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VAT taxation of municipalities in Poland and France – a legal and comparative study

Opodatkowanie gmin podatkiem VAT w Polsce i we Francji – studium prawnoporównawcze

Abstract

The purpose of this article is to analyse the VAT taxation of municipalities in Poland and France. In both Poland and France, the taxation system is subject to harmonisation with European Union regulations. In these countries, there are separate regulations on municipal taxation, which assume taxation of municipalities on general principles, but also provide for the possibility of exempting municipalities from value added tax. The practice in this respect in France has been regulated by law, while in Poland it has been developed through the jurisprudence of the Court of Justice of the European Union and the Supreme Administrative Court. The vague tax regulations in Poland lead to numerous disputes between municipalities and the tax administration. In addition, in the French system, the commune has the right to resign from the VAT exemption and settle under the general rules. In France, municipalities are entitled to receive subsidies from the Value Added Tax Compensation Fund (FCTVA). This gives effect to the principle of value-added tax neutrality and reduces the number of disputes with the tax administration, while at the same time satisfying the interests of local communities much better.

Keywords: value added tax, separate VAT taxation of municipalities, activities exempt from VAT in Poland and France, subsidies for municipalities in France

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Streszczenie

Celem artykułu jest analiza opodatkowania podatkiem VAT gmin w Polsce i we Francji. Zarówno w Polsce, jak i we Francji system opodatkowania podlega harmonizacji z przepisami Unii Europejskiej. W tych państwach istnieją odrębne regulacje dotyczące opodatkowania gmin, które zakładają opodatkowanie gmin na zasadach ogólnych, ale również przewidują możliwość zwolnienia gmin z podatku od wartości dodanej. Praktyka w tym zakresie we Francji została uregulowana przepisami prawa, natomiast w Polsce wypracowana poprzez orzecznictwo Trybunału Sprawiedliwości Unii Europejskiej i Naczelnego Sądu Administracyjnego. Mało precyzyjne regulacje podatkowe występujące w Polsce prowadzą do licznych sporów między gminami a administracją skarbową. Poza tym w systemie francuskim gmina ma prawo zrezygnować ze zwolnienia z VAT-u i rozliczać się na zasadach ogólnych.

Słowa kluczowe: podatek od wartości dodanej, odrębne opodatkowania gmin VAT-em , czynności zwolnione z podatku od towarów i usług w Polsce i we Francji, dotacje dla gmin we Francji

General remarks

Value tax operates throughout the world, except in the United States. It is also a public levy that applies in all countries of the European Union. As this tax is subject to harmonisation on the basis of Directive 112/06[1] and the jurisprudence of the Court of Justice of the European Union, it is worth tracing the solutions in other countries. In addition to problems related to VAT evasion, a significant problem in Poland is the taxation of municipalities with the tax on goods and services, which leads to numerous disputes between local government bodies and the tax administration and creates a state of uncertainty in the application of the law. For this reason,

it is worthwhile to analyse the solutions adopted in France, which regulate the manner of settling this tax in a partially different way, in order to consider a change in regulations and practice and lead to the simplification of this levy in Poland. Undertaking legal and comparative research in this area is fully justified. The research problem is the comparison of Polish and French solutions concerning the taxation of municipalities with the value added tax.

The taxation of municipalities by the goods and services tax in Poland

Municipality and municipal budget units

One of the fundamental disputes between municipalities and tax authorities was the recognition of the municipality as an independent tax entity. The tax authorities considered municipalities and budgetary establishments as separate taxpayers. In contrast, it was more favourable for well-organised municipalities to recognise the municipality as an independent taxpayer. In its resolution of 24 June 2013, ref. I FPS 1/13[2], the Supreme Administrative Court took the position that, in the light of Article 15(1) and (2) of the Value Added Tax Act of 11 March 2004[3], municipal budget units are not taxpayers of value added tax.

The reasoning used by the Supreme Administrative Court in the justification of resolution I FPS 1/13 in relation to budgetary entities is evidence that the Supreme Administrative Court applies the same interpretative rules used by the Court of Justice of the European Union in interpreting the legislation, taking into account the different language versions of EU law and, in view of its ambiguity, referring to the purpose of the provision. The method of proof takes into account the benchmark of pro-EU interpretation in terms of the conditions that entities should meet in order to be considered as independent taxpayers (Wiatrowski, 2021, pp. 238–339).

In its judgment of 29 September 2015, case number C 276/14 in the case of the Municipality of Wrocław v Minister for Finance[4], the CJEU expressed the view that Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that bodies governed by public law, such as the municipal budgetary units at issue in the main proceedings, cannot be regarded as taxable persons for value added tax because they do not satisfy the criterion of autonomy provided for in that provision.

The next problem in terms of subjectivity was whether budget establishments are a taxpayer separate from municipalities, or whether the municipality is the taxpayer that also represents the budget establishment. The Supreme Administrative Court, in a landmark resolution of 26 October 2015, ref. I FPS 4/15[5], held that it is the municipality and not the local government budgetary establishment that is an independent taxpayer of value added tax. In the operative part of the resolution, it was assumed that, in the light of Articles 15(1) and 86(1) of the Value Added Tax Act of 11 March 2004[6], a municipality has the right to deduct input tax from purchase invoices related to the implementation of investments that were subsequently transferred to a municipal budgetary establishment performing the municipality's own tasks entrusted to it, if the investments are used for sales subject to value added tax.

In the justification of the resolution, the Supreme Administrative Court concluded that:

1) a local government budgetary establishment does not have legal personality – it acts on behalf and on account of the entity that established it, and the head of the establishment acts single-handedly on the basis of a power of attorney granted;

2) the local government budgetary establishment performs only its own tasks of the local government unit in the field of municipal management of a public utility activity;

3) the separation of property for the benefit of the local government budgetary establishment is of organisational nature only; the property remains under the direct authority of the local government unit, which determines the principles of management of the property separated for the needs of the establishment;

4) liability for the liabilities of the local government budgetary establishment shall be borne by the local government unit that established it; the local government unit shall also assume the liabilities of the budgetary establishment in the event of its liquidation.

Centralisation of municipal accounts (primary and secondary)

It is to be welcomed that the legislator decided, in order to implement the described CJEU judgment, to make legislative changes and lead to the taxation of the municipality as a single entity. As of 1 January 2016, a package of changes introduced by the Act of 9 April 2015 amending the Act on Value Added Tax and the Act – Public Procurement Law entered into force.[7] In particular, the provisions on the manner of calculating the ratio of input VAT deduction were amended. The issuance on 17 February 2016 by the Ministry of Finance of an Information Brochure on the rules for the deduction of VAT by taxpayers engaged in mixed activities should be viewed positively. A broader clarification of doubtful issues in connection with the entry into force of the aforementioned Act was dealt with by J. Pęczak-Czerwińska in the monograph Pre-coefficient of input VAT deduction (Pęczak-Czerwińska, 2016, p. 257).

The legal regulations contained in the analysed act should be classified as complicated, which may cause a lot of controversy in practice. In addition, they impose numerous obligations on local government bodies, which smaller municipalities or larger but less well organised ones may not be able to cope with. Again, the Brochure of the Ministry of Finance of 24 November 2016 on the

centralisation of VAT settlements of local government units should be assessed positively. The indicated document is written in accessible language and explains many legal complexities, which, however, does not guarantee that the application of the adopted legal regulations will not trigger litigation.

The legal regulations have led to the harmonisation of legal solutions with European Union regulations, including the compliance of legal solutions with the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the interpretation of legal provisions resulting from the CJEU case-law. In particular, they have allowed municipalities to recover value added tax to a greater extent and also for previous accounting periods. In the practice of applying tax law, a problem has arisen as to whether a municipality, when making a correction to a tax declaration, should include all subordinate units or whether it may limit itself to selected ones.

Pre-commutorised deduction of input VAT

Regulations concerning the right to reimbursement of tax calculated by municipalities, particularly the change in the case law of the Court of Justice of the European Union concerning the determination of the pre-proportionate factor, give rise to a great deal of controversy and do not always fully realise the EU principle of tax neutrality. One of the important issues related to the possibility of calculating the proportion at taxation when there are non-taxable activities was addressed by the Supreme Administrative Court in its resolution of 24 October 2011, ref. I FPS 9/10. In this ruling, it was indicated that, in the light of the provisions of Article 86(1) and Article 90(1) and (2) of the VAT Act of 11 March 2004, activities which are not subject to VAT may not affect the scope of the right to deduct input tax pursuant to Article 90(3) of the above-mentioned Act.

This view was departed from by the CJEU in its judgment of 8 May 2019 as a result of a preliminary question, reference C 566/17. According to the Court, Article 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as precluding a national practice which allows a taxable person to deduct in full the value added tax (VAT) charged on the acquisition of goods and services by him for the purpose of carrying out both an economic activity, subject to VAT, and a non-economic activity, which fall outside the scope of VAT, in the absence of specific provisions in the relevant tax legislation on the criteria and methods of apportionment enabling the taxpayer to determine the proportion of that input VAT to be regarded as relating to his economic and non-business activities respectively.

The principles of the democratic state of law and legal certainty expressed in Article 2 of the Constitution of the Republic of Poland oppose the fact that, in the case of accounting periods prior to 1 January 2016, taxpayers who, due to the absence in the legal state in force until 31 December 2015 in the VAT Act regulations on the criteria and methods of apportionment enabling the taxpayer to determine the deductible part of the input VAT related to his economic and non-economic activities, have fully deducted this tax in accordance with the interpretation of the law expressed by the Supreme Administrative Court in the resolution of this Court (7) of 24 October 2011, ref. I FPS 9/10, bore the consequences of this and were – due to the change in the interpretation of Article 86(1) of the VAT Act in the manner specified in point 1 – obliged to correct the settlements of those settlement periods in respect of which tax liabilities were not time-barred.

Many of the municipalities' investments were intended to meet the needs of residents as part of the local government's own tasks. As such, they were not entitled to deduct input tax. In a landmark judgment of 26 June 2018, case file I FSK 219/18[8] concerning the calculation of the proportion, the Supreme Administrative Court indicated that the structural features of the VAT system justify the interpretation of Article 86(2a–2b) and (2h) of the VAT Act of 11 March 2004 (Journal of Laws of 2016, item 710, as amended) allowing the possibility to determine the proportion of input tax deduction with reference to a specific type of activity performed by a municipality.

VAT-exempt activities of the municipality

The most disputed issue in terms of determining the activities performed by a municipality is which activities performed by a municipality as a public authority are not subject to this tax due to the vague regulation contained in Article 15(6) of the VAT Act. Pursuant to this provision, public authorities and offices serving these authorities are not considered taxpayers within the scope of tasks imposed by separate provisions of law, for the performance of which they have been established, with the exclusion of activities performed on the basis of concluded civil law agreements. The exclusion of local government bodies from the definition of a taxpayer for tax on goods and services is subjective in nature and, in view of the principle of universality of taxation, this provision should be interpreted strictly.

In the judgment of 9 June 2017, ref. I FSK 1271/15[9], the Supreme Administrative Court held that, pursuant to Article 15(6) of the Value Added Tax Act of 11 March 2004, a municipality will not be a VAT taxpayer when performing tasks in the field of education in the form of organising: school canteens, holidays for children and young people, participation of children and young people in artistic performances and swimming lessons, and participation of children and young people in international exchanges. A slightly different approach to the classification of educational services was adopted by the Supreme Administrative Court in the judgment of

27 January 2021, I FSK 702/19)[10]. Within the framework of the exemption of educational services, subject to exemption from Vat under Article 43(1)(26)(a) of the VAT Act, also falls the import by entities operating units covered by the educational system of International Baccalaureate programme services from International Baccalaureate organisations providing educational services analogous to those provided by the aforementioned units and recognised by law as part of the national educational system.

Pursuant to Article 15(6) of the VAT Act, public authorities and offices serving these authorities shall not be considered taxpayers within the scope of tasks imposed by separate provisions of law, for the performance of which they have been established, with the exclusion of activities performed on the basis of concluded civil-law agreements. In turn, in the judgment of the Voivodship Administrative Court in Wrocław of 27 August 2014, ref. I SA/Wr 1581/14[11], it was assumed that also a municipality which transfers vehicles for disassembly against payment is not a VAT taxpayer, as it does not conduct business activity in this respect.

Placement in a social welfare home

A consistent line of jurisprudence has emerged in the case-law of the Supreme Administrative Court regarding the impossibility of taxing social assistance services provided by a municipality. In the judgment of 23 March 2017, ref. no. I FSK 1147/15, the NSA took the position that, in accordance with the provisions – Article 15(6) of the VAT Act – public authorities and offices serving these authorities are not considered taxpayers within the scope of tasks imposed by separate provisions of law, for the performance of which they have been established, with the exclusion of activities performed on the basis of concluded civil-law contracts. This provision, when interpreted literally, makes the subjectivity of the authority in the tax on goods and services dependent on the nature of the legal relationship under which the service is provided. Services within the framework of administrative-legal (public-legal) relations thus remain outside the sphere of VAT taxation. The exclusion from taxation with goods and services tax pursuant to Article 15(6) of the VAT Act applies only to those activities which directly constitute the performance of public tasks (e.g. the handling of individual cases under an administrative procedure, collection of public-law receivables).

Value added taxation of municipalities in France

Introduction

The French system of tributes is extremely complicated if only because of the large number of taxes and levies. It should also not be forgotten that it is France that is the first homeland of the value added tax. Value-added tax in France is characterised by the following features (Cozian et al., 2021, pp. 583 et seq.):

1) it is levied at each stage of the process of production and distribution of goods or services, deducting the tax paid at previous stages,

2) the supplier invoices the VAT to his customer but deducts the amount paid to his own suppliers and reimburses the difference to the State,

3) the final burden of the VAT is borne by the final consumer of the product, who has no possibility of recovering the tax paid.

VAT is:

- neutral – the amount of tax does not vary according to the length of economic circulation, it depends only on the value added to the product or service (see Sérandour, 2021, p. 179),
- difficult to "embezzle" – the amount of tax can only be deducted on the basis of a reliable invoice, taxpayers control each other,
- "neutral" for taxpayers – it is simpler to pay this tax on every expense instead of declaring one's income and realising, the amount of his annual taxes,
- proportionate and independent of the taxpayer's personal circumstances – the same for all (Sérandour, 2021, pp. 583–584).

The provision of Article 256 A of the Code général des impôt[12] (CGI) clearly indicates that only activities carried out independently constitute economic activities subject to VAT. This reference has the effect of excluding from taxation the service (activity) performed by employees for their employers. A taxable person is a legal or natural person, a company or association, a person under private law or a person under public law. The legislation defines a VAT taxable person as an entity (person) engaged in production, distribution and supply of services, including professional and agricultural activities. It is important to note that only activities carried out by a taxable person acting as such are taxable. The legislation excludes certain activities carried out by taxpayers in the ordinary course of their business, e.g.: activities carried out on a private basis by a professional, activities carried out outside the scope of business by a company subject to VAT. The Council of State has held that a company specialising in the negotiation of a metal trade is subject to taxation no longer acting 'as such' not in the context of its commercial activity, but as a financial investment (Council of State ruling: CE of 29 December 1995 No 118,754) (Collet, 2021, p. 419).

In order to be considered a taxable person for VAT, an entity must carry out an economic activity. This allows for a broader scope of application, of being subject to VAT. The Court avoids giving a precise definition of this concept (M. Collet, Droi fiscal, Paris 2021, pp. 420–421).

Some countries have provided for regulations exempting internal operations carried out by Article 11 persons from this tax. France, however, unlike Poland, has not provided for such regulations to "avoid" VAT (Cozian et al., 2021, s. 594–599).

There are four rates of VAT in the French system (Cozian et al., 2021, pp. 641–644):

- normal rate: 20% – all services defined enumeratively,
- reduced rates:

– 5.5% (necessities),
– 10% (all other reduced rates),
– 2.10% (super-reduced, e.g. newspapers and periodicals).

However, in the Polish system there are higher rates (more extensively Michalik, 2021, pp. 775–839):

- basic rate – 23%,
- reduced rates:

– 5% for unprocessed products,
– 8% preferential,
– 4% for taxi services,
– 0% for intra-Community supply of goods and exports.

Value added taxation of local authorities in France

Currently, just as in Poland, regulations concerning the analysed tax are subject to harmonisation with the legal regulations of the European Union. Similarly to Poland, partly different regulations apply to VAT on municipalities. In France, however, they take a more pragmatic approach to VAT refunds, ensuring the practical implementation of the neutrality principle. The regulations on the taxation of public authorities are detailed. In relation to VAT, 'local authorities' are considered to be, inter alia, local authorities (municipalities, departments, regions) and local public bodies (including public authorities, public housing, tourist offices). Whether an activity carried out by a public authority constitutes a public service depends on its nature. A public service includes administrative, social, educational, cultural and sports services, as well as industrial services and advertising as defined by law on television. On the other hand, when the community does not act as a public authority, the activities carried out are subject to VAT, as are the taxation of rental activities, certain transactions relating to non-movable property and intra-Community acquisition of goods and services (Direction générale des Finances publiques, 2016, pp. 2–3).

Activities outside the scope of VAT, within the meaning of Article 256 B CGI, must meet two criteria:

- it must be carried out by a legal person under public law,
- it must be carried out by that person as a public authority.

Activities carried out by virtue of self-government or in the general interest are the basic and compulsory administrative tasks that local authorities carry out by virtue of their public authority prerogatives (police power, civil status, tax collection, etc.). Income received by local authorities in the exercise of these powers outside the scope of the tax is therefore not subject to VAT. This applies in particular to:

– local taxes and duties;
– fees collected in return for parking on public roads used for traffic.

The following activities are also outside the scope of VAT:

- Activities which, although they do not fall within the exercise of sovereignty and do not involve the exercise of coercive powers, are exercised as public authority by local authorities; this applies to the following activities (which may, however, be taxed by exercising the option right provided for in Article 260 A CGI):

– water supply in municipalities with less than 3,000 inhabitants and by public inter-municipal cooperation establishments whose scope of action extends to a territory with less than 3,000 inhabitants;
– sanitation facilities;
– household waste;
– hygiene and assistance services;
– slaughterhouses;
– market of national importance.

- The activities of administrative, social, educational, cultural and sporting services when their non-taxation does not lead to a distortion of the conditions of competition.

On the other hand, activities for which competition must be presumed fall within the scope of VAT. These are activities which, by virtue of their nature, scope or the clientele to which they are addressed, and the means used (advertising, prices charged), directly compete with commercial enterprises offering similar services. This applies, for example, to receipts relating to the operation of a golf course, a zoological park, a botanical park, an amusement park, an aquatic centre (swimming pools with recreational facilities such as whirlpools, wave pools, slides, etc.), a theatre or cinema, spa or thalassotherapy establishments and the organisation of sound and light shows or festivals (music, theatre).

The VAT regime applicable to other local authority activities must be assessed on a case-by-case basis, taking into account whether the private sector is able to meet the needs in question. Where an activity carried out by a legal entity under public law is subject to VAT in relation to the criteria set out above, it is taxable or exempt.

In its judgment of 28 May 2021, No. 44 2378, Combined Chambers VIIII–III, published in the Lebon Collection, the Council of State dealt with the problem of competition. The Council of State considered that it follows from the provisions of Article 256b of the CGI that France has availed itself of the possibility, created by Article 13 of the Council Directive of 28 November 2006, to consider services of a sporting nature provided by legal persons governed by public law as activities carried out under public authority. Given the characteristics of Castelnaudary's main swimming pool, namely, a 50 metre outdoor Olympic swimming pool and a 25 metre indoor swimming pool, its operation by the municipality is a service of a sporting nature.

The reasoning of the ruling indicates that the Municipality, considering that it should be subject to value added tax for its management, on 11 May 2017 asked the

tax authorities to reimburse an amount of EUR 12,154 corresponding to the excess tax it had incurred for the expenses incurred for the purposes of this activity with the amount of tax to be collected when invoicing the services provided to the users of the swimming pool.

Thus, the activity in question must be carried out under different legal conditions from those of private economic operators, in particular when the prerogatives of public authority are exercised. In its judgment of 19 January 2017, C-344/15 (ECLI:EU:C:2017:28), the Court of Justice clarified that distortions of competition of a certain importance must be assessed by taking into account the economic situation and that the mere presence of private operators on a market, without taking into account factual elements, objective indicators and an analysis of that market, cannot demonstrate either the existence of actual or potential competition or the existence of a significant distortion of competition.

The finding that, pursuant to the aforementioned provisions of Art. 256b CGI, the Municipality of Castelnaudary should not be subject to value added tax on the operation of the swimming pool of which it is the owner, the Administrative Court of Appeal relied on the fact (the activity was a sporting and educational activity) that it was undisputed, that the municipality operated the only swimming pool open all year round located on the territory of the community of the municipalities of Castelnaudary Lauragais Audois, it did not follow that this led to a distortion of the conditions of competition with the municipal swimming pool located just over twenty kilometres away or would prevent the establishment of a competing economic activity.

The French system has provided for two VAT options, i.e. activities automatically subject to VAT and activities subject to VAT by option. Most of the services of public bodies that can compete with those of private bodies are subject to VAT. These include the operation of a municipal golf course, a zoological or botanical park, the organisation of a festival, a thermal establishment or funeral services (Collet, 2021, p. 422).

The second paragraph of Article 256 B of the CGI contains a list of activities for which legal entities under public law are expressly subject to taxation. These include:

- the supply of new goods produced for sale,
- distribution of gas, electricity (including photovoltaic and wind power) and heat,
- passenger transport (including ski lifts),
- organisation of tours and tourist stays,
- transport of goods,
- broadcasting or redistribution of radio or television programmes.
- public inter-municipal cooperation establishments with an area of at least 3000 inhabitants,
- organisation of trade exhibitions,
- provision of port and airport services,
- water supply in municipalities with a population of 3,000 or more,
- telecommunications.

This list is not exhaustive. Business activities that are not covered by administrative, social, educational, cultural and sporting services are automatically subject to VAT. This applies in particular to the activities of: renting equipped premises, running a bar or grocery shop by the municipality, scientific research work (Direction générale des Finances publiques, 2016, p. 7).

Unlike other countries, the French system provides for activities subject to VAT by option. In general, the right to opt for optional taxation is subject to the fulfilment of the conditions indicated:

- the tax-exempt entity wishes to pay the tax,
- the law allows it in a limited number of cases defined enumeratively in the law,
- the right of option must be recorded by the relevant administration, the mere submission of revenue for VAT does not create a right of option for a specific entity.

The entities that can exercise the right of option are defined in Article 260 – Article 260 D of the CGI and include:

– farmers with less than EUR 46,000 in annual revenue;
– authorities (local authorities) in relation to the provision of specific services of a public nature;
– landlords of buildings for professional use;
– banks for certain commissions;
– micro franchise enterprises;
– delivery by the taxpayer of land that is not to be built and a building that has been completed for at least five years.

The option right lasts in principle for five years and is irrevocable during this period. Beyond this period, the right continues until it is revoked (Cozian et al., 2021, p. 617).

Local authorities may, at their request, pay VAT on transactions for which they are not compulsorily liable (Article 260 A CGI). They are therefore bound by all the obligations incumbent on taxpayers, in particular they must invoice the tax to the user. This tax does, however, allow them to recover the VAT charged on expenses that represent the cost of the products sold or services provided. Local authorities may choose to pay VAT for:

- water supply in municipalities with a population of less than 3,000 inhabitants and by public inter-municipal cooperation establishments with a territory of less than 3,000 inhabitants;
- public slaughterhouses;
- contracts in the national interest;
- rubbish collection and disposal, when this activity triggers the payment of the household rubbish collection fee (REOM) provided for in Article L. 2333–76 of the General Code of Local Authorities;
- sanitation and collective services.

The municipality may choose the option for a period of five years with the possibility of renewal. If the option is chosen, separate accounts must be kept (Cozian et al., 2021, p. 8).

The taxable amount for VAT shall be, in the case of supplies of goods, services and intra-Community acquisitions, all amounts, values, goods or services received

or to be received by the supplier in return for those operations, on the part of the purchaser, lessee or third party, including subsidies directly linked to the price of those operations.

Some subsidies are not included in the tax base. These include equipment subsidies, balance subsidies, operating subsidies, purchase subsidies and exceptional subsidies. On the other hand, subsidies included in the tax base are so-called successive subsidies, which represent the price for a service or sale performed, subsidies representing remuneration for a service or sale, surcharge on supplementary prices.

The application of the rules determining the chargeability of VAT may, on the one hand, give rise to practical difficulties in the preparation of returns by authorities or local bodies in order to determine the taxable turnover, on the other hand, the amount of deductible tax. As a general rule, internal transfers are made from the general budget of a TSU to an additional or separate budget individualising the imposed activities of that TSU. As long as they are not paid by a person other than the beneficiary, the term subsidy is inappropriate. taxable transaction for the payer does not give the latter the right to deduct the associated VAT. In particular, when payment is determined by price collection, the mayor or president of the organisation, acting as principal, cannot have direct knowledge of the due date of suppliers' invoices or those of the regulations. because the responsibility for payments and collections rests with the accountant (Cozian et al., 2021, pp. 11–14).

VAT for municipalities and subsidies

One of the more interesting solutions of the French system is the establishment of a subsidy for municipalities. VAT was established in the early 1970s in connection with problems between the State and local authorities. The local authorities, which since the 1960s have participated fully in the modernisation of the country and its infrastructure, have encountered an increasing burden both in terms of capital expenditure and in terms of operation, which has led them (the local authorities) to demand more strongly the reimbursement of VAT paid on this account.

It is in this context that local authority representatives, worried about finding new funding, were able to claim that the amount of subsidies provided by the State was heavily depleted by the amount of VAT included in the price of investments not forgetting (the amount of tax) included in the price of other goods and services. In fact, like consumers, municipalities paid the VAT included in the price of the goods and services they purchased. Meanwhile, the reimbursement of the tax could have taken place as part of the provision of services related to the payment of fees, during the settlement of the goods and services tax collected due to the State. This case is one in which the local authority, normally excluded from value added tax, can either be a taxpayer/subject of this tax or choose to be taxed (with this tax).

The Act of 25 July 1975 later amended this Act (by the Act of 13 September 1975) developed/imposed a VAT refund system which led to the creation of a subsidy mechanism to equalise the tax burden covering investments. Equalisation funds were established on the basis of Article 13 of the Act of 13 September 1975 Local Authority Equipment Funds (FECL). These funds allowed the launching of a VAT refund process, at first at least partial, handled by the local authorities – let us clarify that the amounts granted on this account were not treated as a refund but as a subsidy independent of the investments previously made; however, from 1 January 1978, on the basis of the law of 29 December 1976 as well as the decree of 28 October 1977, the FECL changed its name to become the VAT Compensation Funds, so the link between subsidy and expenditure was established (from 1979), which clarifies the link between this subsidy and VAT (Cozian et al., 2021, pp. 11–14).

It should be noted that the Value Added Tax Compensation Fund (FCTVA) does not in any way participate in the tax mechanism (tax settlement, tax system) inherent in VAT. It is merely a 'tool' that exists outside the tax system. Local communities in terms of investment are subordinated to the mechanism of the FCTVA, which is treated as a subsidy for investment and not as a VAT refund (Hervé, 2017, p. 37). This benefits the actual investment expenditure (outlay), the maintenance costs of public buildings and highways and also the network maintenance expenditure implemented from 1 January 2020, which is supported by VAT and made directly by or on behalf of the territorial communities (Bouvier, 2020, p. 171). Usually entered in investment income, this subsidy can become a financial compensation for interest on loans and be recognised in the operating income section when the VAT reimbursement is higher than the total amount of investment expenditure.

It must be emphasised that the Fund treats the State as the primary regulator, which was already present in the 1970s. At the same time, a different point of view (a different logic) has been presented, concerning the economic market, creating the Fund as a regulator and whose expression 'fiscal' is externalized in the nature of the tax, which is based (built) on ensuring neutrality, i.e. VAT. The road that has been paved, i.e. – on the one hand, allowing local authorities to be VAT taxable as an option of choice in relation to certain industrial and commercial services and, on the other hand, to reimburse VAT in relation to investments, has shown the inability to choose which option to take between the State or the market economy. On the other hand, the complexity of the (taxation system) VAT applied to the public sector reinforces and reflects the difficulty of combining the two models. As a result, almost 3 of public investment of a civil nature is carried out by local authorities. Maintaining an adequate level of infrastructure and consequently a good level of service to citizens becomes difficult given that their (local authorities') funding capacity is at risk.

Among the possible avenues of choice, instead of continuing to engage in the acquisition of so-called critical products (products that have a relatively small impact on the bottom line, but are complex or difficult to acquire (e.g. a negligible number of suppliers), it would be possible to use leasing or instalment sales. This would make it possible to assess the usefulness of the FCTVA's operation, as the financial and cultural context has already changed forty years after the Fund's inception. The behaviour of consumers such as businesses has changed with regard to the use of equipment and there is a general trend towards replacing acquisition in favour of rental. We can conclude today that individuals, in addition to the real estate that constitutes their assets, and entrepreneurs are increasingly prone to renting resources and equipment rather than acquiring them.

All the indications are that the general VAT framework in which local authorities find themselves today faces certain obstacles related to the economic and sociological denominators of (French) society. Their ambiguous VAT situation distorts the arbitrage between acquisition and rental. In the current situation, and given that local authorities are essentially free to choose their expenditure, this arbitrage is determined by the VAT legal framework and the existence of the FCTVA. Acquisition turns out to be the easier or more attractive solution, given the prospect of VAT reimbursement without being the best financial solution for the (local) community and the citizen-taxpayer-user. Moreover, the management of local finances is currently facing serious difficulties requiring the development of a management culture, in other words the freedom of choice to choose the best strategy. For all these reasons, and because the culture of using state assets is clearly changing, it would be justified to amend the rules to take account of contemporary developments.

Similarities and differences between municipal taxation in Poland and France

In both Poland and France, the taxation system is subject to harmonisation with European Union regulations. In these countries, there are separate regulations on municipal taxation, which assume taxation of municipalities on general principles, but also provide for the possibility of exempting municipalities from value added tax. The practice in this respect in France has been regulated by law, while in Poland it has been developed through the jurisprudence of the Court of Justice of the European Union and the Supreme Administrative Court. An example of this is the exemption of social welfare activities from value added tax in France on the basis of a legal regulation and in Poland on the basis of an interpretation of the law by the Supreme Administrative Court. The vague tax regulations in Poland lead to numerous disputes between municipalities and the tax administration. In addition, under the French system, the municipality has the right to opt out of the VAT exemption and settle under the general rules.

In France, municipalities are entitled to receive subsidies from the Value Added Tax Compensation Fund (FCTVA). This gives effect to the principle of value added tax neutrality and reduces the number of disputes with the tax administration, while at the same time satisfying the interests of local communities much better.

Both in Poland and in France, there are voices from academia calling for legislative work to be undertaken on the taxation of municipalities in order to simplify the VAT system for municipalities There is no doubt that the clarification of legal solutions in Poland will allow municipalities to avoid numerous disputes with the tax administration. The adopted solutions should take into account the principle of neutrality and thus the interest of municipalities.

In Poland, unlike in France, we note numerous disputes between municipalities and tax administration bodies. At this point, it is worth postulating the adoption of a more self-government-friendly interpretation of tax regulations. It is not without significance that the disputes are between authorities, i.e. local government and the state.

Regulations adopted in France may be adopted to the system of taxation of municipalities in Poland. In particular, through legislative changes, it should be clarified which activities of municipalities are subject to VAT and which are outside the VAT and performed as a public authority. An equally good solution found in France is the possibility for municipalities to optionally opt out of VAT and settle the levy under the general rules. Such a solution could be transferred to Poland. In turn, the possibility to receive subsidies from the Value Added Tax Compensation Fund (FCTVA) occurring in France may also be recycled into the Polish legal system. Such a solution will effectively ensure the implementation of the neutrality principle and avoid tax disputes. Constitutional provisions, in particular Articles 84 and 217 of the Polish Constitution, do not seem to stand in the way of this.

Notes/Przypisy

[1] Council Directive 2006/112/EC of 28 November 2006. (OJ EU L of 11 December 2006 2006.347.1) (formerly Sixth Council Directive 77/388/EEC of 17 May 1977).

[2] ONSA i WSA 2013, No. 6, item 96.

[3] Journal of Laws of 2004, No. 54, item 535 as amended.

[4] CLI:EU:C:2015:635.

[5] *Przegląd Orzecznictwa Podatkowego*, 2015, No. 6, pp. 577–584.

[6] Journal of Laws of 2011, No. 177, item 1054 as amended.

[7] Journal of Laws 2015, item 605.

[8] Central Database of Judgments of Administrative Courts (hereinafter: CBOIS orzeczenia.nsa.gov.pl).
[9] CBOIS.
[10] CBOIS.
[11] LEX no 1506447.
[12] Code général des impôt – hereinafter referred to as CGI. https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006069577/- (access:16.02.2023).

References/Bibliografia

Bartosiewicz, A. (2019). *VAT. Komentarz*. Wyd.13. Wolters Kluwer.

Borodo, A. (2014). Glosa do uchwały NSA z 24.06.2023 r., I FSK 1/13. *Orzecznictwo Sądów Polskich*, (1), item 9.

Bouvier, M. (2020). *Les finances locales*. LGDJ.

Collet, M. (2021). *Droit fiscal*. PUF.

Cozian, M., Deboissy, F., & Chadefaux, M. (2021). *Précis de fiscalité des entreprises 2020/2021*. LexisNexis.

Direction générale des Finances publiques. (2016). *Guide de la T.V.A a l'usage des collectivités locales. L'application de la TVA aux collectivités locales*. Version du 22/07/2016.

Hervé, E. (2017). TVA et collectivités locales – Illustrations. *Revue Française de Comptabilité,* (507).

Lipiec-Warzecha, L. (2011). *Ustawa o finansach publicznych. Komentarz*. Dom Wydawniczy ABC.

Mączyński, D. (2021). *Wpływ orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej na stanowienie polskiego prawa podatkowego*. Wolters Kluwer.

Michalik, T. (2021). *VAT. Komentarz*. Wyd. 16. C.H.Beck.

Pęczak-Czerwińska, J. (2016). *Prewspółczynnik odliczenia VAT naliczonego*. Wolters Kluwer.

Sérandour, Y. (2021). *Précis de TVA*. LexisNexis.

Wiatrowski, R. (2021). *Wykładnia prounijna Naczelnego Sądu Administracyjnego w zakresie przepisów dotyczących podatku od towarów i usług*. Wolters Kluwer.

Zubrzycki, J. (2008). *Leksykon VAT 2008*. Tom I. Unimex.

Zubrzycki, J. (2020). *Leksykon VAT 2011*. Tom 1. Unimex.

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