the financial result;
5. Preparation of financial statements;
6. Gathering and storing accounting documents and other documentation required by the Act;
7. Having financial statements audited and published in cases required by the Act.

It is worth mentioning that accountancy is regulated in Polish legal system by Accounting Act, the Banking Law, the NBP Act and the executive laws. Forms and techniques of bookkeeping in banks are specified in laws regarding bank accountancy, especially in Accounting Act. Bank accountancy is conducted on the basis of documentation describing rules implemented by a unit. Bookkeeping is followed by specific rules, i.e. registration of business activities in the form of a file, a regular file on the accounts, together with a turnover and balance report as well as off-balance-sheet liabilities. The basis for records in books of accounts is only the correct evidence qualified for booking on a certain account. Accounting evidence are: an instruction made by a client of the bank, an instruction of the bank, or other documents that fulfill the conditions specified in the Accounting Act. The entries have to be effected in accordance with the rule of validity, i.e. they have to be effected on the day that the accounting evidence was received or accepted for execution.

The rules of bank accountancy are of substantial meaning. The norms included in the International Accounting Standards, EU directives and the Polish balance sheet law are the basis for formulating the rules of bank accountancy. Among these are:

1. The rule of exhaustive expression, which assumes that accountancy should capture the whole of the possessions of the bank and present a true image of those possessions. Therefore the accounting books should include all information enabling the identification of each component of the assets and liabilities, while off-balance-sheet items should mirror future liabilities and received active debt which may alter the value of assets and liabilities.
2. The rule of clarity assumes that accountancy should be legible for bank authorities and useful in its management and assessing its financial situation, therefore it is required for accountancy procedures to be abided by, at all levels.
3. The rule of caution assumes that the value of assets and liabilities and the financial outcome is set and showed in the accountancy books taking into account the maximum risk, which means that the uncertain values should be registered at their minimum.
4. The rule of validity is connected to the necessity of providing a true image of the financial situation of a bank in a dynamic way. This results in each accounting document being supposed to include the date of issue – most commonly, the date of the operation.

2. Character of VAT in Polish legal system.

The issues of value added tax (VAT) are regulated in the act of 11 March 2004 on the Goods and Services Tax. The goods and services tax is one that burdens the expenses, while also being a consumption tax, as, in the economic sense, it only burdens the expenses of consumption nature. It is also an indirect tax, as in most cases, the entity that is the taxpayer is not burdened with the

actual, economic burden of the tax, which is moved to another entity, in this case the consumer of the goods produced by the taxpayer or the services rendered by them.

Value added tax is a turnover tax, as the taxable base is the turnover, i.e. the value of the provided goods or the rendered services. It burdens the net turnover. The goods and services tax is calculated in every phase of the turnover, not excluding the retail. The tax burdens each sale (delivery, service), regardless of whether it takes place in the final phase (sale to the final consumer) or the indirect phase.

The goods and services tax is, all in all, value added tax, as each taxpayer's tax actually burdens only this part of the turnover that is added by this taxpayer. The taxable base is, however, at each stage of the turnover, its whole value. The actual taxation of only the added value is achieved by using either the mechanism of deduction or return of the tax calculated in the last phase of the turnover. Consequently, the only turnover subject to taxation is the turnover 'generated' by the given taxpayer (the difference between the value of the purchase and the value of the turnover).It is, additionally a general (universal) tax, as, to the rule, it burdens the turnover of goods and services of any kind.

In the doctrine a set of basic features of the value added tax is specified. It seems like at least these basic construction qualities should be noted here:

1. Neutrality of the value added tax
2. Universality of taxation
3. Avoidance of double taxation, as well as unintentional non-taxation
4. Maintaining the conditions of competition.

The basic feature of the value added tax is the neutrality of this tax. Sometimes, in relation to the rule of neutrality of the tax the, resulting from it, rule of actual taxation of consumption is pointed out. In accordance with the above-mentioned feature the value added tax should only burden the consumption. It should not, however, be an actual burden to those taxpayers,

who purchase goods and services not for the purpose of consumption, but for later resale, transformation, using for the purpose of executing their activity etc. This tax should therefore be neutral for entrepreneurs, and burden the consumers.

The goods and services tax is, additionally, a multiphase (all-phase) tax (calculated in every phase of the turnover) and calculated on the basis of the whole of the turnover. Therefore, the neutrality of the tax is ensured by introducing the right for deduction of the tax calculated during the purchase of goods used for executing business activity.

Another fundamental rule for the value added tax is the universality of taxation. It is to guarantee that every transaction carried out when executing business activity is subject to taxation with the goods and services tax. All exceptions to the rule of universality of taxation can only be applied in situations clearly and explicitly regulated by the law. Practically, it means that all exemptions from the tax can be introduced only under the conditions and within the scope of the *VAT Directive 2006*/112/EC of 28 November 2006. Value added tax have been harmonized in the EU so the possibility of exemption exists only if the directive provides for such. It should also be noted that laws introducing tax exemptions are of exceptional character. Therefore, in accordance with the *exceptiones non sunt extendentae* rule, they should be interpreted with the highest exactitude.

3. Special regimes of domestic banks

The Goods and Services Tax Act does not introduce special regimes for banks. However, it must be mentioned that Article 43 VATA includes exemptions which significantly affect VAT taxation of banking activities.Exemptions from the value added tax have been introduced for various reasons. Some activities are exempted from taxation as they are executed for the

common good and common interest, where the third sector helps the activity of the state. In other cases it would be difficult to specify the taxable base, therefore exemption was the better solution (e.g. financial intermediary services). It should be noted that the wide range of exemptions from the value added tax, and sometimes even their existence, is criticized. It is pointed out, that the exemptions disturb the logic of the value added tax mechanism (taxation-deduction), complicate the tax returns, disturb the outsourcing of the services and raise the cost of goods and services.[2]

It must be underlined that the Goods and Services Tax Act of 11 March 2004 does not introduce

any special VAT regime for banks. However, it must be mentioned that Article 43 VATA includes exemptions which significantly affect VAT taxation of banking activities. One of the VAT taxable activities is the rendering of services and legal persons (e.g. banks) are taxable persons. Thus, banking services, financial services rendered by banks and financial institutions are within the scope of VAT, but are exempted with some exceptions. It should be stressed, that the VAT exemption applicable to some services rendered by banks and financial institutions results in these institutions not having the right to deduct input VAT if purchases are connected with these exempted services.

According to Article 43 of the VAT Act in the wording as of 1 January 2011, the following

financial services are exempted[3]:

1. Services of granting loans and intermediary services in the rendering of services of granting loans,
2. Services in the area of guarantees and any other financial- and insurance transaction securities and intermediary services in the area of rendering those services,

[2] For more see: V. Lenoir, *April 1954 - April 2004. VAT Exemptions: The Original Misunderstanding*, European Taxation 2004, nr 10.

3. Services in the area of depositing monetary means, account management, monetary transactions of any kind, money transfers, debts, checks and bills of exchange, as well as intermediary services in the rendering of those services,
4. Services, the object of which are financial instruments that are mentioned in the Trading in Financial Instruments Act of 29 July 2005, with the exclusion of the storage of those instruments and their management, as well as intermediary services in that area,
5. Services that are an element of financial services listed in Arts. 43(1)7, 37-41 of the Act, one that is a separate unit on its own and is suitable and indispensable in rendering a service subject to exemption according to Arts.43(1)7 and 37-41 – this exemption does not apply to services that are an element of intermediary services.

In the context of exemptions from VAT provided in Art.43, the problem of calculating this tax on ancillary services should also be stressed. The Polish laws specify the scope of the exemption too narrowly, resulting in financial institutions (e.g. banks, brokerage houses) managing funds being burdened with VAT during the purchase of ancillary services. According to Art.43(1)12 of the VAT Act, subject to exemption from tax are, among others, services of managing investment funds and capital insurance funds. The management shall be understood as:

1. Asset management;
2. Distribution of participation units;
3. Creating and management of registers of participants;
4. Maintaining accounts and records of assets;
5. Storage of assets.[4]

Definition mentioned above does not, therefore, cover the many necessary ancillary activities, such as the appraisal of share units. These are, to the rule, performed by external companies, as they require specialist knowledge and

[4] Art 43(8) of Vat Act

equipment. These companies have to calculate VAT, that cannot be deducted by the financial institutions using their services, as their basic activity is exempt from tax. This is, for the institution, an additional cost. This solution is a source of many problems for the financial branch. Moreover, it is incompliant with the EU regulations, which results clearly from the judicature of the Court of Justice of the European Union. In the *Abbey National* ruling of 4 May 2006 (C-169/04) it has been stated that the definition of management includes administrative activities, administrative management services and fund accountancy services among those, including the appraisal of shares (certificates).

Another incompliance of the Polish VAT laws with the 2006 directive has been revealed after the amendment introduced in 2011. This amendment has introduced new regulations in the area of services subject to exemption from VAT. It has to be noted, that in relation to financial services subject to exemption from VAT, reference was made to the Act of July 29, 2005 on the turnover of financial instruments. The provisions of this act do not, however, apply to shares in companies. As a result, services the object of which are shares (e.g. in limited liability companies), are not subject to exemption, although the VAT directive provides such an exemption.[5] After numerous statements, including those of tax consultants, the Ministry of Finance has remedied this oversight by introducing a retroactive VAT exemption for financial services associated with shares in companies.

This has, however, led to other mistakes. While introducing new regulations regarding the VAT exemptions in the disposition, the need for a suitable modification of Article 90(6) of VATA, which indicates, which ancillary transactions exempt from VAT are not included in the calculation in the VAT indicator, has been forgotten. This provision still references Article 43(1)37-41 of the VATA, thus not accounting for ancillary transactions associated with shares in companies (this exemption has been introduced not to

[5] Art.135(1)f of Vat Directive 2006.

the VATA, but to the executive regulation). As a result, Polish VAT provisions are still incompliant with the VAT directive.

It should be stressed, that when the national regulations are incompliant with a clear and precise provision of the directive, which is more beneficial for the taxpayer, the EU provisions may be directly applied.

One of the most common financial services is granting loans. Activities of that nature are subject to exemption from the goods and services tax. Therefore, the views of the doctrine and jurisdiction in this area, expressed while the last act of 1993 was in force, are still up-to-date. The verdict of the Supreme Court of July 10, 2002 (III RN 146/01) (3), in which it is stated that "A contract of a loan, the subject of which is a specified sum of money (article 720 § 1 of the Civil Code) and that is a financial service of its nature, is subject to exemption from the goods and services tax in accordance with article 7(1) 2 of the value added tax act, if this loan has been granted from own financial means of the complainant", may be used as an example.

Insurance services are also financial intermediary services. They have also been benefiting from the tax exemption. It is accordance with suitable regulations of 2006 directive, which treats insurance and reinsurance transactions, including these executed by brokers and insurance agents, as services subject to exemption from taxation under the conditions specified by a member state. The fact that the Polish act exempts most of services related to insurance (including those of insurance intermediary nature) raises some doubts. The only services subject to exemption should be those, the purpose of which is to grant insurance security. It appears from the jurisdiction of the Court of Justice of the European Union that subject to exemption on that ground may be all services, the purpose of which is granting insurance security, regardless of whether one rendering those services is formally entitled to executing insurance activity, or not.

In other ruling *Staatssecretaris van Financiën v. Arthur Andersen & Co. Accountants c.s.* the Court of Justice of the European Union has ruled that the activity of the administrative staff within an insurance firm, such as accepting insurance applications and submitting them to the database can be treated as neither insurance services nor related services. Such services cannot be, therefore, exempt from taxation.

There is no doubt that financial transactions in the Polish act are subject to exemption in a range much broader than that of the 2006 directive. An example presenting the lack of compliance of the Polish VAT provisions with EU provisions are the above-mentioned insurance services. The Polish statute provides an exemption for the most of services associated with insurance, while only the services the subject of which is granting insurance security should be subject to the exemption.

The EU law, however, provides solutions for the taxpayers to be protected from the consequences of local regulations incompliant with those provisions. Above all, entities have the possibility of directly applying the provisions of the directive without application of the incompliant local provisions. According to the judicature of the CJEU, the provision of the directive has to be mandatory and precise enough for direct application. The taxpayers can also use the local provisions incompliant with the directive, if they are preferable. The entitlement for direct application of the directive in order to limit the rights of the taxpayers, if the provisions if they have not been properly implemented in local law is not possessed by the state organs, such as tax organs (*The Kolpinghuis Nijmegen* case). According to the judicature of the CJEU a provision incompliant with the directive cannot serve as a basis for issuing a decision negative for the taxpayer (*The Lennartz* case).

Summary

From the analysis contained in the article it is clear, that regulations included in the VAT Act are very important for financial institutions. On the grounds of the aforementioned act, legal persons are, among others, considered taxpayers, which means that financial services rendered by banks and financial institutions are included in the scope of taxation with VAT. It has to be also stressed, that financial transactions in the Polish Act are subject to an exemption in a much broader range than in the 2006 VAT Directive.

The matter of financial institutions, especially banks, has to be considered also in the context of the VAT. Even though it does not include any special regimes for banks, it does provide a catalogue of exemptions for financial services. When the Directive 2006/112 and the jurisdiction of the CJEU are taken into consideration, a conclusion may be reached, that in the Polish Act on Tax on Goods and Services the scope of exemptions in the banking (financial) sector is much broader than in the Directive. Poland, as a member state of the EU, has regulations adapted to the standards of the EU, but still some differences may be noticed, which can have significant consequences.

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