DOI: 10.52028/rbadr.v5i10.ART09.POL

ADR in Tax Disputes in Poland – The State of Play and Perspectives

Hanna Filipczyk

Dr. habil. in law, researcher at the University of Bialystok (Poland), judge at the District Administrative Court in Warsaw. Email: h.filipczyk@uwb.edu.pl or hanna.filipczyk@warszawa.wsa.gov.pl. ORCID: 0000-0002-6836-9109.

Abstract: This article examines alternative methods for resolving tax disputes in Poland. It discusses the current limited legal regulation in place, the proposed draft regulation from 2019 by the Committee for Codification of the General Tax Law (which did not take effect), and the emergence of consensual resolution practices despite the absence of a comprehensive regulatory framework. Between June and September 2021, the author conducted a limited empirical study involving in-depth interviews with eight representatives of taxpayers who had firsthand experience with the consensual resolution of tax disputes. The findings shed light on the practice of tax alternative dispute resolution (ADR). The article puts forth two main arguments. First, it contends that practical negotiations between tax authorities and taxpayers do occur. Second, it suggests that rather than hindering normativization (the process of establishing legal regulations), this phenomenon underscores the need for it.

Keywords: Tax Disputes. Tax Procedure. Empirical Study. Consensual Resolution Of The Case.

1 Introduction

The current-day shift towards responsive law[1] manifests in the growing interest in alternative methods of resolution of disputes, replacing or supplementing the adjudication mode. This interest is fuelled by both ethical and pragmatic considerations. In short, ADR procedures are perceived as more participatory and empowering the participants and less costly than traditional methods of dispute resolution, hence their appeal.[2]

1 SELZNICK, P. NONET, P. *Law and Society in Transition: Toward Responsive Law*. New York: Harper and Row, 1978.

2 Cf. THURONYI, V.; ESPEJO, I. *How Can an Excessive Volume of Tax Disputes Be Dealt With?*, How Can an Excessive Volume of Tax Disputes Be Dealt With? By IMF Legal Department, December, 2013, 2013, accessed 18 Jul 2023.

Tax disputes are no exception to this trend. ADR procedures – both in the broad and in the strict sense, as indicated below in this article – are often used to resolve tax disputes in common law countries (in the United States, the United Kingdom, Australia, and New Zealand). Still, their ambit currently spans also to other jurisdictions, such as Belgium, Italy, Portugal, and France.[3]

The article aims to present the state of play and perspectives on the development of ADR in tax disputes in Poland. It builds in particular upon the experience of the Committee for the Codification of the General Tax Law (*Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego*), which proposed the regulation of the tax ADR and the results of the limited empirical study performed by the author and consisting in in-depth interviews with the professionals (tax advisors and legal attorneys) representing taxpayers in tax procedures.

In what follows, a tax ADR is understood as any procedure whereby the resolution of the tax dispute between a taxpayer and a tax authority is attained based on the consensus between them – irrespective of the stage of the proceedings (administrative or court level) and legal form of the resolution of the case (traditional tax decision or agreement)[4]. The paradigmatic example of a tax ADR is mediation, which is the procedure where parties to the dispute aim to reach an agreement (a consensus) with the participation of a neutral and impartial third party as the intermediary between them (a mediator). However, a tax ADR defined as above does not need to be proceduralized (normativized) and individualized as an independent procedure (separate from general tax proceedings). A tax ADR procedure can instead be embedded in tax proceedings. The gist of tax ADR as a category – the common denominator of procedures encompassed by the above definition – is that a taxpayer and a tax authority negotiate the case resolution.

In the analysis, the dogmatic method and qualitative empirical method are used.

2 Tax ADR in Poland *de Lege Lata*

Presently in Poland at the administrative level, there is no tax ADR procedure of general application. Tax Ordinance, as the main act governing tax procedures (including adjudicatory procedure – tax proceedings), remains silent as to the possibility of basing the case resolution on the consensus between a taxpayer (party to the proceedings) and the tax authority.

[3] VAN HOUT, D. Is Mediation the Panacea to the Profusion of Tax Disputes?, *World Tax Journal 2018*, v. 10, no. 1, p. 43-97.

[4] For other definitions see, e.g., ZAROSYLO, V.; KAPLYA, O.; MURAVIOV, K.; MYNIUK, D.; MYSIUK, O. Application of forms of alternative dispute resolution in Ukraine, *Revista Brasileira de Alternative Dispute Resolution – RBADR 2022*, v. 4, n. 7, p. 234-236.

The consultative elements are included in the procedure for Advance Pricing Arrangement (APA; *uprzednie porozumienia cenowe*, regulated in Section III, articles 81-107 of the Act on resolving disputes on double taxation and conclusion of advance pricing agreements), the program of the co-operative compliance including real-time audit and agreed-upon so-called agreements (*porozumienia*) (*Program Współdziałania*; regulated in Section IIB – Articles 20s-20zr of the Tax Ordinance), and in the investment agreements (*porozumienia inwestycyjne*; regulated in Section IIC – articles 20zc-20zzb of the Tax Ordinance). However, these procedures do not qualify as tax ADR defined above. They do not presuppose or imply the previous state of a dispute (they are pre-audit procedures and prevent the occurrence of a dispute between a tax authority and a taxpayer rather than resolve it). These procedures are also limited in scope – they are not horizontal and do not apply universally to all tax cases (their objects and subjects are qualified).

The only formal and horizontal ADR procedure potentially applicable to tax disputes is mediation in the administrative court procedure – regulated in Articles 115-118 of the Act on Procedure before Administrative Courts (Section III Chapter 8 of the Act). The court mediation is available to taxpayers when they file a complaint against a tax decision to the first-instance administrative court. This institution has been in force since 2004, but after its introduction, it soon fell into disuse. According to the official statistical data published yearly by the Supreme Administrative Court, the respective regulation is a dead-letter law (e.g., in 2022, mediation took place only once[5]).

Though in Poland, tax proceedings are regulated separately from general administrative proceedings, affinities between the two remain apparent, mainly because the underlying legal relation between a regulator and a regulate is similar in these two domains. It is therefore interesting to note that from June 2017, the general administrative procedure encompasses the method of alternative dispute resolution: mediation (Chapter 5a of the Code of Administrative Proceedings)[6]. The official data on the practical import of the institution are, to the best of my knowledge, unavailable. According to the anecdotal data, administrative mediation has only limited to no success.

[5] *Informacja o działalności sądów administracyjnych w 2022 roku*, Warsaw, March 2023, available at www.nsa.gov.pl, accessed 18 Jul 2023.

[6] Employing ADR in administrative law is a wide-spread0 phenomenon, though not without its problems – DRAGOS, D.C.; NEAMTU, B. (EDS). *Alternative Dispute Resolution in European Administrative Law*. Heidelberg–New York–Dordrecht–London: Springer, 2014.

3 Proposal for the Tax ADR in the Draft Law Prepared by the Committee for the Codification of the General Tax Law

The Committee for the Codification of the General Tax Law was appointed by the Prime Minister of the Republic of Poland in November 2014 and tasked with elaborating a new tax ordinance – to replace the one currently in force. The Committee was composed of tax academics, tax advisors, tax officials, and tax judges.

The Committee worked for five years towards this end. The resulting draft new ordinance included two chapters dealing with tax ADR: "Tax agreement" and "Mediation" (chapters 10 and 11). These two newly proposed institutions were among the flag ideas of the project. The Committee presented these procedures as a breakthrough change in the procedure, and the audience responded to them with significant interest.

Without going into excessive details, it is worthwhile to outline the main features of the proposed procedures.[7] The draft provided that a taxpayer and a tax authority can make a so-called "tax agreement." They conclude a tax agreement "within the boundaries of the law" by making settlements, in particular where doubts concerning facts of the case are difficult to overcome, where the further effort of evidence gathering is impracticable or cost- or time-consuming, in the valuation issues, in cases where relief in the payment of tax is sought by a taxpayer, and a tax authority is to decide on the type of relief to be applied and on its conditions (e.g., payment in installments vs. waiver of payment). The list of possible areas for the conclusion of a tax agreement was not exhaustive – the Committee provided it for illustration and to encourage the employment of the institution of tax agreement in practice. The draft further stated that a tax agreement cannot consist in settling directly the determination of the tax due. This condition intended to exclude bargaining (direct negotiating figures of tax) – to keep the discussion about the case resolution to the merits.

A tax agreement was binding on a tax authority – determinative of a tax decision. This status also implied that a tax agreement was intended not to replace a tax decision (as an alternative act closing the proceedings) but to determine its substantive content. The proposal was conservative, to respect the existing procedural framework and to retain the possibility of judicial review of the case resolution wherever a party (a taxpayer) files a complaint to the administrative court.

The draft law proposed by the Committee also regulated tax mediation. The proposal stated that mediation could be conducted "in cases where a tax

[7] Cf. also ETEL, L.; POPŁAWSKI, M. The Assumptions of a New Tax Ordinance in Poland. *Public Governance, Administration and Finances Law Review*, v. 1, no. 1, p. 30-48, 2016.

agreement can be concluded and with the aim to conclude it." Therefore, the institution of tax agreement was embedded in the institution of mediation. The draft mediation was premised upon traditional principles: it was voluntary for both parties in dispute (a taxpayer and a tax authority), and a mediator was to be neutral and impartial.

The work of the Committee (with amendments introduced by the Ministry of Finance) was presented by the Council of Ministers as the bill to the Parliament in June 2019.[8] Soon afterward, parliamentary works were discontinued. Although selected parts of the project are now being reutilized („recycled") by the Ministry of Finance in their bill, this is not the case with the tax ADR proposed by the Committee. Consequently, it appears that the decision-makers have abandoned their idea for good.

4 Reception of the Committee Proposal

The idea of the tax ADR normativization – i.e., of providing an explicit legal framework for it – has been dropped primarily for reasons unspecific to it. This idea simply shared the fate of the failure of the entire new tax ordinance project. Still, it is worthwhile to investigate the response to the proposal. The draft has been subject to numerous consultations, informal (among tax academics, the Ministry of Finance, and tax administration) and formal (within the official public consultation process, under the Polish law mandatory for a draft law). Additionally, the Committee members presented it at numerous academic events, where it received feedback from academics, tax authorities, tax advisers, and tax judges.[9]

The draft of tax ADR received mixed – and polarised – feedback. Those in favor of it highlighted the positive impact consensual methods of dispute resolution may have on the level of participation of taxpayers in tax proceedings (who, thanks to such methods, can gain desirable "process control"[10]) and, consequently, their favorable influence on voluntary tax compliance. The very same considerations also motivated the Committee to propose tax ADR. Those against the tax ADR raised constitutional reservations, related to the rule of law and equality, and the alleged impracticality of the proposal. The critics stressed that the previous failure of administrative court mediation substantiated their reservations.

8 Document no. 3517, VIII term, available at www.sejm.gov.pl, accessed 18 Jul 2023.

9 For a detailed discussion of consultations, see: FILIPCZYK, H. *Alternative Methods of Resolving Tax Disputes in Poland* (in:) *Contemporary Issues in Tax Research*, eds. MULLIGAN, E.; OATS, L., Vol. 3, Birmingham: Fiscal Publications, 2019, p. 87-120.

10 THIBAUT, J.W.; WALKER, L. *Procedural Justice: A Psychological Analysis*. Hillsdale: L. Erlbaum Associates, 1975.

Constitutionality issues raised by the critics can be conceptualized as related to tax justice in its two aspects: legality (lawfulness, the rule of law) and equality. Under Article 2 of the Constitution, Poland is a democratic state of law. Under Article 217 of the Constitution, the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute. Under Article 84, everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. These three provisions are the bedrock of the formalistic approach to tax law, typical for the Polish legal culture. Under this approach, tax rules are supposed to be strictly provided by the statute. Seemingly, such construal of the cited provisions of the Constitution leaves little or no room for tax authorities' discretion in tax law application. This rigor also serves the interest of equality: it ensures consistency in tax law application which results in like cases being treated alike.

An aspect of the legality problem is the alleged incompatibility of tax ADR with the current model of tax proceedings. This model postulates that tax proceedings are inquisitorial (as opposed to adversarial). It also postulates adherence to the principles of legality and objective truth and the asymmetry between a tax authority and a party to the proceedings: in the tax decision, the former unilaterally determines the legal situation of the latter. ADR procedures, on the other hand, seem to require the equality of parties in dispute. The skeptics feared also the privatization of tax disputes. Interestingly, similar criticisms related to the incompatibility between ADR and the model of proceedings are raised regarding general administrative mediation.[11]

The objections shortly outlined above refer to the fundamentals and allude to the Montesquieu ideal of "mechanical jurisprudence"; they downplay the omnipresence of discretion in law and the impossibility of excluding "human factor" in law application, to which tax law is no exception. They also overemphasize the dominant position of a tax authority. I will come back to these issues below.

Importantly, in their overall appraisal of the tax ADR, the critics' conservative outlook on tax procedures has not been balanced out by pragmatic considerations. In other words, the skeptics did not expect that any practical gains could be derived from negotiating the consensual resolution of a tax case. The critics were heavily influenced by the perception of antecedent or concurrent ADR procedures: mediation in the administrative court proceedings and mediation in administrative

[11] SUWAJ, R. Mediation as a new form of settling administrative matters in Poland. *Przegląd Ustawodawstwa Gospodarczego*, v. LXXII, no. 12, p. 18-26, 2019.

proceedings, as failures. Consequently, they have seen ADR as lacking credibility, as another unpromising and impractical experiment, exotic to the Polish legal culture of administrative and tax law, and not as a potentially effective and efficient way to deal with tax disputes.

The opinions about the tax ADR varied characteristically: along the lines of the role of respondents in the tax proceedings. The proposal received mixed feedback from tax academics, rather negative feedback from the tax administration, somewhat positive feedback from tax advisers, and positive feedback from business organizations, and trade unions.[12] Tax officials did not see at the time the practical import of the tax ADR and viewed them as leading only to the lengthening of the proceedings and as a "costly gift" for taxpayers or a "dispensable exercise in interpersonal communication" (the quotes come from their statements).

5 Limited Empirical Study: Methodology and Aim

I argue that the current tax practice of "negotiating tax deals" contrasts with these doubts and reservations. Though any attempt to put a number on this practice – quantify it – would be unwarranted, it is safe to claim that negotiations between taxpayers and tax authorities in dispute are at least sometimes conducted – even without a legal framework.

To verify this contention, I conducted a limited empirical study using the qualitative method of in-depth interviews (IDI). Between June and September 2021, I interviewed eight professionals: tax advisers and attorneys from tax consultancy firms in Warsaw, representing the clients in tax procedures, who declared that they engage in negotiations with tax authorities whereby the settlement of the case is sought. The interviews, each of a duration of approximately one hour, were registered (upon interviewees' consent), anonymized, transcribed, and coded.

The aim of the study was twofold: first, to investigate the scope and structure of the practice of consensual resolution of tax disputes, and second, to investigate the perceptions of the interviewees of such practice in the context of tax justice (to establish how this practice relates in their view to standards of legality, equality, and procedural fairness).

Besides the study, I discussed the practice of negotiations (which can be referred to as tax ADR *de facto*) with tax professionals on numerous informal occasions, also in my capacity as a member of the Committee.

An important caveat is that IDI, due to its nature, does not provide insight into *facts* but into the *perceptions* of respondents. The relation of perceptions to facts

[12] FILIPCZYK, H. *Alternative Methods*...

is indirect. Consequently, IDI potentially can offer a distorted picture of reality. I am also aware that my study was limited (in the so-called exposure, impacted in particular by the number of respondents[13]).

One can safely assume, though, that where the study participants declare that negotiations take place, they do take place (otherwise, respondents would grossly misrepresent the reality, which – absent fundamental cognitive distortions – should not be assumed). At the same time, the variety of their accounts of the negotiation practice can be partly attributed to (and explained by) the variety of their perceptions. The study does not permit to conclude about the scale of tax ADR *de facto*.

6 Main Results of the Empirical Study

The study revealed that – according to the interviewees – despite the lack of an explicit formal basis in the Tax Ordinance, negotiations with the tax authorities are conducted. The answers given by the respondents (participants of the study) sit in the continuum between two opposing statements given by my interlocutors who refused to participate formally in the study: "I never make deals with tax authorities" *versus* "Now in the customs-tax office everything is negotiated." In my view, to engage in the tax ADR (whether formal or informal), one has to know that negotiations can be conducted, be willing to conduct them, and be able to conduct them (i.e., have appropriate know-how). These conditions have to be fulfilled conjunctively. The scale of negotiations is, therefore, presumably limited; still, the phenomenon is present and worthy of scholarly attention.

The primary aim of talks with tax officials is not negotiations in the strict sense but ensuring open communication between a taxpayer and a tax official. Participants of disputes wish to exchange arguments and views to know and acknowledge their respective positions. Yet such talks also have the goal of reaching a consensus – to effectively resolve the case to the merits.

Negotiations are informal; obviously (as mentioned above), there is no explicit legal basis for them in the procedure, but they are not formalized spontaneously by their participants. Usually, there is no trace of negotiations in the case files – at most, a tax official writes a protocol, confirming that a meeting took place but giving no details as to the negotiation process.

Several interviewees stressed that a situational pretext is needed to initiate talks. Standard activities explicitly provided for in the procedure, such as the opportunity offered to a taxpayer to review the case files and comment on them

[13] For exposure in qualitative research, see: SMALL, M.L.; MCCRORY CALARCO, J. *Qualitative Literacy*. Oakland: University of California Press, 2022.

(before the closure of the proceedings), give such pretext. The sooner talks begin, the more likely they will lead to a consensus. The initiative is usually on the part of a taxpayer (their legal representative), but – according to the interviewees – the attitude of a tax official is crucial for the success of talks. The respondents varied in opinions about this attitude (or attitudes), or – more generally – about tax officials' "bad" or "good" will. The respondents may fall prey to the stereotype of a tax official each of them has.

The scope of negotiations ranges across issues, with the particular position of transfer pricing issues in income taxes as the mainstream subject of negotiated agreements. In the TP area, the "right answer"[14] to a legal question central to the resolution of the case is typically within the range of values, which makes it particularly amenable to negotiation.

Parties negotiate the outcome of the case and minor, technical, or procedural issues arising during tax proceedings (such as the timescale and sequence of proofs, the scope of explanations to be provided by a taxpayer, etc.). Nothing seems to be out of scope upfront: even tax avoidance issues can be subject to discussion. Interviewees stressed that it could not be established in the abstract (*in abstracto*) which points can be discussed towards a consensus since contentious issues can divulge their potential for negotiation during talks. They also highlighted that particularly liable to negotiation are "grey areas" of law or facts, non-binary questions, questions of fact or law other than evident. A good starting point is an inconsistency in the administrative court jurisprudence because it shows the discursive potential of the case and makes participants of the dispute sensitive to risks inherent in depending on the court for future case resolution. When confronted with such inconsistencies in judicial practice, parties sometimes prefer to negotiate the deal rather than place the resolution in the hands of tax judges.

Parties engage in the game of negotiations or "negotiation dance" (it is symptomatic that the word "game" has often been used spontaneously by the respondents). The interviewees reported that they prepare the strategy of negotiation before its commencement, inflate their opening position, are partial (intentionally biased) in presenting the arguments (e.g., the arguments based on jurisprudence – they select verdicts speaking in favor of their position), concede a minor irregularity to close the procedure before a tax authority discovers a major irregularity, etc. They attribute the same strategic approach to tax officials. "Package deals" are possible: conceding an issue by one party to a dispute in return for conceding another issue by the other.

[14] DWORKIN, R. *Taking Rights Seriously*. Cambridge, Massachusetts: Harvard University Press, 1977.

Interviewees were less vocal about the second group of questions I asked: concerning how negotiations relate to tax justice. In their perception, the central aspect of justice relevant to tax ADR (and taxation in general) is legality (lawfulness). Respondents underlined that the principal value of reference, and the leading dimension of justice in their perception, is the rule of law. The concept of paying the right amount of tax, i.e., the amount set in the law, is held firmly. They see this concept as the requirement of the funding principle of Polish law but also as their personal and professional responsibility. At the same time, they problematize the normative content of the law – see this content (i.e., what the law requires) as an enigma, highlighting the growing complexity and obscurity of present-day tax law.

According to the respondents, negotiations with tax authorities are advantageous because of their time- and cost-effectiveness and elimination of outcome risk inherent in resolving the dispute at the court level. They favorably commented on the pragmatism of tax authorities present when the latter are eager to negotiate – as a token of responsibility for the interest of the state budget. They positively value the consensus between a taxpayer and a tax authority. It seems that this value is, in their eyes, not only instrumental but intrinsic as well.

The majority of interviewees (except one) called for legal regulation providing clear grounds for tax ADR. The expected advantages of such regulation are that it would – in respondents' view – open wider the channels of communication with tax authorities, dissipate doubts as to the legality of this practice, enhance the sense of legal security for both parties to the dispute and ensure more transparency in the deals. In particular, legal regulation should ensure that the negotiated deals are honored – now, this operates only based on gentlemen's agreement and mutual trust (the trust which, admittedly, is rarely – if at all – disappointed) with no legal guarantee that tax authorities will respect the deal in tax decision and that disclosure of facts during talks will not be then played against a taxpayer at the later stage of proceedings. However, one interviewee, and several participants of informal consultations, showed ambiguity in answering this question. While they appreciated the advantages of legal regulation, they also feared that regulating tax ADR could exert a freezing effect on the current practice of negotiations developing organically (as one of the discussants put it, the normativization is likely to "kill" negotiations).

7 The Legal and the Pragmatic: the Discussion

The study, though limited in exposure, invites us to reconsider doubts and reservations against tax ADR *de iure* – because negotiations are conducted *de facto*.

The respondents' (practitioners') views on law support theoretical arguments polemical to the "mechanical jurisprudence". The model of tax proceedings proves to be sufficiently flexible to accommodate the negotiations. The fact that tax disputes are sometimes concluded consensually confirms that they can be so concluded. Thus, this fact falsifies the contention that tax negotiations are incompatible with the model of tax proceedings. The tension with the model is apparent but not necessarily factual – it is not unsurmountable (at least in the perceptions of the respondents).

There are two competing concepts of tax proceedings, which illustratively can be referred to as "thin" (or parsimonious) and "thick" (or rich). The "thin" concept reduces the proceedings to the act of legal syllogism: establishing facts of the case and applicable law and subsuming facts under the law. The "thick" concept, while admitting the legal syllogism as the general structure of law application or the "technical ladder" – "a support frame of our cognitive processes"[15] – sees tax proceedings as the arena of the exchange of arguments. It gives flesh to the bone of the syllogism. The "thick" concept is, therefore, the extension of the "thin."

Traditional outlook on substantive and procedural tax law offers their "thin" idea. It neglects the inevitable presence of the complexity and discretion in applying tax law – which is in tension with the widely acknowledged fact that tax law epitomizes the complexity and obscurity of present-day legal regulation. The "thin" concept is dogmatic: it *a priori* excludes discretionary decision-making from the area of tax law. But such exclusion cannot be performed by *fiat*, as discretion is intrinsically present in the law application – and this also concerns the application of tax law.

Contrary to popular views, above cited Articles 2, 84, and 217 of the Constitution do not oblige us to subscribe to the "thin" concept of tax proceedings. Moreover, the principle of active participation of a taxpayer and the principle of objective truth governing tax proceedings (Articles 123 and 122 of the Tax Ordinance) speak for the "thick" concept. This is self-evident for active participation. For the principle of objective truth, it should be noted that facts and laws relevant to the case are more readily disclosed in the communication with a taxpayer than in the "solipsist" position of a tax authority. In the academic accounts of procedural fairness, this double role of participation is highlighted: a party (a taxpayer) is not only entitled to it but also is placed in an excellent position to deliver proofs and arguments shedding light on the "truth" of the case.[16]

[15] BROŻEK, B. *The Legal Mind. A New Introduction to Legal Epistemology*. Cambridge: Cambridge University Press, 2019, p. 113.

[16] Cf., e.g., GALLIGAN, D. *Discretionary Powers. A Legal Study of Official Discretion*. Oxford: Oxford University Press, 1986, p. 328.

The study shows that participants in tax disputes see the discursive potential in their cases, and they try to play it out for their benefit. It is the role of a tax authority to ensure, to the maximum extent attainable, the closeness of real-life dispute to the Habermasian "ideal speech situation" (bearing in mind that "ideal speech situation" is only the regulative and aspirational idea).

What is more, negotiations *de facto* show that the procedures of tax ADR can be effective and efficient instruments of case resolution – contrary to previous negative experiences with similar consensual procedures. The organic development of negotiation practice implies that it serves the purposes of the disputing parties: it is useful for them. Otherwise, taxpayers and tax officials probably would not be inclined to negotiate (assuming that they act rationally). Tax ADRs are not doomed to fail – as the critics feared.

Therefore, importantly, the practice of tax negotiations with tax authorities attests to the pragmatic usefulness of tax ADR. This finding opens the discussion to the questions of *when* and *why* it is pragmatically useful (or perceived as useful by the involved parties). It would be unjustified to claim that tax ADR is beneficial, in legal and pragmatic terms, in every case. Decision-makers should address these critical questions in drafting the law.

The anatomy of tax disputes is more complex than the formalism suggests. Despite the formal dominant position of the tax authority in tax proceedings, the principal and guiding relation of dependence is that both the tax authorities and taxpayers are subjected to the law. In this perspective, their position is on par.[17] This dependence manifests in the judicial review of tax decisions – the administrative court procedure is adversarial, and the court is the arbiter deciding which party is right. Ultimately, the law is what the court decides.

Moreover, taxpayers and tax authorities are interdependent. They have interests in common and interest in conflict. The essential shared interest is tax compliance: their common goal is that the tax paid by a taxpayer corresponds with the tax due. At the same time, it would not be prudent to ignore the structural conflict between them, which can be encapsulated in simple terms: a taxpayer wishes to pay less tax, and a tax authority wishes him to pay more tax.

Above all, the substance of the settlement (deal between a taxpayer and a tax authority), and not the mere fact that it was reached through negotiation, should be judged in the light of the rule of law (the standard of legality). The legality of the outcome of a disputed case is not dependent on whether the resolution of the case was reached unilaterally by a tax authority or via a consensus with a taxpayer.

[17] BRZEZIŃSKI, B. *Wstęp do nauki prawa podatkowego*. Toruń: Dom Organizatora, 2001, p. 102-103.

In tax proceedings, the legal and the pragmatic are interlinked. Tax administration activities are to be effective and efficient. This obligation is rooted in the Constitution. Therefore tax procedures should be conducted in a way that ensures the prudent allocation of resources. Hence the self-reporting method, for the most taxes, and a (widely known and valid across many jurisdictions) fact that tax audits are addressed only to a minority of taxpayers. Tax ADRs are – again – only the extension of the pragmatic attitude of tax administration already present in tax proceedings.

Summarising, the study invites us to reconsider from a legal and pragmatic point of view the criticisms addressed to the idea of the regulation of tax ADR in Polish law. On the face of it, the results of the study shift the burden of argumentation back to critics. It is for them to argue that despite tax ADR *de facto* taking place, regulation is not needed.

8 Call to Action: Reasons

As observed already in 1996, "[a]lthough few empirical studies have been done, there is good reason to think that bargaining is a common part of administrative processes".[18] The results of my empirical study urge us to consider whether we are better off with or without the regulation of the tax ADR – knowing that in either case, negotiations between tax authorities and taxpayers are, and presumably will be, conducted.

I believe that the regulation is needed – for four reasons. First, discretion is part and parcel of the practice of law application. Discretion is inevitable and difficult to manage. An ever-lasting academic question, symbolized by the debate between H.L.A. Hart and R. Dworkin, is whether discretion is fully constrained or not (i.e., whether its existence is real or only apparent – *prima facie* – because of the operation of legal principles which eliminates all areas of indeterminateness in law). Be that as it may, an important tool for putting discretion under constraint is transparency. The negotiated deals between taxpayers and tax authorities should be supported by reasons expressed in writing; the resulting document should be included in the case files. Moreover, the negotiated deals should be subject to usual scrutiny by the courts (upon the taxpayer filing the complaint) – since judicial review is an essential element of the rule of law. For all that to be possible, tax agreements (deals) have to be "visible": overt and not covert.

Second, the regulation is vital for ensuring legal security for taxpayers. When a tax authority makes a settlement, it should be obligated to honor it in the tax

[18] GALLIGAN, D. *Due Process and Fair Procedures*. Oxford: Clarendon, 1996, p. 282.

decision. Absent legal regulation, taxpayers cannot be sure this will be the case, and this uncertainty – naturally – weakens also their bargaining position.

Third, legal regulation is needed to ensure even-handedness and equality in tax proceedings – in the formal aspect of access to advantageous procedural instruments. Tax administration should communicate explicitly the conditions for a dispute to qualify for tax ADR and employ these conditions consistently toward all interested taxpayers. The general public should know that there is a procedural option to enter negotiations with tax authorities. This should no longer be the insider or selective knowledge since this state of affairs in itself gives rise to inequality: to uneven distribution of procedural rights.

Fourth, tax ADR should include mediation. The respondents participating in the IDI did not see mediation as a valuable method of dispute resolution or even were not sufficiently knowledgeable about the nature of it. Still, the presence of a neutral and impartial third-party intermediary between a taxpayer and a tax authority can be an important factor in maximizing the procedural fairness (of the process) and quality of the negotiated agreement (as the outcome of this process). This will be so particularly where taxpayers themselves lack technical knowledge of tax law. In such cases, a mediator could ensure effective communication between them and tax authorities, encouraging the latter to "translate" their message into lay terms.

9 Conclusion

In the current Tax Ordinance, there is no procedure for consensual resolution of tax disputes. The attempt to provide legal regulation of tax ADR in Poland, made by the Committee for Codification of the General Tax Law, failed. Yet despite the lack of a clear legal framework negotiations between taxpayers and tax authorities are conducted. This practice was confirmed by the limited empirical (qualitative) study: in interviews with legal representatives engaged in real-life tax disputes. As I claimed, this phenomenon is, above all, the byproduct of the omnipresence of discretion in tax law application, and of the complicated interplay of interests between taxpayers and tax authorities. Clearly, parties in dispute see the value in negotiating deals.

I also claimed that if this is the case, tax ADR should be regulated in procedural law. Deals between taxpayers and tax authorities should no longer be kept in obscurity. Turning a blind eye to the practice does not make it disappear but rather – naturally – makes us lose sight of it. Tax ADR *de facto* should be regulated as *de iure* to shed light on their practical operation and constrain the managerial discretion of tax administration.

Given the valuable insight offered by my interviewees, I believe that public consultations of any potential future legal regulation of tax ADR should involve those having hands-on experience: professionals who have been engaged in actual negotiations between taxpayers and tax authorities. Organically developed practice of consensual resolution of tax cases serves as a natural experiment – the results of this experiment, with corrections mandated by the Constitution, should be structured into legal provisions.

It is difficult to predict whether the idea of tax ADR, elaborated in the work of the Committee, will be revived. Yet I believe that the more we make tax ADR *de facto* a public knowledge, the more likely the decision-makers will care to regulate it in the law. I hope that this paper contributes to disseminating such knowledge.

Acknowledgments

The article is supported by the National Science Centre in Poland under research project no. 2018/31/B/HS5/01730 “Is negotiating taxes fair? Alternative methods of tax disputes resolution in light of constitutional standards”.

References

BROŻEK, B. *The Legal Mind. A New Introduction to Legal Epistemology*. Cambridge: Cambridge University Press, 2019.

BRZEZIŃSKI, B. *Wstęp do nauki prawa podatkowego*, Toruń: Dom Organizatora, 2001.

DRAGOS, D.C.; NEAMTU, B. (EDS). *Alternative Dispute Resolution in European Administrative Law*. Heidelberg–New York–Dordrecht–London: Springer, 2014.

DWORKIN, R. *Taking Rights Seriously*. Cambridge, Massachusetts: Harvard University Press, 1977.

ETEL, L.; POPŁAWSKI, M. The Assumptions of a New Tax Ordinance in Poland. *Public Governance, Administration and Finances Law Review*, v. 1, no. 1, p. 30-48, 2016.

FILIPCZYK, H. *Alternative Methods of Resolving Tax Disputes in Poland* (in:) *Contemporary Issues in Tax Research*, eds. MULLIGAN, E.; OATS, L., Vol. 3, Birmingham: Fiscal Publications, 2019, p. 87-120.

GALLIGAN, D. *Discretionary Powers. A Legal Study of Official Discretion*. Oxford: Oxford University Press, 1986.

GALLIGAN, D. *Due Process and Fair Procedures*. Oxford: Clarendon, 1996.

Informacja o działalności sądów administracyjnych w 2022 roku [*Information on activities of administrative courts in 2022*], Warsaw, March 2023, available at www.nsa.gov.pl, accessed 18 Jul 2023.

SELZNICK, P.; NONET, P. *Law and Society in Transition: Toward Responsive Law*. New York: Harper & Law, 1978.

SMALL, M.L.; MCCRORY CALARCO, J. *Qualitative Literacy*. Oakland: University of California Press, 2022.

SUWAJ, R. Mediation as a new form of settling administrative matters in Poland. *Przegląd Ustawodawstwa Gospodarczego*, v. LXXII, no. 12, p. 18-26, 2019.

THIBAUT, J.W.; WALKER, L. *Procedural Justice: A Psychological Analysis*. Hillsdale: L. Erlbaum Associates, 1975.

THURONYI, V; ESPEJO, I. *How Can an Excessive Volume of Tax Disputes Be Dealt With?*, How Can an Excessive Volume of Tax Disputes Be Dealt With? By IMF Legal Department, December 2013, accessed 18 Jul 2023.

VAN HOUT, D. Is Mediation the Panacea to the Profusion of Tax Disputes? *World Tax Journal*, v. 10, no. 1, p. 43-97, 2018.

ZAROSYLO, V.; KAPLYA, O.; MURAVIOV, K.; MYNIUK, D.; MYSIUK, O. Application of forms of alternative dispute resolution in Ukraine, *Revista Brasileira de Alternative Dispute Resolution - RBADR*, v. 4, n. 7, p. 231-240, 2022.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

FILIPCZYK, Hanna. ADR in Tax Disputes in Poland: the State of Play and Perspectives. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 05, n. 10, p. 205-220, jul./dez. 2023. DOI: 10.52028/rbadr.v5i10.ART09.POL.