

Judgment of 15th February 2005, [K 48/04](#)
**INSUFFICIENT *VACATIO LEGIS* WHEN INTRODUCING HIGHER RATE
 OF PERSONAL INCOME TAX**

Type of proceedings: Abstract review Initiator: Prosecutor General	Composition of Tribunal: 5-judge panel	Dissenting opinion: 1
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Legal provisions under review	Basis of review
Introducing, as of 1 st January 2005, a 50% tax rate on annual personal income exceeding 600,000 Polish Zloty, on the basis of a statute published in the Journal of Laws on 13 th December 2004 <small>[Personal Income Tax Act Amendment Act of 18th November 2004: Article 9 insofar as relating to Article 1 point 13, point 19(a) and (b), point 22 and point 26]</small>	Rule of law [Constitution: Article 2]

Since 1st July 1992, the Polish system for general taxation of personal income has been based on the frequently-amended Personal Income Tax Act 1991. The subject of this taxation is, in principle, the annual income of a natural person, calculated as a surplus of revenue over the costs of obtaining such revenue. Although the final tax settlement occurs at the conclusion of the tax year, based upon the taxpayer's tax returns, advance payments are deducted "at source" from certain revenues (such as remuneration for employment) as payment towards annual income tax. Where the sum of advance payments is less than the income tax due, the taxpayer is required to pay the shortfall; in the reverse situation, the taxpayer is entitled to a return of the excess payment from the tax office.

The current form of income tax is progressive in character, with higher income taxed in accordance with a higher percentage rate. Currently (i.e. 2005), three levels of progressive tax scale exist. Annual income not exceeding 37,024 Polish Zloty is taxed at the lowest rate (i.e. 19%). The second rate, being 30%, applies to income exceeding 37,024 Zloty and not exceeding 74,048 Zloty. Finally, a 40% tax rate applies to income exceeding 74,048 Zloty.

The provision successfully challenged in this case by the Prosecutor General introduced a fourth level of progressive tax, applicable from the 2005 tax year to income exceeding 600,000 Zloty. The legislator intended that the tax payable on such income should equal 227,992.48 Zloty (the maximum tax payable under the third level of taxation) plus 50% of any income in excess of 600,000 Zloty.

An amending statute (hereinafter referred to as "the 2004 Act") which, inter alia, introduced the aforementioned change into the 1991 Act, was finally adopted by the Sejm (following inclusion of certain amendments made by the Senate) on 18th November 2004. The President of the Republic of Poland signed the bill on 9th December 2004, which was the last day of the 21-day period prescribed by Article 122(2) of the Constitution. The Act was published in the Journal of Laws No. 263 of 13th December 2004. In accordance with the wording of Article 9, the Act entered into force on 1st January 2005 (with some exceptions which are unimportant to this case).

On 22nd December 2004, the Prosecutor General challenged the 2004 Act before the Constitutional

Tribunal in the part introducing the fourth level of taxation. When a statute is challenged in [subsequent review](#) proceedings, its entry into force is not suspended.

The applicant did not challenge the changes to the tax system on their merits but, rather, alleged that introduction of the challenged increase in tax rate from the year 2005 occurred in the absence of the minimum one-month *vacatio legis* (i.e. the period between publication of a statute in the Journal of Laws and the beginning of the tax year). Therefore, in accordance with the Constitutional Tribunal's established line of jurisprudence, such a statute does not conform to Article 2 of the Constitution.

The subject of the declaration of unconstitutionality in this case was Article 9 of the Amendment Act 2004, which prescribes the date of entry into force insofar as relating to the fourth level of the taxation scale and the regulations strictly connected with the introduction thereof (e.g. concerning the levels of advanced payments to be deducted during the tax year). Accordingly, the Constitutional Tribunal's ruling on the unconstitutionality of Article 9 was clarified by points (a)-(e) referring to the relevant parts of Article 1 of the 2004 Act, which introduced amendments to the Personal Income Tax Act 1991. In order to facilitate a clear presentation of the essence of the Tribunal's judgment, such technical details are omitted from this summary.

Judge Marek Mazurkiewicz delivered a dissenting opinion. The difference of opinion amongst the members of the judicial panel did not concern the essence of the problem under discussion (i.e. the insufficient *vacatio legis*) but, rather, the formulation of the ruling, in accordance with which the only norm to lose its binding force was the provision prescribing the date for the entry into force of the new regulation. Such a formulation results in a *sui generis* "time-suspension" of the regulation; it was a question for the legislator to decide whether or not to reintroduce the regulation (for example from the year 2006).

Doubts as to the understanding of the judgment's effects, as of 1st January 2006, have been explained within the Constitutional Tribunal's judgment of 22nd February 2006 (case number as above).

RULING

Article 9 of the Amendment Act 2004 (prescribing the entry into force of that statute on 1st January 2005), insofar as concerning the introduction of a fourth level on the taxation scale, does not conform to Article 2 of the Constitution, given that there was an insufficient *vacatio legis*.

PRINCIPAL REASONS FOR THE RULING

1. In evaluating the constitutionality of tax legislation, the starting assumption is the legislator's relative freedom in shaping the State's income and expenditure. Such freedom is balanced and restrained by the obligation, incumbent upon the legislator, to respect the procedural aspects of the rule of law principle (Article 2 of the Constitution), including the principles of correct legislation. A particular guarantee in this area is the requirement for a *vacatio legis* period appropriate to the nature of the tax law provision introduced.
2. As stemming from the rule of law principle, the principle of trust in the State and its laws (also known as the principle of the State's loyalty towards the addressees of legal norms) requires laws to be created and applied in such a manner that they do not create "traps"

for citizens. Citizens should be entitled to conduct their affairs with confidence that they will not be exposed to legal consequences that were unforeseeable at the time the decision was taken and that their actions, being in accordance with the law operative at that time, shall continue to be recognised by the future legal order. New legal regulations should not surprise their addresses but, rather, should allow them time to adjust to the revised provisions and to thoughtfully decide as to their further actions.

3. The conclusion, derived from the rule of law principle whilst the previous Constitution was operative, that it is in principle impermissible to alter tax burdens during a tax year and that alterations to income tax provisions should be published at least one month prior to the end of the preceding tax year (the minimum one-month *vacatio legis* requirement), remains valid.
4. From the moment of its enactment (26th July 1991) the Personal Income Tax Act 1991 envisaged a three-level personal income tax scale. These tax rates have not been subject to significant fluctuations. Taxpayers were entitled to form a conviction that the levels of this tax would remain stable and, in particular, that the three-level scale of taxation would be maintained. Such a conviction would not have been affected by press reports concerning plans to introduce fundamental changes to the scale of taxation or to introduce linear taxation, since such preparations did not go beyond the postulatory stage and the provisions challenged in the present case were regarded as controversial from the time the Act was signed by the President and subsequently published. Accordingly, it must be concluded that taxpayers were only able to become aware of the new tax rate, to be applied from 2005, when the amending Act was published in the Journal of Laws on 13th December 2004, less than one month earlier.
5. Given the increased tax burden which would fall upon certain taxpayers following the introduction of a 50% tax rate on 1st January 2005, the failure to publish such amendments prior to 13th December 2004 resulted in an insufficient *vacatio legis*. This infringes the principle of trust in the State and its laws and, accordingly, means that it does not conform to Article 2 of the Constitution.
6. In consequence of the judgment summarised herein, the taxation scale for the year 2005 shall consist of three levels. Accordingly, there is (currently) no basis for Article 27(1) of the amended 1991 Act to limit the applicability of the third tax level to 600,000 Polish Zloty; income exceeding this limit will also be taxable at a rate of 40%.
7. The aforementioned 600,000 Zloty limit and the fourth tax level associated therewith, together with legal provisions strictly connected with the existence of this rate, may “re-enter” into force at a future date, provided that the appropriate legislative requirements for their coming into force are fulfilled. Until such time, all of those provisions (indicated in the ruling) shall remain part of the text of the amended statute, but shall lack operative force.

MAIN ARGUMENTS OF THE DISSENTING OPINION

- Given the manner in which the ruling is formulated, this judgment deviates from the Constitutional Tribunal’s well-established jurisprudential line, according to which material tax law provisions introduced in the absence of the required *vacatio legis* are *per se* incompatible with Article 2 of the Constitution; a Constitutional Tribunal ruling on their unconstitutionality results in their definite elimination from the legal order.
- Following the entry into force of the present Tribunal judgment, fragments relating to the fourth tax level will

remain in the text of the amended statute, albeit deprived of the attribute of “entry into force”. Preservation of such misleading – non-binding – fragments in the text of the statute contradicts the principle of clarity and unambiguity of law.

- A proper formulation of the ruling in the present case should declare that the amendments to the 1991 Act, challenged by the Prosecutor General, concerning introduction of the fourth tax rate in Article 27(1) and the resultant consequences than the amended tax scale had on other provisions of the Act do not conform to Article 2 of the Constitution given an insufficient *vacatio legis*. Such a ruling would eliminate those changes from the amended Personal Income Tax Act 1991.

Provisions of the 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. 122. [...] 2. The President of the Republic shall sign a bill within 21 days of its submission and shall order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).