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An Organised Part of an Enterprise: The Legal Definition Limiting the Imprecision

Zorganizowana część przedsiębiorstwa – definicja legalna ograniczająca nieostrość

SUMMARY

One of the key legal definitions introduced into tax law, i.e. the definition of "an organised part of an enterprise", was analysed in the study. It is an example of a definition under which a tax legislator expresses the tax consequences of business trading. According to the author, this legislative measure may be qualified as a legal definition limiting the imprecision in the provisions of tax law. The fulfilment of certain determinants becomes important for the construction of this definition, on the basis of which it should be constructed. The study specifies these determinants and shows that the tax legislator does not always use them when formulating the analysed definition. Therefore, in the article the author indicates solutions aimed at implementing these determinants.

Keywords: organised part of an enterprise; determinants of formulating a legal definition; degree of limitation of vagueness of a legal definition

INTRODUCTION

Considering tax regulations from the point of view of applied measures of the legislative technique should be one of the most crucial tasks for both doctrine and practice. The choice of appropriate normative solutions may become an important factor limiting the dynamics of introducing new regulations. There is no doubt that the specificity of this law, and thus a strong connection between its solutions and business trading, or rather the consequences of this trading, will be manifested in the creation of new regulations as a certain response to the dynamics of business trading. Therefore, it is not about negating the process of amending tax law.

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However, it becomes essential to search for such mechanisms as would be, on the one hand, a reaction to the dynamics of business trading and its consequences in tax law, and, on the other hand, would create some protection against seeking too frequent changes of this law. One of such solutions that directly implements the two levels of consideration indicated above is the legal definition limiting the imprecision of tax law. It is a measure of a legislative technique that a tax legislator uses more and more often, as exemplified by the solutions adopted under the tax avoidance clause[1], as well as in the field of tax schemes[2]. Legislative measures of this type are used by the tax legislator not only in the provisions of general tax law. They are also used in the detailed tax law, which is reflected in, among others, the provisions on transfer pricing[3].

The legal definition limiting the imprecision in tax law should become a valuable measure of legislative technique in those cases where the legislator intends to regulate, in the provisions of tax law, the effects of business trading. This definition should not only ensure that the relationship between the effects of business trading and the solutions of this law is reflected, but at the same time that it contributes to maintaining certainty in tax law by implementing the legal-administrative method of regulation.

One of the characteristic normative solutions of this type, where the tax legislator directly expresses the effects of business trading, is the legal definition of "an organised part of an enterprise". This legislative measure was considered in tax law literature[4]. However, its analysis as this kind of definition has not yet been

[1] Regulated by the provisions of Articles 119a to 119f of the Act of 29 August 1997 – Tax Law Act (Journal of Laws 2019, item 900 as amended).

[2] What is being considered is Article 86 of the Tax Law Act.

[3] Included in the Act of 26 July 1991 on Personal Income Tax (consolidated text Journal of Laws 2019, item 1387 as amended), or in the Act of 15 February 1992 on Corporate Income Tax (consolidated text Journal of Laws 2019, item 865 as amended). See also comments on the definition in Article 1a (1) (3) of the Act of 12 January 1991 on Local Taxes and Fees (currently consolidated text Journal of Laws 2019, item 1170 as amended) – A. Hanusz, [in:] *Źródła finansowania samorządu terytorialnego*, red. A. Hanusz, Warszawa 2015, pp. 61–62.

[4] See, for example, B. Janiak, [in:] B. Janiak, T. Kosieradzki, R. Piekarz. *Opodatkowanie nieruchomości*, Warszawa 2016, p. 50 ff.; K.G. Szymański, *Instytucja prawna przedsiębiorstwa, jego zorganizowanej części oraz zakładu (oddziału) samodzielnie sporządzającego bilans*, „Prokuratura i Prawo" 2006, nr 5, pp. 3–9. The analysis of the definition of an organised part of an enterprise in a comprehensive manner is presented in the PhD thesis of J. Obidowski entitled: *Pojęcie przedsiębiorstwa w polskim prawie podatkowym. Majątek i restrukturyzacje* (University of Silesia, Faculty of Law and Administration, Katowice 2019, pp. 57–82). The author also emphasizes that this concept is characteristic for tax law (*ibidem*, p. 60). In turn, the analysis of the definition of an organised part of an enterprise from the point of view of the terminology of Polish tax laws in relation to the implementation of EU law was presented by J. Koronkiewicz in the study *Terminologia podatkowa a prawidłowość implementacji dyrektyw unijnych w Polsce* (Warszawa 2015, p. 214 ff.). Therefore, the author stresses, based on the analysis of the jurisprudence of the CJEU, that the definition of an

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conducted in the doctrine. Hence, its consideration becomes essential, taking into account certain determinants of the formulation of this type of definition, which can be considered on the basis of the regulation on "Principles of legislative technique"[5].

Therefore, the purpose of this study is to indicate these determinants in relation to the definition of "an organised part of an enterprise" and to examine whether the legislator complied with them when formulating this kind of measure of legislative technique. The hypothesis concerns the statement that the legislator has not always complied with these determinants. Considering the normative shape of the definition of "an organised part of an enterprise"[6], two determinants can be distinguished, i.e. the determinant of imprecision of the term of "an organised part of an enterprise" and the determinant of an appropriate degree of limiting the imprecision of "an organised part of an enterprise".

The paper is based on the dogmatic-legal and theoretical-legal method. The first method was used to analyse the current regulation within the framework of the considered definition and to indicate in which direction this norm should be verified in the future. On the other hand, the theoretical-legal method allowed to examine this definition from the point of view of the assumed determinants, and thus to additionally justify the need for its verification.

THE DETERMINANT OF IMPRECISION OF THE TERM "AN ORGANISED PART OF AN ENTERPRISE"

Establishing the need to meet this determinant is essential, taking into account the catalogue of the basics of formulating legal definitions, including the one concerning the limitation of the imprecision. If a given term is not imprecise, it is not possible to formulate a legal definition within this basis for creating a measure of

organised part of an enterprise incorrectly treats the organisational and financial separation as equal. It is also worth pointing out that in the literature on civil law the issue of the relationship between the concept of enterprise and an organised part of enterprise has been addressed. See P. Blajer, *Nabycie przedsiębiorstwa będącego przedmiotem zapisu windykacyjnego. Aspekty materialno- i proceduralno-prawne*, Warszawa 2017, p. 163 ff. and literature cited therein.

[5] These are determinants that can be distinguished based on § 146 (1) (2) of the regulation of the Prime Minister of 20 June 2002 on the "Principles of legislative technique" (consolidated text Journal of Laws 2016, item 283).

[6] This definition of an identical normative shape was introduced in Article 2 (27e) of the Act of 11 March 2004 on Tax on Goods and Services (consolidated text Journal of Laws 2018, item 2174 as amended) and in Article 4a (4) of the Act on Corporate Income Tax and Article 5a (4) of the Act on Personal Income Tax. According to these regulations, the term "an organised part of an enterprise" should be understood as an organisationally and financially separated set of tangible and intangible assets, including liabilities, intended for the implementation of specific economic tasks, which could also constitute an independent enterprise performing these tasks by itself.

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legislative technique. There is a close relationship between the analysed and the other out of two indicated determinants. In other words, the existence of the second determinant depends on the first of them. Failure to meet them when formulating a legal definition may lead to the occurrence of an error of precision of concepts, and thus a situation where by defining terms without the use of determinants, a definition is created that not only does not fulfil its role, but at the same time leads to a violation of the level of detail of a given regulation. This may then lead to the need to create a more detailed definition only as a consequence of the introduction of this previous normative solution.

Establishing this determinant in the case of "an organised part of an enterprise" comes down to stating whether this term is imprecise. It is, therefore, necessary to examine whether the fulfilment of the imprecision determinant should be a consequence of the imprecision of all the terms (words) used in the construction of the phrase "an organised part of an enterprise", or whether it is sufficient to meet it in relation to one of them. There is no doubt that in a situation where all the words are imprecise, this determinant has been met. It is also worth noting that when the imprecision applies to even one term contained in a given expression, it causes consequences for the whole expression, which then becomes imprecise. Considering the term "an organised part of an enterprise", it is difficult to unequivocally conclude whether the imprecision concerns each of the words used. Undoubtedly, it is a consequence of using the expression "an organised part". However, referring to the term "an enterprise", we obtain an imprecise area related to the entire defined term. The area of imprecision that corresponds to this term concerns the examination of what should occur in order to meet the requirement of a given part to be organised in relation to an enterprise. It should also be noted that this imprecision is already a consequence of the expression "an organised part", because it is a certain simplification resulting from the activities of a given entity, which result in being organised, or at least in a minimum dimension of it. When referring the imprecise expression of "an organised part" to the term of "an enterprise", it can be concluded that no area of imprecision is sufficient. As it is about confirming the organisation of a part in relation to this enterprise, thus, the imprecision area becomes wider. Statically, this is not just about establishing a combination of component data, but also about the existence of such relationships between them, so that they result in being organised.

When examining this determinant, it also becomes necessary to establish the moment from which it can be assumed that the entity's specific behaviour fulfils a certain dimension of being organised. Therefore, it is about the moment from which it should be assumed that the connections between the component data meet such qualification that this data ought to be assessed as "an organised part" in relation to an enterprise.

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Hence, there is no doubt that within the term "an organised part of an enterprise", the determinant of imprecision should be indicated, and thus there is a basis for formulating the definition. In turn, its normative shape should be assumed to meet the determinant of the appropriate degree of limiting the imprecision. The answer to the question of whether it can be indicated under this definition requires an analysis of its normative shape.

THE DETERMINANT OF THE APPROPRIATE DEGREE OF LIMITING THE IMPRECISION OF "AN ORGANISED PART OF AN ENTERPRISE"

When considering this determinant, it should first of all be clarified whether it should be applied to the imprecision of the term itself, "an organised part of an enterprise", or only as part of formulating the shape of a defining phrase. It seems that this determinant should already be regarded at the stage of examining the term "an organised part of an enterprise", and its implementation as part of formulating the shape of a defining phrase. In other words, its non-application within the term that is subject to definition should be considered as lack of grounds for creating this type of legal definition. It is, therefore, worth emphasizing the necessity to regard it on two levels. The first can be conventionally defined as the initial level of this determinant and the second as the level of its implementation. The initial level of the analysed determinant should result from the analysis of the phrase subject to definition. On the other hand, determining the appropriate degree of limiting the imprecision should take place only as part of formulating the shape of a defining phrase. Therefore, considering the shape of this part of the definition, through which the legislator explains what a defined phrase is, i.e. "an organised part of an enterprise", it can be established whether this determinant has been used.

The indicated initial level of this determinant results from the very formulation itself of "an organised part" related to an enterprise. The imprecision of this expression requires limitation because of the necessity to adopt a manner and dimension of organisation within the elements of the definition. The manner and dimension of this organisation should be a confirmation of the appropriate degree of limiting the imprecision.

The legislator indicates the manner of organisation at the beginning of the defining phrase, where he or she expresses the organisational and financial separation. There is no doubt that the term "an organised part of an enterprise" refers to some kind of organisation. Therefore, the legislator uses this manner of organisation in the form of a certain separation of organisational nature. It is probably not the most fortunate solution to adopt a similar-sounding expression indicating separation in relation to the phrase, which is subject to being defined. However, one cannot be accused of failing to implement the determinant under consideration for this reason.

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Nevertheless, ultimately this formulation could be replaced by an expression that describes organisation without using this term. In order to examine whether the legislator in the shape of the definition has expressed the appropriate degree of limiting the imprecision, it should be determined whether it is sufficient to adopt any dimension of organisational separation. It is worth noting that in this case the legislator uses the expression, which is also an imprecise term, and therefore in practice, there can be many different situations of organisational separation. Hence, it becomes doubtful whether in this case the legislator retained one of the model's assumptions regarding the stage of formulation of legal definitions limiting the imprecision, i.e. the use of imprecise terms within the initial imprecision area as a consequence of the expression that will be subject to define[7]. Therefore, owing to a rather broad formulation of the first element of the definition (organisational separation) and the lack of indication of a certain dimension of organisation, in practice, the interpretative emphasis should be put primarily on separation, and then it should be examined whether it has the nature of organisational separation, all the more so since the organisational dimension is much easier to obtain than at the time of introducing the analysed legal definition into tax laws owing to technological progress.

It seems that ultimately the degree of limiting the imprecision should be increased by pointing to a specific dimension of organisational separation. While this element is, in a sense, universal in nature, as it may relate to a broader catalogue of entities owing to the 'organising factor', financial separation may have a narrower scope. It is also an imprecise term, but it does not potentially contain such a wide range of actions. Thus, this does not mean that it is necessary to postulate a greater degree of limiting the imprecision. In other words, the implementation of the determinant in question may be difficult owing to the lack of indication of a specific dimension of organisational separation. However, the formulation indicating financial separation does not cause such doubts.

When examining the appropriate degree of limiting the imprecision, it should also be determined whether it becomes necessary to consider organisational and financial separation together and whether it is relevant to the fulfilment of this determinant. Depending on the circumstances of the facts, the financial separation element may be considered together with the previous element or separately. To adopt the definition of "an organised part of an enterprise", both these types of separation must exist, whether simultaneously or in a certain relationship. It is no accident that the legislator puts organisational separation first, as it is in a sense the consequence of a defined phrase. Nevertheless, in a particular case, difficulties may result from determining

[7] P. Borszowski, *Definicja legalna służąca ograniczeniu obszaru nieostrości w prawie podatkowym (założenia modelu)*, [in:] *Współczesne problemy prawa podatkowego. Teoria i praktyka. Księga jubileuszowa dedykowana Profesorowi Bogumiłowi Brzezińskiemu*, red. J. Głuchowski, t. 1, Warszawa 2019, pp. 82–83.

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the moment of priority for organisational or financial separation. It is of no significance when it comes to implementing the elements of the definition. In addition, it does not seem necessary to demand specifying the stages where firstly the element of organisational separation, and then that of financial separation should be shown owing to the implementation of the appropriate degree of limiting the imprecision. The problem, when it comes to implementing this determinant, concerns the already stressed lack of any organisational separation dimension. As, in a particular case, it may be possible to extend the time in order to determine whether this separation took place, therefore, the postulated clarification when it comes to the dimension of organisational separation serves not only to demonstrate this element, but at the same time makes it possible to move to the determination of the latter type of separation more quickly. It cannot be assumed that through financial separation it is possible to specify the fulfilment of the first of the elements.

As part of the definition, these two elements were referred to as "a collection of tangible and intangible assets". This formulation limits imprecision, but it can, however, cause concern about the implementation of the examined determinant.

These fears are the consequence of using another imprecise term, i.e. "a collection of tangible and intangible assets" in connection with their organisational and financial separation in an existing enterprise. While the very expression "a collection of tangible and intangible assets" leads to a certain area of imprecision, its relation (reference) to organisational and financial separation significantly extends this area.

First of all, the expression "a collection of assets" itself may cause doubts. Secondly, the problem arises as to whether its reference to organisational and financial separation means that this separation is to take place before the existence of the collection of these assets, or whether it is only a consequence of its occurrence. Therefore, in this respect, there is significant doubt as to the implementation of the determinant of the appropriate degree of limiting the imprecision. It is, therefore, proper to clarify this expression within the definition, in the direction of an unambiguous indication of when these assets are to be separated.

As has been assumed, "a collection of tangible and intangible assets" is also imprecise. It should be considered that this is not about any set of these assets in the sense of their loose association. The word 'collection' indicates some ordering and maintaining of relationships between them. Not just any set of tangible and intangible assets, which can be considered to have been separated in organisational and financial terms in an existing enterprise, can be described as a collection of assets. Indeed, the two types of separation indicated do not necessarily have to provide the basis for qualifying a set of tangible and intangible assets as a collection in each case. Therefore, two situations can be distinguished, i.e. the first, when organisational and financial separation results in the fact that the set of these assets is a collection, and the second, when this separation does not lead to recognition of the given assets as a collection. In this first situation, it can be considered that one of the elements of the

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definition of "an organised part of an enterprise" has been fulfilled. On the other hand, in the second of them, it remains to be considered whether the inability to qualify a given set of tangible and intangible assets as a collection means that the examined element of this definition has not been fulfilled. At the same time, it is necessary to determine whether the admissibility of recognizing a given set of tangible and intangible assets as a collection can occur, not so much as a result of organisational and financial separation, but of other factors. As part of the analysed definition, no requirement that the collection be merely a consequence of separation was introduced. Nevertheless, it may be questionable to indicate other factors that would provide the basis for qualifying the set of these assets as a collection. Therefore, it should be assumed that this is another confirmation of failure to maintain the appropriate degree of limiting the imprecision. Hence, to meet this determinant, it would be necessary to clarify whether this collection is to be solely a consequence of organisational and financial separation, or whether other factors may influence it.

It is worth noting that the phrase "a collection of tangible and intangible assets" may also raise some doubts owing to the fact that their numerical size is not indicated so as to realize this phrase. In this respect, however, it is difficult to assess it from the point of view of the failure to implement the determinant in question owing to the specificity of a given enterprise and the assets that can be distinguished in it. Therefore, it should be recognized that the amount of assets in the collection does not matter, because it is the result of the activity of a given entity and the circumstances accompanying this behaviour, and thus it is related to the broader issue of considering the tax effects of business trading. In a specific case, it does not matter whether, for example, the amount of tangible assets is greater than that of intangible assets. The legislator treated liabilities in a special way. Therefore, it should be assumed that this asset should be established within "an organised part of an enterprise".

Functional separation is distinguished as the third element[8]. It should be emphasized that the legislator does not use the element formulated in this manner, but describes it. By his examination of the shape of this expression, it can be concluded that the legislator considered not only the potential, but the actual dimension of this element. This expression consists of two parts, i.e. the first when the legislator indicates the intended use of the separated assets for the performance of specific economic tasks. On the other hand, in the second part, the legislator emphasizes the possibility of functioning as an independent enterprise that can prepare its own balance sheet. Owing to the fact that the first part of this phrase is decisive, there is no fear of not implementing the appropriate degree of limiting the imprecision. It is only in the second conventionally named part that the legislator uses a formulation indicating the possibility of functioning as an independent enterprise performing these tasks by itself.

[8] This element is indicated by B. Janiak (*op. cit.*).

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From the point of view of this third element, which can be described as a functional purpose, the concept of specific economic tasks is of key importance[9]. It should be noted that the analysis of the manner of the formulation of this first part of the element under consideration confirms the legislator's action towards the implementation of the appropriate degree of limiting the imprecision, which should also be relevant to the concept of economic tasks. "Specific economic tasks" is also a phrase that creates a certain area of imprecision. It is necessary to determine whether a given task is of an economic nature, which may cause problems when only part of that task can be classified as such. It seems that in a situation where the assessment of the overall task makes it possible to conclude that it also has an economic nature, despite its other nature, it should be considered that the task qualifies for this element of the definition of "an organised part of an enterprise". From the point of view of the determinant in question, there may be objections to the formulation indicating specific economic tasks owing to the imprecision as to whether the purpose of individualised economic tasks or any of them that could be separated is considered. In addition, it may be difficult to determine the moment when such an assessment should be made, i.e. whether as a consequence of earlier organisational and financial separation or only after the application of the third of the indicated elements. It should, therefore, be clarified in the context of the definition of "an organised part of an enterprise".

Although the fulfilment of this first part of the last of the indicated elements of the definition is of decisive importance, in order to assume that "an organised part of an enterprise" applies in the case, the other part should also be implemented. It is qualified by the potential possibility of constituting an independent enterprise performing these specific tasks by itself, nevertheless, the assessment formulated in this manner must be made in order to recognize that in the case the legal definition being analysed is applicable. Clarification of doubts as to the concept of specific economic tasks will also be relevant to the implementation of the determinant examined in relation to the latter part.

CONCLUSION

The analysis of the normative shape of the legal definition of "an organised part of an enterprise", which is *de facto* a definition that limits imprecision, makes it possible to indicate two determinants on the basis of which it should be formulated. These determinants serve not only to verify the correctness of the construction of this definition, but can also be used to check whether the tax legislator has properly expressed the tax consequences of business trading. The examination of certain

[9] Performed by organisationally and financially separated assets.

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elements that can be distinguished under this definition in relation to the two determinants indicated, and in particular the determinant of the appropriate degree of limiting the imprecision, does not always provide satisfactory results for the tax legislator. Therefore, an attempt can be made to verify the shape of this definition in such a manner as to eliminate certain emphasized doubts, and thus to achieve the purpose for which this definition was constructed in greater respect.

Therefore, it is necessary to postulate that the dimension of organisational separation should be indicated. Furthermore, it is also worth clarifying whether the set of components should be the sole consequence of organisational and financial separation, or whether other factors may be involved, as well as determining the moment of separation. The last of the conclusions concerns the clarification of the studied definition in relation to the expression indicating specific economic tasks. It is, therefore, necessary to clarify whether the purpose is to designate for individualised economic tasks or for any of them that could be separated, together with the moment of assessment.

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STRESZCZENIE

W opracowaniu analizie poddano jedną z kluczowych definicji legalnych wprowadzonych do prawa podatkowego, tj. definicję zorganizowanej części przedsiębiorstwa. Jest to przykład definicji, w ramach której ustawodawca podatkowy wyraża podatkowe skutki obrotu gospodarczego. Zdaniem autora ten środek legislacyjny można zakwalifikować jako definicję legalną ograniczającą nieostrość w przepisach prawa podatkowego. Istotne dla konstrukcji tej definicji staje się spełnienie pewnych determinantów, w oparciu o które powinna być ona zbudowana. W opracowaniu określono te determinanty oraz wykazano, że ustawodawca podatkowy nie zawsze korzysta z nich, formułując analizowaną definicję. Ponadto autor wskazał rozwiązania mające na celu realizację tych determinantów.

Słowa kluczowe: zorganizowana część przedsiębiorstwa; determinanty formułowania definicji legalnej; stopień ograniczenia nieostrości definicji legalnej

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