

Judgment of 27th April 2004, [K 24/03](#)
**FORMAL CONDITIONS FOR ALLOWING A TAXPAYER TO OFFSET
INPUT TAX REVEALED IN AN INVOICE FOR THE PURCHASE
OF A GOOD OR SERVICE**

Type of proceedings: Abstract review Initiator: Commissioner for Citizens' Rights	Composition of Tribunal: 5-judge panel	Dissenting opinion: 1
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Legal provisions under review	Basis of review
Conditioning the right for a taxpayer-entrepreneur, having purchased a good or service, to offset input tax against output tax, or where appropriate to obtain reimbursement of input tax, upon the purchaser's possession of a VAT invoice and the seller's possession of a duplicate thereof, or upon inspection actions undertaken against the seller [VAT and Excise Duty Act 1993: Article 32a (inserted in 2002); The Minister of Finance's Regulation 2002 concerning the execution of some provisions of the aforementioned Act: § 48(4) point 2]	Rule of law Conditions for authorising the issuing of a regulation Legal reservation (exclusivity of statutes) in relation to imposing a tax obligation [Constitution: Articles 2, 92(1), 217]

One of the distinguishing features of the goods and services tax is the possibility for a taxpayer-entrepreneur to offset the amount of tax included in the price of goods and services purchased by them in pursuit of an economic activity (the so-called input tax) against the tax payable on the basis of the value of the goods and services sold by them (the so-called output tax). Where input tax exceeds output tax, it is possible to obtain reimbursement of the respective difference from the Tax Office (i.e. Inland Revenue). This is equally true in cases where output tax amounts to zero.

Given the existence of such a construction, the goods and services tax is also referred to as "value-added" tax (VAT). The tax burden, in its formal-legal sense (the duty to calculate output tax and to make payment thereof to the Tax Office's account), rests on each entrepreneur selling a good or service. In the economic sense, however, it may be shifted onto the final purchasers of those goods and services (consumers), who are unable to offset or deduct any tax amount included in the price paid by them.

In August 2003, the Commissioner for Citizens' Rights challenged before the Constitutional Tribunal two elements of a regulation in existence at the time, concerning goods and services tax, which restricted the possibility for entrepreneurs to offset input tax in their tax declarations in a manner which was alleged not to conform to the Constitution.

According to § 48(4) point 2 of the Minister of Finance's Regulation 2002, this possibility was generally excluded unless any VAT invoices issued by the seller to the purchaser were confirmed by duplicates thereof retained by the seller. Adoption of this Regulation was intended to minimise the possibility of dishonest practice consisting in offsetting input tax revealed in an invoice, or obtaining reimbursement thereof, where, in reality, the seller had paid no such tax to the State. The Commissioner alleged that this did not conform to constitutional principles governing the hierarchy of sources of law and the exclusivity

of statutes (so-called legal reservation) in relation to matters concerning tax obligations (Articles 92(1) and 217 of the Constitution).

Analogous provisions were, *nota bene*, included in previous executive acts (Regulations) of the Minister of Finance, also issued on the basis of the VAT Act 1993. In two of its earlier judgments (of 16th June 1998 – [U 9/97](#) and of 11th December 2001 – [SK 16/00](#)), the Constitutional Tribunal found these provisions to be in conformity with the bases of review cited by the initiators of those earlier proceedings. In both cases, the Tribunal found that the challenged provisions of these Regulations merely gave greater definition to pre-existing statutory norms, in a manner conforming to the Constitution.

In the present case, Article 32a of the VAT Act (inserted by the VAT Amendment Act 2002), whose merits relate to the executive regulation of 2002, was also reviewed. The challenged statutory provision imposed certain obligations upon a seller issuing a VAT invoice to a purchaser: a seller was required, where requested by the purchaser, to forward evidence of the transaction to the purchaser and to provide the purchaser with appropriate information regarding the seller's tax and accounting documentation. Article 32a(3) provided that, where a purchaser had requested, in writing, the relevant information from the seller, and the seller had acknowledged receipt of such a request without actually providing the relevant information, the purchaser-taxpayer would not lose the right to offset input tax in their tax declarations, provided they notified the Head of the Tax Office about the aforementioned events prior to the Tax Office commencing an investigation (i.e. of the seller). The Commissioner for Citizens' Rights alleged that Article 32a of the Act infringes the principles of correct legislation, as stemming from the principle of the rule of law (Article 2 of the Constitution), since it results in the obligation to inspect payment of taxes being shifted from the fiscal authorities to an individual taxpayer, thereby going beyond the principle of self-calculation of tax dues (i.e. taxpayers being responsible for calculating their own tax dues).

Judge Marek Mazurkiewicz disagreed with the decision adopted by a majority of the judicial panel, insofar as the majority found that it was, *per se*, incompatible with the Constitution for the offset of input tax against output tax, or reimbursement of the former, to be made conditional upon the purchaser's possession of a VAT invoice and the seller's possession of a duplicate thereof. He delivered a dissenting opinion to this effect.

RULING

1. Article 32a of the challenged Act does not conform to Article 2 of the Constitution.

2. § 48(4) point 2 of the challenged Regulation does not conform to Articles 92(1) and 217 of the Constitution.

3. The non-conformity with the Constitution of the provisions indicated in points 1 and 2 does not constitute a basis for the reimbursement of tax determined by a final decision of the tax authorities or paid as a result of the application thereof.

PRINCIPAL REASONS FOR THE RULING

1. The legislator is bound by the principle of proportionality not only when introducing limitations on the exercise of constitutional rights or freedoms (Article 31(3) of the Constitution), but also when imposing obligations upon citizens or other entities remaining under his authority (in such instances, the requirement of proportionality stems directly from Article 2 of the Constitution). The legislator acts in accordance with the principle of proportionality when, from the permissible means of acting, he chooses those which are possibly least burdensome for the entities in respect of whom they will be applied, or are severe to no greater degree than is necessary to achieve the assumed and constitutionally justified goal.
2. In a State governed by the rule of law, actions of a preventive or repressive nature aimed at ensuring the observance of tax law, and the taxpayers' due execution of their obligations to the State, must meet certain standards and must, primarily, take account of the need to protect a taxpayer's rights and legitimate interests.
3. The principle of the rule of law does not preclude the operation of a legal provision which, in respect of documents whose form fails to satisfy criteria contained in binding law, renders such evidence inadmissible. Accordingly, the legislator's assumption, contained within the provisions reviewed in the present case, that an original VAT invoice may not, in the absence of a duplicate thereof being retained by the seller, constitute the basis for offsetting input tax against output tax, or for claiming reimbursement of the difference between input tax and output tax, is permissible, *per se*, given the existence of justified doubts concerning the veracity of facts stated in such an invoice.
4. Nevertheless, the particular content and context of Article 32a of the 1993 Act lead to the conclusion that this provision does not conform to the Constitution. This provision assumes that failure to confirm the authenticity of a VAT invoice, by the taxpayer-seller's retention of a duplicate thereof, justifies the imposition of a tax liability on the taxpayer-purchaser, with no account taken of the fact that the latter paid the input tax revealed in such an invoice, and moreover – in the event of including the offset of input tax against output tax, or claiming reimbursement of the difference between the input and output taxes, in a tax declaration, – the imposition on such a taxpayer of an additional tax liability, determined by the Tax Office on the basis of Article 27(5)-(8) of the Act, amounting to a value of 30% of the offset/reimbursement amount. Concomitantly, the challenged Article 32a(3) removes the adverse consequences for the purchaser of the failure to confirm a VAT invoice by the seller's retention of a duplicate thereof, provided the purchaser undertakes the actions specified in Article 32a(1) and (2) in relation to the seller (these may be called "inspection actions" or "diligence actions"). *Ipsa facto*, the reviewed provision imposes something tantamount to a duty for the taxpayer-purchaser to undertake such actions. The imposition of this duty on the taxpayer, going further than the obligations connected to self-calculation of payable VAT and assuming that the taxpayer is required to control another taxpayer – in particular, the duty to notify the Head of the Tax Office of the seller's failure to fulfil their statutory obligations, prior to commencement of a tax investigation – is disproportionately burdensome and complicated vis-à-vis the factual benefits capable of being achieved in this manner. An equivalent effect may be achieved by applying less formalised solutions.

5. Where, from a formal perspective, a legal provision reviewed by the Constitutional Tribunal is different (i.e. differently denoted and forming part of a different normative act) from a provision reviewed in earlier proceedings concluded with a Constitutional Tribunal judgment, the prerequisite for discontinuing proceedings on the basis of Article 39(1) point 1 of the Constitutional Tribunal Act is not met, even in the event that these separate provisions have an identical content.
6. Although the Constitutional Tribunal has already twice reviewed (cases numbered U 9/97 and SK 16/00) provisions having an identical content to § 48(4) point 2 of the Minister of Finance's Regulation 2002 (point 2 of the ruling), as challenged in the present case, there exists no reason to discontinue proceedings on the basis of the uselessness of adjudication (Article 39(1) point 1 of the Constitutional Tribunal Act). Although the content of the challenged provision of the Regulation is identical to provisions reviewed in the previous cases and the bases of review cited by the applicant are the same as in case U 9/97 and narrower than in case SK 16/00, this does not determine the identity of the case. From the formal perspective, the current proceedings concern a different legal provision and – more significantly – the law in force at the time of adjudicating in the present case differs considerably from the legal state previously in existence. The normative context of the challenged provision underwent a significant change relative to equivalent provisions reviewed by the Tribunal in two previous cases. An important change of context took place at the time of the entry into force of the aforementioned (in point 4) Article 32a of the VAT Act 1993 (cf. point 9).
7. The principle of the superiority of statutes over executive acts (in particular, regulations), stemming from Article 92(1) of the Constitution, encompasses a prohibition on regulations repeating or transforming the content expressed in the authorising statute itself or in other statutes.
8. The principle of the superiority of statutes over executive acts has further-reaching consequences in relation to tax law than in other fields of law, since Article 217 of the Constitution creates additional conditions for authorising the issuing of executive acts in this field.
9. Until the entry into force of Article 32a of the VAT Act 1993, the effects of a failure to confirm a VAT invoice by the seller's retention of a duplicate thereof was in no manner directly regulated by statute. Since this time, issues concerning the purchaser's tax declarations in relation to input tax revealed in an invoice but not confirmed by the seller's retention of a duplicate thereof (cf. point 4) are regulated by statute and not by a regulation. The challenged § 48(4) point 2 concerns a particular category of factual situations which are already regulated within the Act itself and, accordingly, the repetition of the content expressed thereby does not conform to Articles 92(1) and 217 of the Constitution.
10. The Constitutional Tribunal is obliged, *ex officio*, to take into account the consequences of its judgments and to prevent the creation of a legal state that would in itself fail to conform to constitutional norms as the result of its judgments. This signifies that the Tribunal is not only authorised to adjudicate on the conformity, or otherwise, with the Constitution of the normative acts stipulated in Article 188 of the Constitution, together with Articles 79 and 193 thereof, but is also empowered to stipulate

time frames of such non-conformity, in particular time limits on the retroactive effects of a judgment finding that a specific provision (legal norm) does not conform to the Constitution. Such a conclusion is supported primarily by the possibility, envisaged in Article 190(3) of the Constitution, to delay the loss of binding force of a normative act; *a fortiori*, the Tribunal is empowered to specify the scope of its judgments' retroactive effects. Furthermore the Tribunal is, by its very nature, called upon to explain doubts arising in respect of its judicial decisions, irrespective of the content of Article 74 of the Constitutional Tribunal Act. A judgment of the Constitutional Tribunal, as a universally binding act (cf. Article 190(1) of the Constitution), should be formulated in such a manner as to preclude doubts concerning its significant constituent elements. The Constitutional Tribunal's stipulation of time limits regarding a judgment's retroactive effects, as with delaying the loss of binding force of a normative act, is related to the necessity to consider various constitutional values. The Tribunal, as an organ constitutionally authorised to review the conformity of law with the Constitution, should resolve conflicts where the possible re-opening of proceedings or quashing of an individual decision in different proceedings (cf. Article 190(4) of the Constitution) could lead to deviations from the principles of the validity of judicial decisions and stability of administrative decisions, as well as non-retroactivity of the law and protection of acquired rights.

11. The adoption, in point 3 of the ruling, of a specific solution restricting the retroactive effect of this judgment in relation to the non-conformity of the reviewed provisions with the Constitution, is justified by the particular circumstances of the present case. Firstly, two of the Minister of Finance's formerly operative Regulations contained wording identical to that used in § 48(4) point 2 of the Minister of Finance's Regulation 2002 and the Constitutional Tribunal has twice ruled that this conformed to the Constitution. Accordingly, it could amount to an infringement of the principle of equality before the law (Article 32 of the Constitution) to endow the present judgment with the legal effects described in Article 190(4) of the Constitution, since this judgment would not apply to factual situations arising under the two previous regulations. Secondly, the finding that § 48(4) point 2 of the Minister of Finance's Regulation 2002 does not conform to the Constitution is based on an analysis of the legal situation that arose following the entry into force of Article 32a of the VAT Act 1993, operative on the date of this adjudication. Accordingly, the failure to conform to the constitutional provisions cited in this case – insofar as upheld by the Tribunal – has a derivative character (i.e. the non-conformity exists in essence as of 1st January 2003; the judgment does not concern the issue of conformity with the Constitution prior to this date). Thirdly, the judgment does not determine whether it would be in conformity with the Constitution for VAT invoices unconfirmed by the seller's retention of a duplicate thereof, to constitute an unconditional basis for offsetting input tax against output tax, or for reimbursing the difference between the former and the latter. Fourthly, in the course of these proceedings, the applicant's representative stated that he did not seek to create, as a consequence of the Constitutional Tribunal's judgment, a regulation requiring the reimbursement of tax already paid, so a ruling which failed to limit the retroactive effects of the judgment would, by its very nature, fall outside the limits set out by the application.
12. It should be assumed on the basis of the principle of protecting acquired rights that, despite the non-conformity of Article 32a of the amended VAT Act 1993 with the

Constitution, taxpayers, having acted in accordance with the content of this provision during such time as it remained operative and fulfilled the conditions specified therein, may not suffer adverse consequences as a result of the Tribunal's finding that this provision does not conform to the Constitution.

13. The fact that the Constitutional Tribunal is bound, in relation to the legal provisions under review, by the limits of the application, question of law or constitutional complaint (Article 66 of the Constitutional Tribunal Act), does not signify that the Tribunal is also bound by the motivation of each individual allegation contained in the reasoning for the application, question of law or constitutional complaint.
14. Irrespective of the competences of the President of the Tribunal, as stemming from Article 25(3) of the CT Act, the judicial panel of the Constitutional Tribunal may, *ex officio*, decide whether it constitutes an appropriate panel for considering a particular case, from the perspective of Article 25(1).
15. Whilst, in light of Article 25(1) points 2 and 3 of the CT Act, a 5-judge panel of the Tribunal is generally appropriate when reviewing the constitutionality of a statute, and a 3-judge panel is generally appropriate when reviewing the conformity of a regulation with a superior act, it may sometimes be justifiable to rule jointly on the legality of a regulation and a statute. Such a situation occurs when (as in the present case) the challenged provisions of a statute and a regulation are so inter-linked that an assessment of the constitutionality of one invariably affects an assessment of the other, thereby rendering it unjustifiable to separate them for the purposes of isolated consideration. Since the CT Act does not regulate the issue regarding the appropriate size of the judicial panel in such situations, this lacuna should be filled, in accordance with Article 20 of the CT Act, by "appropriate" application of the provisions of the Civil Procedure Code. This Code does not directly regulate such situations. Accordingly, reference should be made, by way of purposive analogy, to provisions concerning the division of competences between regional and district courts, in particular to Article 17 point 1 of the Civil Procedure Code, which regulates the possibility for a regional court to consider a case falling within its jurisdiction together with a claim whose isolated consideration would fall within the jurisdiction of a district court. If, in similar situations, the legislator prefers a more "qualified" judging panel, it should be assumed, in accordance with existing judicial practice, that the appropriate judicial panel for jointly reviewing a statute and a regulation should consist of (at least) 5 judges.

MAIN ARGUMENTS OF THE DISSENTING OPINION

- Provisions of formerly operative regulations, containing wording identical to that used in the challenged § 48(4) point 2 of the 2002 Regulation, have already been reviewed by the Tribunal as regards their conformity with the Constitution, in cases U 9/97 and SK 16/00. Contrary to the Tribunal's position in the present case, Article 32a of the VAT Act 1993 does not in essence have direct influence on the rule stemming from the Regulation insofar as indicated in point 2 of the ruling.
- In light of the Constitutional Tribunal's position expressed in the two earlier cases mentioned above, it should be found that § 48(4) point 2 of the 2002 Regulation constitutes one of the instruments ensuring that taxpayers duly perform the constitutional obligation imposed upon them, as specified in Article 84 of the Constitution. This provision does not exceed the statutory authorisation contained in Article 23(2) of the 1993 Act. It also does not contradict Article 217 of the Constitution, since it does not regulate any matters encompassed by legal reservation (i.e. exclusivity of statutes).

Provisions of the Constitution and the Constitutional Tribunal Act

Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 31 [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 79. 1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

2. The provisions of para. 1 above shall not relate to the rights specified in Article 56.

Art. 84. Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute.

Art. 92. 1. Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.

Art. 188. The Constitutional Tribunal shall adjudicate regarding the following matters:

- 1) the conformity of statutes and international agreements to the Constitution;
- 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
- 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
- 4) the conformity to the Constitution of the purposes or activities of political parties;
- 5) complaints concerning constitutional infringements, as specified in Article 79, para. 1.

Art. 190. 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.

[...]

3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

4. A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

Art. 193. Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

Art. 217. 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.

CT Act

Art. 20. In relation to cases not regulated in the Act concerning the proceedings before the Tribunal, the provisions of the Code of Civil Procedure shall apply.

Art. 25. 1. The Tribunal shall pronounce judgments:

- 1) sitting in full bench - in cases:
 - a) of disputes between constitutionally recognised central State organs with respect to their powers;
 - b) in confirmation of impediments to exercise the office of the President of the Republic of Poland and vesting the temporary performance of the duties of the President of the Republic of Poland in the Marshal of the Sejm;
 - c) on the conformity to the Constitution of the purposes and/or activity of political parties;
 - d) upon the application of the President of the Republic of Poland for the confirmation of conformity to the Constitution of a statute prior to its signing or an international agreement prior to its ratification;
 - e) of a particularly complicated nature - upon the initiative of the President of the Tribunal or where the application for consideration has been submitted by a bench adjudicating in a given case or in cases in which the particularly complicated aspect is related to financial outlays not provided for in the budgetary act, and, in particular, where the adjudicating bench intends to depart from the legal opinion expressed in the Tribunal's judicial decision given earlier in full bench;
- 2) sitting in a bench of five judges of the Tribunal - in cases:
 - a) of the conformity of statutes or ratified international agreements to the Constitution;
 - b) of the conformity of statutes to ratified international agreements whose ratification requires prior consent granted by statute;

- 3) sitting in a bench of three judges of the Tribunal - in cases:
 - a) of the conformity of other normative acts to the Constitution, ratified international agreements and statutes;
 - b) complaints in relation to the refusal to proceed with the application for the confirmation of the conformity of other normative acts to the Constitution, ratified international agreements and statutes as well as complaints concerning constitutional infringements;
 - c) challenging of a judge.

2. The hearing of a case by a full bench shall require participation of at least nine judges of the Tribunal. The President or Vice President of the Tribunal shall preside over the hearing and should they be prevented from presiding - the judge, eldest in age, of the Tribunal.

3. The President of the Tribunal shall designate the judges to the bench of the Tribunal, including the presiding judge and the judge rapporteur.

Art. 39. 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:

- 1) if the pronouncement of a judicial decision is useless or inadmissible;
- 2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
- 3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.

Art. 66. The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint.

Art. 74. 1. On application by a participant in the proceedings, the bench of the Tribunal, which passed the judicial decision at a sitting in camera, shall, by an order, settle all doubts as to its contents.

2. If the application for explanation of doubts cannot be considered by the bench specified in paragraph 1, the application shall be considered by the bench sitting with the same number.