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CONCLUSION OF A CIVIL LAW CONTRACT AS A PREMISE FOR THE MUNICIPALITY TO ACT AS A TAXABLE PERSON OF TAX ON GOODS AND SERVICES (VAT)

ZAWARCIE UMOWY CYWILNOPRAWNEJ JAKO PRZESŁANKA WYSTĘPOWANIA GMINY W CHARAKTERZE PODATNIKA PODATKU OD TOWARÓW I USŁUG (VAT)

Summary: The research goal undertaken in this article is to answer two questions. First, can a municipality's legal tax status in the field of tax on goods and services (VAT) in each transaction always be determined precisely? Second, is the conclusion of a civil law contract by a Polish municipality a sine qua non condition for it to obtain VAT taxable status? Theses presented in the publication, and arguments clearly indicate that with the VAT system in force in the European Union, including Poland, it is not always possible to precisely define the status of a municipality as a taxpayer in a given transaction; and the conclusion of a civil law contract by a municipality is not always sufficient for it to obtain the status of a taxpayer in a given transaction. The research material used includes domestic and foreign substantive law, doctrine and practice, in which current case law of tax authorities, administrative courts and the CJEU plays a special role.

Keywords: civil law agreement and VAT, VAT taxpayer (taxable person) status, taxpayer for goods and services tax, local government unit, imperium and dominium, municipality, VAT/GST, local government, public bodies

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Streszczenie: Podjętym w niniejszym artykule zamierzeniem badawczym jest udzielenie odpowiedzi na dwa pytania. Pierwsze brzmi: czy status prawnopodatkowy gminy w zakresie podatku od towarów i usług (VAT) w danej transakcji można zawsze wyznaczyć precyzyjnie? Drugie: czy zawarcie umowy cywilnoprawnej przez polską gminę jest warunkiem *sine qua non* uzyskania przez nią statusu podatnika VAT? Przedstawione w opracowaniu tezy i argumentacja jednoznacznie wskazują, że w obowiązującym w Unii Europejskiej, w tym w Polsce, systemie VAT precyzyjne określenie statusu gminy jako podatnika w danej transakcji aktualnie nie zawsze jest możliwe, a zawarcie przez gminę umowy cywilnoprawnej nie zawsze jest wystarczające do uzyskania przez nią w danej transakcji statusu podatnika. Wykorzystany materiał badawczy obejmuje krajowe i zagraniczne prawo materialne, doktrynę oraz praktykę, w ramach której szczególną rolę odgrywa aktualne orzecznictwo organów podatkowych, sądów administracyjnych i TSUE.

Słowa kluczowe: umowa cywilnoprawna a VAT, status podatnika VAT, podatnik podatku od towarów i usług, jednostka samorządu terytorialnego, imperium i dominium, gmina, VAT, samorząd terytorialny, podmioty publiczne

INTRODUCTION

In tax law relations, the taxpayer plays one of the main roles. A municipality (gmina), on the basis of value added tax – VAT[1], may be a taxable person in one transaction and not in another. There are strictly defined rights and obligations associated with the VAT status. For the local government, they are important in the sphere of *imperium* (financial and administrative law) and *dominium* (civil law).

In addition, it is important that the goal pursued by the municipality, which is to meet the needs of residents, to take place in conditions of competition or lack thereof, on a given market. The EU VAT system, by protecting the value of not disturbed competition, uses concepts that are unclear in terms of meaning[2]. However, current Polish VAT regulations are different. They refer to the concept of „activities carried out under concluded civil law contracts"[3] and indicate the existing relationship between the tax law and civil law. According to the national law, public authorities and their offices are not considered to be taxable persons in the scope of implemented tasks imposed by separate legal regulations, for the implementation of which they were established, with the exception of activities performed on the basis of concluded civil law contracts[4].

[1] The abbreviation (VAT – Value Added Tax) is also referred to as the tax on goods and services applicable in Poland.

[2] See Article 13 (1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (Journal of Laws of 2006, No. 347, item 1), hereinafter: "Directive 2006/112" or "Directive 112".

[3] See Article 15 (6) of the Act of 11 March 2004 on tax on goods and services (vol. Journal of Laws of 2018, item 2174 with later as amended), hereinafter: "the VAT Law".

[4] Ibid., and see the judgment of the CJEU of 29.09.2015, C-276/14, point 7: '(…) "Taxable persons" shall not include public authorities and the offices of such authorities as regards tasks established by

Hence, municipalities, in order to decide whether they are VAT payers in a given transaction, apply for individual interpretations of the tax law. They are dominated by the view that the exclusion from the „taxpayer category" is of „subject-object" nature[5].

The local government unit (municipality) will be considered a VAT taxpayer (a taxable person who is acting as such) in two cases: when it "performs activities other than those which are included within its tasks" or if it "performs activities within the scope of its tasks, but does so on the basis of civil law contracts"[6]. In other words, the division criterion is „the nature of the activities performed"[7]. Public law activities „exclude" a municipality from the definition of a taxpayer, and civil law actions result in the recognition of the municipality as the taxpayer.[8] Is it always the case? This issue raises significant doubts[9].

Therefore, the undertaken research goal is to answer two questions. First, can the municipality's legal tax status always be determined precisely in terms of VAT in a given transaction? Second, is the conclusion of a civil law contract by the municipality, a *sine qua non* condition for it to obtain the VAT status?

The hypotheses formulated in the article assume that in the VAT system in force in the European Union, including Poland, the precise determination of the status of a municipality as a taxpayer in a given transaction is currently not always possible, and the conclusion of a civil law contract by the municipality is not always sufficient to obtain the taxpayer status in a given transaction. The research material used includes the substantive law and doctrine[10] and a practice in which the case law of tax authorities, administrative courts (WSA and NSA) and the Court of Justice of the European Union (CJEU) plays a special role[11].

specific provisions for the accomplishment of which they have been appointed, with the exception of activities carried out under private law contracts.' (ECLI:EU:C:2015:635).

[5] E.g. an individual interpretation of the Director of the National Tax Information of 15.11.2019, 0112-KDIL2-2.4012.506.2019.1.AKR; https://sip.mf.gov.pl/ [access: 25.11.2019].

[6] E.g. individual interpretation of the Director of the National Treasury Information of 31.12.2019, 0112-KDIL1-1.4012.649.2017.11.AK, https://sip.mf.gov.pl/ [access: 4.01.2020].

[7] E.g. individual interpretation of the Director of the National Treasury Information of 31.12.2019, 0111-KDIB3-2.4012.693.2019.2.ASZ, https://sip.mf.gov.pl/ [access: 4.01.2020].

[8] Ibidem.

[9] An example is the performance of works involving the disassembly and disposal of asbestos-containing products, in the event when a municipality resident does not bear any costs and does not conclude a civil law contract with the municipality. In the opinion of tax authorities, such a factual situation means that the municipality acts as a VAT taxpayer because it provides a service free of charge (financed with the received grant and the municipality's own contribution). According to municipalities, this is analogous to other activities carried out as part of their own tasks, e.g. cleaning works, road repairs, etc. These activities are carried out for the benefit of the local community free of charge, and simultaneously specific beneficiaries of the carried out activities can be identified.

[10] More on the status of the VAT payer in the local government from the previous monographic work: K. Feldo, *VAT w partnerstwie publiczno-prywatnym*, Warszawa 2011; S. Owczarczuk, *Status podatnika VAT w samorządzie terytorialnym*, Warszawa 2012 and further referenced literature.

[11] Concerning Directive 112 and Member States' regulations.

THE PRINCIPLE OF UNIVERSALITY OF THE VAT TAXATION AND ITS EXCEPTIONS

It is common in literature and jurisprudence that the EU principle of the universality of VAT should be understood as broadly as possible, and Article 13 (1) of Directive 2006/112, excluding municipalities from the subjective scope of the VAT system, constitutes an exception to this rule[12]. The EU directive does not benefit from direct effectiveness but is merely an instrument for harmonizing the law[13]. Because the VAT system is to be harmonized, it cannot be based on the concepts and constructions set out in the non-harmonized system of administrative law or civil law[14]. The different laws in individual EU countries would also have different consequences under tax laws[15]. Hence, the EU VAT system uses autonomous concepts, and the creation of one conceptual grid aims to „determine the same consequences for specific activities and events in each Member State"[16].

Considering these assumptions, most often Member States have carried out such an implementation of Article 13 (1) of Directive 2006/112, which refers to the concept of „(significant) distortions of competition" used in this provision. An example is the Portuguese regulation, whose Article 2 (2) of the VAT Code[17] states that „the State and other legal persons governed by public law (including municipalities – own emphasis added) are not taxable persons for VAT purposes where they engage in transactions in the exercise of their powers conferred by public law, even where they collect fees or other consideration in that connection, in so far as their treatment as non-taxable persons does not cause distortions of competition"[18].

The content of this regulation, like other Member States' legislation, largely corresponds to Article 13 (1) of the Directive 2006/112[19]. The second example is Article

[12] "States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions. However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible."

[13] J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa*, Warszawa 2016, p. 177.

[14] T. Michalik, *Formalnie niezależny podmiot jako stałe miejsce prowadzenia działalności gospodarczej innego podatnika na gruncie unijnego systemu podatku od wartości dodanej*, [in:] *Współczesne problemy prawa podatkowego, Teoria i praktyka. Księga jubileuszowa dedykowana Profesorowi Bogumiłowi Brzezińskiemu*, J. Głuchowski (scientific ed.), t. 2, Warszawa 2019, p. 161.

[15] Ibidem.

[16] Ibidem.

[17] Código do IVA. See the judgment of the CJEU of 29.10.2015, C-174/14 (ECLI:EU:C:2015:733) and https://www.pwc.pt/pt/pwcinforfisco/codigos/civa/dl394-b-84.html#decretolei [access: 5.01.2020].

[18] Ibidem.

[19] More S. Owczarczuk, *Status podatnika VAT.…*, pp. 69-76 and literature cited there.

8 (2A) of the Value Added Tax Act, 1972[20], in the wording: „ (…) the State or any public body shall not be treated as a taxable person acting in that capacity in respect of any activity or transaction that is carried out by it in, or is closely linked to, the exercise by the State or such public body of particular rights or powers conferred on it by any enactment, except where –

(a) that activity is listed in Annex I (…), and is carried out by the State or that public body on a more than negligible scale, or

(b) not treating the State or that public body as a taxable person in respect of that activity or transaction creates or would likely create a significant distortion of competition"[21].

The Irish VAT Law shows that the municipality in a given activity (transaction) will be a VAT payer if it carries out the activities listed in Annex I on a larger scale than small or non-recognition of the municipality as VAT payer in connection with this activity or transaction, would lead or would „likely" lead to significant distortions of competition. This Law, like Directive 2006/112, contains unclear terms, however, does not define these concepts[22]. This unclear definition of the taxpayer does not deserve approval[23].

Having the status of a VAT taxpayer can be economically advantageous for one entity, but not for another[24]. Services provided to residents by the local government, are increasingly competing with services provided by the private sector [25]. This competition would be disturbed if the former was subject to exemption from taxation (due to the municipality's lack of VAT status) and the latter, supplied by private entities, was subject to taxation (due to their VAT status)[26]. The postulated reform of the EU VAT system, in the context of existing competition, for years, has been the subject of analyses by the European Commission [27], however, the conclusion cannot be reached.

In the EU legal system, based, among others, on such principles like equality, legal certainty, proportionality, harmonization of VAT, it is the internal law of a given country that decides whether a municipality operates in a public law regime, as a public authority, in relation to its activity or not.

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[20] The Irish Value Added Tax Act of 26 July 1972, hereinafter referred to as the Irish VAT Act, http://www.irishstatutebook.ie/eli/1972/act/22/enacted/en/print#sec8 [access: 5.01.2020].

[21] The content of the translation is contained in the judgment of the CJEU of 19.01.2017, C-344/15 (ECLI:EU:C:2017:28), (LEX No. 2188414).

[22] Similarly, in the Law in force since 1993 of 5 July 1993 on tax on goods and services and on excise duty (Journal of Laws of 1993, No. 11, item 50, as amended) it was not clarified who is the taxpayer of the value added tax. However, there were no exemptions from the definition of a taxpayer for municipalities. It is also confirmed by a letter from the Ministry of Finance of 24 June 1994, PP1-7205-69 /94/OP.

[23] See P. Boroszowski, *Działalność gospodarcza w konstrukcji prawnej podatku*, Warszawa 2010, LEX/el 2019.

[24] More: P.P. Gendron, *VAT Treatment of Nonprofits and Public-Sector Entities*, Tax Analysts 2011, p. 241, http://www.taxhistory.org/www/freefiles.nsf/Files/GENDRON-19.pdf/$file/GENDRON-19.pdf [access: 19.12.2019].

[25] Ibidem.

[26] Ibidem.

[27] Ibidem, and e.g. Copenhagen Economics, *VAT in the public sector and exemptions in the public interest. Final report for Taxud/2011/DE/334/*, 10 January, 2013, https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/vat_public_sector_exemptions_en.pdf [access: 5.01.2020].

In this way, member countries analyse circumstances that have a direct impact on the status of the VAT payer in relation to the activities carried out by the local government. They also issue guidelines in this respect that are not sources of law, but they are an example of the interpretation used and recommended by these authorities[28]. According to Irish guidelines, in the case of activities that are carried out under the same legal conditions as private entities, the municipality has the status of a VAT payer[29]. It also happens when a municipality, while performing a given activity, is admittedly under a public law regime, but its treatment as a non-VAT payer would lead to a „significant distortion of competition"[30].

Clarification of the meaning of this unclear concept is interesting. Distortion of competition should be assessed in relation to the given activity, actual or potential[31]. It may occur when a municipality competes with a private entity on the same market. In addition, if treating a municipality as a non-taxable person may impede or even prevent a private entity from entering a given market[32].

Regardless of the indicated circumstances, the municipalities have the status of a VAT payer for certain specific activities listed in Annex I of Directive 2006/112, if these activities are carried out on a „larger than negligible scale"[33]. In the presented interpretation, based on the regulation of Article 13 (1) of Directive 2006/112 and the judicial decision of the CJEU, there is visible striving to achieve equal conditions of tax competition. This normative construction is very casuistic and imprecise, which leaves room for many interpretations [34].

CIVIL LAW CONTRACTS AND DISTORTIONS OF COMPETITION

Factual states, using a linguistic (grammatical, literal) interpretation Article 15 (6) of the VAT Law, for municipalities, create civil law contracts[35]. In other words, civil law norms create factual situations for the second area of law, i.e. tax law[36].

[28] See e.g. Irish guidelines: Irish Tax and Customs, *The VAT treatment of activities of public bodies andother bodies governed by public law*, 2019, https://www.revenue.ie/en/tax-professionals/tdm/value-added-tax/part02-accountable-persons/vat-and-public-bodies/vat-treatment-of-activities-of-public-bodies.pdf or British guidelines: HMRC, *VAT Government and Public Bodies*, https://www.gov.uk/hmrc-internal-manuals/vat-government-and-public-bodies/vatgpb2100 [access: 19.12.2019].

[29] Ibidem, p. 2.

[30] Ibidem.

[31] Ibidem, p. 3.

[32] Ibidem.

[33] Ibidem.

[34] An example is the issue of establishing VAT taxpayer status in relation to the Polish local government units of the public finance sector. See S. Owczarczuk, *Status podatnika VAT w samorządzie terytorialnym po 1 stycznia 2010 r.*, „Finanse Komunalne" 2010, No. 7-8, pp. 89-100.

[35] Compare B. Brzeziński, *Prawo podatkowe a prawo cywilne*, „Toruński Rocznik Podatkowy" 2008, pp. 127-128, www.trp.umk.pl,http://www.trp.umk.pl/download/trp2008/TRP2008_B_Brzezinski_Prawo_podatkowe_a_prawo_cywilne.pdf.

[36] Ibidem.

As emphasized by B. Brzeziński, the problem is how to determine the scope of the concept that exists in tax law; it is marked with an identical term as the term used in civil law; it is not explained in tax law, but is explained (i.e. its scope is known) in civil law[37]. It should then be assumed that we are dealing „with the concept of tax law, which is synonymous with the concept of civil law and called the same as in in civil law"[38], which respects the "will of the legislator"[39], "the postulate of coherence of the legal system"[40] and "internal coherence of tax law"[41].

For civil law relations it is characteristic to shape the legal situation of entities on the principle of equality[42]. The municipality, however, carries out public tasks of local importance[43], not reserved by laws in favour of other entities[44]. It can implement them in an orderly manner (e.g. administrative decision), civil law manner (civil law agreement: named and unnamed) or mixed (e.g. administrative decision and civil law agreement). Its own tasks include meeting the collective needs of the community[45].

The literature indicates that „the legislator may choose between a civil law and a public law method of regulation"[46]. It is also permissible to „create hybrid solutions in which elements of both methods of regulation are intertwined"[47]. This assessment may be more complicated because „every civil law institution applied to public administration changes its legal nature at least partially"[48]. Legal relations related to municipal property are on the one hand „based on civil law, where the municipality acts as the owner of the property (*dominium*), on the other, it establishes property relations based on public law (*imperium)*"[49]. In addition, the existence of mixed legal institutions, in which different legal issues and relationships converge, means that consistent distinction between public law and private law is not a „value in itself"[50]. It is also right to note that introducing the demarcation line, in local

[37] Ibidem.
[38] Ibidem, p. 128.
[39] Ibidem.
[40] Ibidem.
[41] Ibidem.
[42] Compare S. Kalus, *Komentarz do art. 1*, [in:] M. Fras, M. Habdas (ed.), *Kodeks cywilny.* Komentarz,tom I: *Część ogólna (art. 1-125)*, and literature cited there, LEX/el 2019.
[43] Art. 2 (1) of the Law of 8 March 1990 on municipal government (Journal of Laws of 2019, item 506, with later amendments.), further further: l.m.g.
[44] Art. 6 (1) l.m.g.
[45] Art. 7 (1) l.m.g.
[46] R. Szczepaniak, *Cywilnoprawne i publicznoprawne instrumenty przeciwdziałające niszczeniu dróg samorządowych przy budowie autostrad i dróg ekspresowych*, „Samorząd Terytorialny" 2015, No. 11, p. 57. The author indicates that it is difficult to find purely civil law solutions in the field he is analysing.
[47] Ibidem.
[48] Ibidem.
[49] Compare J. Bodio [in:] I. Ramus (ed.), *Obrót powszechny i gospodarczy. Problemy cywilnoprawne*, Kielce 2014, LEX/el 2019.
[50] R. Szczepaniak, *Cywilnoprawne i publicznoprawne instrumenty…*, p. 57.

government activities, between *imperium* functions and *dominium* functions will be difficult in many cases"[51].

It may also be that „an administrative event has civil-law effects, for the assessment of which civil law is applied"[52], and thus tax law. An example is the expropriation of real estate which concerns the municipal property (e.g. the expropriation of real estate owned by the municipality for the benefit of the Treasury). In essence, it consists in deprivation or limitation, by way of decision, and not as a result of a civil law contract (emphasis added), property rights, perpetual usufruct right or other property right on the real estate[53]. The expropriation of real estate may be carried out if public purposes cannot be achieved otherwise than by depriving or limiting the rights to the real estate and these rights cannot be acquired by contract[54]. The authority competent in matters of expropriation is the starost, who performs the task of government administration[55]. The doctrine unanimously indicates that the expropriation is imperious interference that encroaches upon the sphere of individual rights and freedoms[56]. The decision to expropriate property gives rise to civil law effects. It may cause them to arise, change or cease[57]. Despite the lack of a civil law contract, the transfer by order of a public authority or an entity acting on behalf of such an authority, or the transfer of goods in exchange for damages by virtue of the right to property, due to the effects it causes in the sphere of private law, constitutes the supply of goods, referred to in Article 5 (1) (1) of the VAT Law[58]. And the provision of Article 7 (1) (1) of the VAT Law, which is an implementation of Article 14 (2) (a) of Directive 2006/112 can be considered a *lex specialis*[59]. The VAT taxation, in the event of a compulsory transfer of ownership in exchange for compensation (explicitly intended by the EU legislator in Article 14 (2) (a) of Directive 2006/112), implements the principle of universality of taxation and not distorting the competition"[60].

Therefore, the answer to the question will be of fundamental importance for the municipality to be considered a VAT taxpayer, not so much whether the municipality concluded civil law contracts, but whether it works under conditions similar to

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[51] M. Bitner, *Prawne instrumenty ograniczania deficytu budżetowego i długu publicznego jednostek samorządu terytorialnego*, Warszawa 2016, LEX/el 2019.

[52] Ibidem.

[53] Compare Art. 112 (2) of the Law dated 21 August 1997 on real estate management (i.e. Journal of Laws of 2018, item 2204 with later amendments), further: l.r.e.m.

[54] Art. 112 (3) l.r.e.m.

[55] Art. 112 (4) l.r.e.m.

[56] J. Parchomiuk, *Charakter prawny roszczenia o zwrot wywłaszczonej nieruchomości*, „Samorząd Terytorialny" 2008, No. 1-2, p. 138.

[57] T. Woś, *Wywłaszczanie nieruchomości i ich zwrot*, LexisNexis 2011, LEX/el 2019.

[58] Art. 7 (1) (1) the VAT Law.

[59] Compare A. Wesołowska, *Wywłaszczenie jako czynność podlegająca opodatkowaniu podatkiem VAT. Glosa do wyroku TS z dnia 13 czerwca 2018 r., C-665/16*, LEX/el 2018.

[60] Judgment of the Supreme Administrative Court, composed of 7 judges, of 8.09.2014, I FSK 1211/12, item 12 (LEX No. 1504903).

private entities, subject to the same legal and market conditions[61]. If this is the case, the municipality should be a taxpayer, „which would coincide with the purpose of Article 13 (1) of Directive 112, which serves to maintain competition between legal and public entities performing similar activities"[62].

According to current, individual interpretations of national tax authorities, the position is presented that municipalities are VAT payers only in respect of all activities that are of a civil law nature, i.e. they are carried out by them on the basis of civil law contracts[63]. This would mean that the conclusion of a civil law contract by the municipality, in hypothetical conditions for the correct implementation and harmonization of Directive 2006/112, is tantamount to potential distortion of competition referred to in Article 13 (1). Acting as a party to such an agreement, the municipality would, as a rule, obligatorily act as a VAT taxpayer.

Such a statement does not exhaust the doubts indicated earlier regarding the existence in the operation of municipalities of legal institutions with mixed (public law and civil law) character, which after all do not always cause potential distortion of competition. Literature and case-law are generally consistent that when interpreting a given provision of law, one should, inter alia, take into account its relations to other provisions of a given normative act[64] and to the provisions contained in other legal acts[65]. Only the implementation of the directive interpreting the *argumentum a rubric* guarantees a complete and consistent reading of a given legal institution from the provisions law[66].

This means that in the first place, there should be an assessment of the occurrence, in a given transaction, of the premise, the independent nature of economic activity, referred to in Article 9 of Directive 2006/112 and Article 15 (1) and (2) of the VAT Law. This assessment precedes a further one conducted in the light of Article 13 (1) of Directive 2006/112[67]. Exclusion from the VAT system „is based on the assumption that the activity of a public entity is conducted on the basis of a kind of monopoly"[68]. Then „there is no threat of distortion of competition, as competition is in principle excluded"[69]. Unfortunately, it remains unexplained when the distor-

[61] Judgment of the Supreme Administrative Court of 26.05.2011, I FSK 769/10, item 8 (LEX No. 1055177).
[62] Ibidem.
[63] Individual interpretation of the Director of the National Treasury Information of 15.11.2019, 0113-KDIPT1-2.4012.455.2019.2.MO, https://sip.mf.gov.pl/ [access: 4.01.2020].
[64] Internal system interpretation. Judgment of the Supreme Administrative Court of 26.05.2011, II FSK 115/10 (CBOSA) and the publication cited therein: L. Morawski, *Zasady wykładni prawa*, Toruń 2010, pp. 152 et seq.
[65] Internal system interpretation. Ibidem.
[66] Ibidem.
[67] See opinion of Advocate General Niil Jääskinen of 30.06.2015, point 32 and the case-law cited in point 31 (ECLI:EU:C:2015:431).
[68] Ibidem, point 26.
[69] Ibidem.

tion of competition is so insignificant that the provision of Article 13 (1) second paragraph should not be used[70].

It can be concluded from the considerations and case law of the CJEU to date[71] that the terms contained in Article 13 (1) of Directive 2006/112 should be given autonomous and uniform interpretation throughout the European Union[72] and this provision, as an exception, must be interpreted strictly[73]. In practice, the answer to the question whether the municipality acts as a VAT taxpayer in a given transaction depends on the adjudication panel of which court, national or the EU?

In this context, it is necessary to analyse national judicates, as a current case study, considering the role of the CJEU for the interpretation of tax law. Ongoing tax disputes in the field of VAT affect the matters of municipalities in the field of public education and social assistance services.

The jurisprudence presents not an uncommon position that „the mere existence of a paid service" is not enough to state that an economic activity is being carried out within the meaning of Article 9 (1) of Directive 2006/112[74]. To determine whether a given service is provided for remuneration and constitutes an economic activity, it is necessary to examine "all the circumstances in which it is provided"[75].

For example, school nutrition is necessary for education and is not provided in order to generate additional income by making transactions in direct competition with the activities of commercial enterprises subject to VAT[76]. It is pointed out that the case of the municipality's operation in the sphere of the administrative *imperium*, the method of regulation pushes the civil law nature of the concluded contracts to the background. This applies if the parties to a legal relationship do not have full freedom as to their content, because they are restricted by administrative law[77]. Consequently, activities involving the delivery of meals in school (pre-school) canteens for a fee for students, teachers and non-pedagogical employees, are not taxable pursuant to Article 15 (6) of the VAT Law. The municipality does not act like an entrepreneur then, it carries out tasks imposed on it by legal regulations that determine the manner and scope of their performance. It is not possible to withdraw from their implementation, and the fees collected are not of a commercial nature, as their amount is regulated[78].

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[70] A. Wesołowska, *Opodatkowanie podatkiem VAT podmiotów prawa publicznego. Glosa do wyroku TS z dnia 19 stycznia 2017 r., C-344/15*, LEX/el. 2017.

[71] Judgment of the CJEU of 29.10.2015, C-174/14, point 53 (ECLI:EU:C:2015:733).

[72] Ibidem, point 54.

[73] Ibidem, point 55.

[74] Judgment of the Provincial Administrative Court in Poznań of 15.11.2019, I SA/Po 622/19 (CBOSA) and the judgment of the CJEU cited therein of 12.05.2016, C-520/14, points 24-30 and 34 (ECLI:EU:C:2016:334).

[75] Ibidem.

[76] Ibidem, and the judgment of the CJEU cited therein of 4.05.2017, C-699/15 (ECLI:EU:C:2017:344).

[77] Ibidem and the judgments of the Supreme Administrative Court of 6.11.2014, I FSK 1644/13; 9.06.2017, I FSK 1271/15 (CBOSA).

[78] Ibidem.

The price includes the costs of purchasing products necessary to prepare meals, and their amount is determined in agreement with the school unit[79]. These activities are not of an economic nature and do not lead to a distortion of the rules of competition. A different position is taken by tax authorities, for which it does not matter whether the remuneration covers the costs of the service and whether it creates profit for the taxpayer. Also, activities performed „at cost", or below these costs, are payable activities subject to the VAT Law, as long as the remuneration has been collected for them[80].

Also, in the opinion of the Supreme Administrative Court, tasks in the field of public education, „which include issuing a duplicate certificate or school ID, remain in the sphere of imperious activities"[81], therefore the decision of the interpretative body that by issuing duplicate documents, the municipality would operate on the basis of a civil law contract, since it has a higher priority than the persons concerned, is incorrect[82].

Similarly, in the case of social assistance benefits, they are not of a market nature[83]. In a situation where the municipality, via the MOPS (Municipal Social Welfare Centre), undertakes to perform activities specified in an administrative decision and charges fees based on the decision, the obligation to pay it is in fact not created by the contract referred to in Article 103 (2) of the Law[84], but an administrative decision to set a fee for staying in a nursing home. The purpose of such an agreement is not to enter into a civil law binding relationship to pay for staying in a nursing home, but to determine the amount of the fee paid by the obligated persons, i.e. the amount of which the obligation of payment has already been established.[85] The municipality provides services in the field of social assistance "As a public authority and not as a VAT taxable person"[86].

CONCLUSION

It has been shown that the correct determination of the municipality's tax status in the VAT system in a given transaction requires the use of different interpretation methods. Despite the unambiguous, against Article 13 (1) of Directive 2006/112,

[79] Judgment of the Supreme Administrative Court of 24.10.2019, I FSK 1248/17 (CBOSA).
[80] Individual interpretation of the Director of the National Treasury Information of 31.12.2019, 0112-KDIL1-1.4012.649.2017.11.AK, https://sip.mf.gov.pl/ [access: 4.01.2020].
[81] Judgment of the Supreme Administrative Court of 7.11.2019, I FSK 1551/19 (CBOSA).
[82] Ibidem.
[83] Judgment of the Provincial Administrative Court in Gliwice of 01.08.2019, I SA/Gl 1077/19 (CBOSA).
[84] Law of 12 March 2004 on social assistance (Journal of Laws of 2019, item 1507, as amended), hereinafter. l.s.a.
[85] See the judgment of the Provincial Administrative Court in Gliwice of 01.08.2019, I SA / Gl 1077/19 and the judgment of the Supreme Administrative Court cited in the justification of 19.06.2015, I OSK 62/14 (CBOSA).
[86] Ibidem.

normative content of Article 15 (6) of the VAT Law, the status of a municipality as a VAT taxpayer under the current EU regulation cannot be determined accurately.

Therefore, it is not surprising that in the dominant current of literature and readings, *prima facie*, statements prevail, about the need to amend EU law, which seems unrealistic[87]. It is suggested to specify the definition of public bodies at the EU level, which would be independent of the interpretation of national law, which is very difficult to achieve[88].

In a harmonized legal system, the conclusion of a civil law contract by a municipality is not always a *sine qua non* condition for it to obtain VAT taxable status. The interpretation of tax law includes the necessity of binding language directives with extra-linguistic ones[89]. Observing the currently issued individual interpretations of tax law, we can notice a different approach of tax authorities to legal texts. On the one hand, these bodies strictly interpret the language of Article 15 (6) of the VAT Law, when it comes to determining the taxpayer's status, based on the premise that the municipality performs activities under civil law contracts, and omit the external and functional systemic interpretation.

In current jurisprudence, it is noted that the distinction used by tax authorities, in the analysed matter, is not so unambiguous[90]. When applying the EU interpretation, the courts clearly take the position that whether the municipality is to be considered VAT taxable basically depends on whether it operates in conditions similar to private entities, subject to the same market and legal conditions. Pursuant to Article 15 (6) of the VAT Law, all transactions carried out by the municipality which performs public tasks, whose „non-taxation will not cause significant distortions of competition" will be subject to exclusion[91]. The lack of a civil law agreement does not always constitute a condition excluding a municipality from the group of VAT payers. This may also occur if a significant distortion of competition was possible, as evidenced by the regulation of Article 13 (1) of Directive 2006/112 and the harmonized content of Article 7 (1) (1) of the VAT Law.

To sum up, the conclusion of a civil law contract as a premise for the municipality to act as a taxable person of the tax on goods and services (VAT), should always

[87] See O. Henkow, *The VAT/GST Treatment of Public Bodies*, Wolters Kluwer 2013, pp. 182-183; B. Rogowska-Rajda, T. Tratkiewicz, *Opodatkowanie podatkiem VAT organów władzy publicznej w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej*, „Samorząd Terytorialny" 2018, No. 7-8, p. 66.

[88] O. Henkow, *The VAT/GST Treatment…*, pp. 183-185.

[89] M. Zieliński, *Dogmatyka a wykładnia prawa*, [in:] *Współczesne problemy prawa podatkowego…*, t. I, pp. 567-568.

[90] "Sometimes, there are difficulties with distinguishing the activities of these entities in the public law sphere from the sphere typical of economic activity, as evidenced by the multitude of questions referred to the CJEU by various Member States in this regard (...) – judgment of the Supreme Administrative Court of 28.10.2019, I FSK 164/17 (CBOSA).

[91] Ibidem.

be assessed against the background of applicable EU and national regulations, while maintaining a proper distance and perspective, including directives on legal interpretation and comparative statistics[92]. In a legal system based on harmonization, this is important in applying the law and seeking *de lege ferenda* solutions[93].

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[92] See, e.g., a comparative approach to the study of VAT law O. Henkow, *The VAT/GST Treatment...*; A Schenk, V. Thuronyi, W. Cui, *Value-Added Tax: A Comparative Approach*, Cambridge University Press 2015; K. James, *The Rise of the Value-Added Tax*, Cambridge University Press 2015.

[93] Compare J. Supernat, *Z zagadnień komparatystyki prawniczej*, Acta Universitatis Wratislaviensis No. 3833, „Przegląd Prawa i Administracji" 2018, No. 114, p. 232.

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