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TAXATION OF PARKING PLACE IN RESIDENTIAL BUILDINGS. GLOSA TO THE JUDGMENT OF THE CONSTITUTIONAL COURT OF 18 OCTOBER 2023 REF. ACT NO SK 23/19

OPODATKOWANIE GARAŻY W BUDYNKACH MIESZKALNYCH. GLOSA DO WYROKU TRYBUNAŁU KONSTYTUCYJNEGO Z 18 PAŹDZIERNIKA 2023 SYGN. AKT SK 23/19

Abstract

On 18 October 2023, the Constitutional Tribunal handed down its second ‚revolutionary' verdict in three months on the grounds of property tax (ref. SK 23/19), once again stating the unconstitutionality of the provisions of the law governing it – this time only with regard to a specific interpretation of the provisions. Indeed, the Court found that both the definition of a building and the provisions on property tax rates are unconstitutional to the extent that they would result in the recognition that garages with separate ownership located in residential buildings are to be taxed at the rate for other (higher) buildings and not at the rate provided for residential buildings.

Keywords: *Property tax, taxation of buildings, taxation of structure, separate ownership, taxation of parking place*

Streszczenie

18 października 2023 r. Trybunał Konstytucyjny wydał drugi już w ciągu 3 miesięcy *rewolucyjny* wyrok na gruncie podatku od nieruchomości (sygn. SK 23/19), ponownie stwierdzając niekonstytucyjność przepisów regulującej go ustawy – tym razem jedynie w odniesieniu do określonej interpretacji przepisów. Trybunał stwierdził bowiem, że zarówno definicja budynku, jak i przepisy dotyczące stawek podatku od nieruchomości są sprzeczne z konstytucją, w zakresie w jakim powodowałyby uznanie, że garaże o wyodrębnionej własności znajdujące się w budynkach mieszkalnych mają być opodatkowane stawką dla budynków pozostałych (wyższą), a nie stawką przewidzianą dla budynków mieszkalnych.

Słowa kluczowe: *podatek od nieruchomości, opodatkowanie budynków, opodatkowanie budowli, wyodrębniona własność, opodatkowanie garaży.*

Introduction

On 18 October 2023, the Constitutional Court issued a judgment in case number SK 23/19 concerning the taxation of garages located in a residential building with property tax. The Constitutional Court found that the taxation of garages in residential buildings at a separate property tax rate is incompatible with the Polish Constitution. The judgment was handed down as a result of a complaint by spouses who purchased a residential unit in a multi-family

building with, among other things, a share in a multi-car garage. The multi-car garage was separated as an independent non-residential premises for which a separate land and mortgage register was established.

Pursuant to the resolution of the Supreme Administrative Court of 27 February 2012. (ref. II FPS 4/11), first the tax authorities and then the administrative courts held that a garage constituting the subject of separate ownership, located in a multi-family residential building, is subject to taxation at the higher real estate tax rate provided for other buildings or parts thereof. For this reason, the spouses were assessed the property tax for the dwelling at a lower rate (dwellings) and the share in the multi-unit garage at a higher rate (buildings and other parts thereof). Having exhausted possible avenues of appeal, the spouses filed a complaint with the Constitutional Tribunal claiming that the application of different rates for the building and the attached garage constituting a separate property violates the standards of due legislation set by the Constitution. It was argued, inter alia, that it is impermissible to tax a building on the basis of the provisions of the Geodetic and Cartographic Law and the implementing regulations issued to that law.

After examining the complaint in closed session, the Constitutional Tribunal issued a judgment on 18 October 2023, holding that the provisions of the Local Taxes and Fees Act to the extent that:

- enable, for property tax purposes, a detached garage located in a residential building to be considered as a part of a building of a non-residential character,
- make the application of the relevant real estate tax rates to a garage located in a residential building conditional on whether or not it is separated as an object of separate ownership,

The regulations of the Local Taxes and Fees Act deemed unconstitutional shall expire on 31 December 2024, however, the postponement of the expiry of validity does not preclude the revision of the judgments made in the applicants' case in connection with which the constitutional complaint was filed.

Taxation of buildings and facilities

Property tax is regulated by the provisions of the Act of 12.01.1991 on local taxes and charges – hereinafter u.p.o.l. The subject of this tax is the ownership of real estate or certain buildings. Indeed, pursuant to the provision of Article 2(1) of the A.P.L., the following real property or structures are subject to real estate tax:

1. land;
2. buildings or parts thereof;
3. structures or parts thereof related to the conduct of business activities.

It should be emphasised here that the manner of taxation of buildings (parts thereof) is completely different from that of taxation of structures (parts thereof). While in the case of the latter, the tax has a real property character, in the case of the former – its character is quasi-material.

The amount of the real estate tax – as with any tax – is affected by the size of the tax base and the tax rate. The manner in which they are both determined is completely different for buildings and completely different for structures. This results in a dramatic difference in the level of taxation.

The way buildings are taxed

In the case of buildings, all buildings are taxed, irrespective of their function and use. These circumstances affect the tax rate. Different categories of buildings (depending on their function and use) are taxed at different rates, with a wide range of tax rates – the highest property tax rate is 30 times the lowest rate. However, the tax base for buildings is the size of the usable area of the building expressed in square metres. Consequently, the tax is the product of these two values – the tax rate and the square metre of the building. However, the value of the building does not, in principle, affect the tax rate. Obviously, the size of the building (its surface area) translates directly into the tax rate, but the technical condition of the building, its standard of finish, etc. have no bearing on the tax rate. Two buildings of the same area will be taxed the same amount of property tax, even if one of them is worth three times as much as the other.

Method of taxation of facilities

Completely different circumstances affect the amount of the real estate tax in the case of structures. Firstly, the subject of the tax is limited to structures related to the pursuit of business activities (this is a statutorily defined term). Other structures are not subject to the tax. Secondly, in the case of structures, the taxable basis is their (initial) value. Therefore, in this case, the amount of the tax is not affected by the size of the structure itself (its cubic capacity, the area it builds on the land), but by its value. Thirdly, the tax rate is a percentage (which is a natural consequence of the value-based tax base). Thus, in the case of a structure, the amount of tax is affected primarily by the initial value of that structure. It is on this factor (in principle, only on this factor) that the amount of the tax in question depends directly.

It may also be noted that in the case of given structures (which aspire to the status of a building or a structure) of the same value, the real estate tax calculated as for a building will usually be at least several (and usually even several or even tens or hundreds of times) lower than the tax calculated as for a structure. This makes the determination of whether it is a building or a structure important in the case of certain structures (especially structures that are not entirely typical).

Definition of a building

The provisions of the Local Taxes and Fees Act have long provided legal definitions of a number of terms, including, inter alia, the term ‚building' and the term ‚structure'. Pursuant to the provision of Article 1a(1)(1) of the Local Tax Act, the term ‚building' should be understood as a construction object within the meaning of the provisions of the Construction Law, which is permanently connected to the ground, separated from the space by means of building partitions and has foundations and a roof. A building (in accordance with the provisions of the Construction Law to which these provisions refer) is a building, a structure or a small architectural object, together with the installations ensuring its suitability for use, erected using construction products.

A building is a structure which is permanently connected to the ground (in principle, through foundations), is separated from the space by means of building partitions and has a roof (and the already mentioned foundations).

Definition of a structure

Pursuant to the definition provided in Article 1a(1)(2) of the A.P.L., a structure is a construction object, within the meaning of the provisions of the Construction Law, which is not a building or a facility of small architecture, as well as a construction device, within the meaning of the provisions of the Construction Law, connected with a construction object, which ensures the possibility of using the object in accordance with its purpose.

In essence, the concept of a building encompasses two types of objects: firstly, construction objects that are neither buildings nor small architecture objects; secondly, construction equipment, within the meaning of the Construction Law, connected to a building object that ensures the possibility of using the object for its intended purpose.

Thus, structures are construction objects that are neither buildings nor small architecture objects. In essence, this therefore applies to structures within the meaning of the Construction Law, as buildings, structures and small architecture facilities are construction objects. Structures which are neither buildings nor landscaping are precisely structures.

According to the Construction Law, a structure is any building which is not a building or a small architectural object, such as: line structures, airports, bridges, viaducts, flyovers, tunnels, culverts, technical networks, free-standing aerial masts, free-standing permanently fixed advertising boards and devices, earth structures, defence structures (fortifications), protective structures, hydrotechnical structures, reservoirs, free-standing industrial installations or technical equipment, sewage treatment plants, waste disposal sites, water treatment stations, retaining structures, overground and underground pedestrian walkways, utility networks, sports facilities, cemeteries, memorials, as well as the construction parts of technical facilities (boilers, industrial furnaces, nuclear power stations and other equipment) and the foundations of machinery and equipment as technically separate parts of objects constituting a functional whole.

Thus, on the basis of the above definition, several types of constructions can also be distinguished: firstly, constructions sensu stricto; secondly, construction parts of technical equipment; thirdly, foundations for machinery and equipment. All of these types of structures are covered by the phrase *a building*

object which is neither a building nor a small architecture object, which is one of the parts of the term *structure* under the Local Taxes and Charges Act.

The second type of structure under the Act is *construction equipment connected with a structure, which ensures the possibility of using the structure in accordance with its purpose*. In this respect, the provisions of the Local Taxes and Fees Act also refer to the provisions of the Construction Law.

Pursuant to the provision of Article 3(9) of the Construction Law, to which reference should be made here, the term *construction equipment* should be understood as technical equipment connected to a construction object, ensuring the possibility of using the object in accordance with its purpose, such as connections and installation equipment, including equipment for the treatment or collection of sewage, as well as passages, fences, parking areas and places for rubbish bins.

The above analysis shows that the provisions of the Local Taxes and Fees Act in fact group four categories of facilities under the concept of structures:

1. constructions sensu stricto;
2. construction parts of technical equipment;
3. foundations for machinery and equipment;
4. construction equipment related to a structure (which ensures that the structure can be used for its intended purpose).

Determinants of the determination of the object of taxation (Constitutional Court judgment in SK 48/15)

It should be noted at this point that there is no doubt that the provisions of the Act on Local Taxes and Fees, while determining the subject of taxation with real estate tax, make its division separate and at the same time complete. This means that each of the elements of the division (land, buildings, structures related to the conducted activity) remains in a mutually exclusive relationship, while all the elements of the division make up the divided whole. This means, inter alia, that a building (one of the subdivisions) cannot be a building (another subdivision) at the same time.

Despite the above, in practice it was possible to observe the formation of an interpretative line (including a basically uniform line of rulings), according to which buildings that have all the features of a building, but at the same time contain certain additional elements and perform special functions (not commonly ascribed to buildings) are structures and are subject to taxation as structures. Such an interpretation appeared in the case of, inter alia, transformer stations, gas stations, silos. It could be found, for example, in dozens of judgments of the Supreme Administrative Court issued between 2008 and 2017.

The issue of grading whether such a way of interpreting the provisions of the Local Taxes and Fees Act, allowing for the recognition as constructions of such structures that fulfilled the features of buildings, became the subject of a Constitutional Tribunal ruling. In the judgment of 13.12.2017, SK 48/15, the Constitutional Tribunal held that *Article 1a(1) (2) of the Act of 12 January 1991 on Local Taxes and Fees, to the extent that it allows for the recognition as a structure of a building object that fulfils the criteria for being a building as provided for in Article 1a(1) (1) of the aforementioned Act, is inconsistent with the principle of specificity of tax regulations derived from Article 84 in connection with Article 217, in connection with Article 64(3) of the Constitution of the Republic of Poland.*

In the justification of the ruling, the Court first emphasised that since a structure cannot be a building (a small architecture object), a building (a small architecture object) cannot be a structure. This is determined by logic itself (theorems of the theory of multiplicity). This is because the relationship of exclusion of sets is undoubtedly symmetrical in nature.

Secondly, he pointed out that in the case of the notions of a building and a structure, we are dealing with their unambiguous distinction by the legislator. This in turn means that the meaning of those concepts may not be modified on the basis of premises not provided for by the legislation, in particular in view of the functions of the building in question (taking into account its purpose, equipment and method and possibility of use).

Consequently, the Tribunal emphasised that such an interpretation of the provisions of the Act on Local Taxes and Fees, which would allow such a building object that has all the features of a building to be regarded as a structure, is inconsistent with the Constitution of the Republic of Poland.

At the same time, the Constitutional Tribunal noted that it is not excluded that certain objects with the features of a building may be recognised by the legislator in a special provision as structures, which – in view of the principle of equality of taxation – would have to be justified by their exceptional specificity. This, however, would require a specific and unambiguous regulation, which, if applicable, would recognise certain objects (which have certain features) meeting the characteristics of a building as structures for the purposes of property tax. No such regulation exists de lege lata.

Building and facilities related to economic activity (Constitutional Court judgment in case SK 39/19)

Another important judgment of the Constitutional Tribunal in the area of real estate tax is the judgment of 24.02.2021, SK 39/19. In the above judgment, the Constitutional Tribunal held that *Article 1a(1)(3) in connection with Article 5(1)(1)(a) and Article 5(1)(2)(b) of the Act of 12 January 1991 on Local Taxes and Fees (Journal of Laws 2014, item 849), in the wording in force until 31.12.2015, to the extent that it „makes the qualification of land, buildings and structures subject to real estate tax into the category of land, buildings and structures connected with the conduct of business activity (which results in the obligation to pay real estate tax at a higher rate) dependent exclusively on the fact that the natural person (who owns the real estate) conducts business activity, and regardless of whether the land, buildings and structures are actually connected with the conduct of business activity by the natural person*, with Art. 64(1) and (3) in conjunction with Article 2 of the Constitution and Article 64(1) and (3) in conjunction with Article 2, Article 31(3), Article 84 and Article 217 of the Constitution".

As follows from the justification of the judgement, the problem presented in the constitutional complaint – as a result of the examination of which the above verdict of the Constitutional Tribunal was issued – concerns l automatic qualification of real property owned by a natural person conducting economic activity into the category of land, buildings or structures related to the conduct of such activity. This is because natural persons conducting such activity have

a dual character under the tax law – as entrepreneurs and as private persons (within the scope of their personal property). It is unconstitutional to classify land owned by such persons as land connected with the pursuit of business activity and – as a consequence – to subject it to a higher tax rate regardless of whether it is actually connected with the pursuit of such activity. The legislator does not distinguish, for the purposes of payment of real estate tax, between the situation of taxpayers who own real estate and use it for business activities and taxpayers who own real estate and do not use it for business activities. Both groups of entrepreneurs will be obliged to pay tax at the higher rate attributable to real estate connected with the conduct of business activities. The lack of this distinction particularly affects entrepreneurs who are natural persons, who appear in legal transactions in two capacities: as private persons (and therefore within the scope of their personal property) and as entrepreneurs. The mere pursuit of economic activity by a natural person is not, in the opinion of the Constitutional Court, relevant for the taxation of real estate at the tax rate on real estate connected with the pursuit of economic activity. Given the ratio of the application of the increased rate, which is the possibility of generating revenue from the use of the real property in business activities, it is necessary to establish the actual use of the taxed real property.

In the Court's grade, entrepreneurs cannot be taxed at a higher rate merely because they own property which is not used for business purposes. The taxation at a higher rate of real estate tax on land or buildings – which are not used and cannot potentially be used for business activity – solely because they are owned by an entrepreneur or other entity conducting business activity is considered by the Court to be incompatible with Article 64(1) of the Constitution.

The effect of the above ruling was the loss of the binding force of the provisions of the A.p.l. defining buildings (structures, land) connected with economic activity in so far as the provision links such status of such buildings (structures, land) with the mere fact of their possession by such a natural person who is an entrepreneur.

The definition of a structure for the purposes of property tax (judgment of the Constitutional Tribunal in case SK 14/21)

The next important decision of the Constitutional Tribunal concerning property tax is the judgment of 4.07.2023, SK 14/21. In this judgment, the

Tribunal stated that Article 1a(1)(2) of the Act of 12.01.1991 on local taxes and charges is inconsistent with Article 84 and Article 217 of the Constitution of the Republic of Poland. At the same time, the effect of this ruling – i.e. the expiry of the validity of the above provisions – was postponed by 18.months (i.e. practically until the end of 2024).

In this judgment, the Court found that the definition of a structure – contained in the Local Taxes and Fees Act – is inconsistent with the Constitution of the Republic of Poland. The reason for this inconsistency is first and foremost the fact that the definition does not sufficiently clearly define the subject of taxation. At the same time, it has an independent character, as it refers to the provisions of other legal acts. Consequently, taxpayers are not able to determine their tax obligations on its basis with certainty.

At the same time, it should be emphasised that this definition, although unconstitutional, is still in force. The Contitutional Tribunal judgment does not have retrospective effect. Therefore, it does not, in principle, provide an opportunity to challenge legal rulings made before it was issued.

It also does not allow for the assumption that the definition of a structure is not in force until the end of 2024 (unless new legislation would have been introduced earlier). On the other hand, it may be noted that the judgment of the Constitutional Tribunal may be a certain impulse to apply in practice – in relation to the real estate taxation of many objects whose principles of charging this tax raise many doubts – the principle in dubio pro tributario expressed in Article 2a of the Tax Ordinance. Thus, in cases of doubt as to whether an object is a structure or not, the interpretation that the object is not a structure should be favoured.

Different tax rates for garages (ECJ judgment SK 23/19)

Attention should also be drawn here to the judgment of the Constitutional Tribunal of 18.10.2023, SK 23/19. According to this judgment, the provisions of the act of local texes and fees:

„ – to the extent that they make it possible, for the purposes of real estate tax, to consider a separate garage located in a residential building as a part of a building of a non-residential character, they are incompatible with the principle of specificity of tax regulations (…),

– in so far as they make the application of the relevant rates of real property tax to a garage located in a residential building conditional on whether or not the garage is separated out as an object of separate ownership, with the result that the rate laid down in Art. 5(1)(2)(e) of the Act on Local Taxes and Fees and not the rate set out in Article 5(1)(2)(a) of that Act, are inconsistent with Article 32(1) in conjunction with Article 64(2) and Article 84 of the Constitution".

Thus, in that judgment, the Court held that it is not consistent with the Constitution of the Republic of Poland to introduce different property tax rates for garages depending on whether the garage has been separated as an object of separate ownership or not.

In the Court's grade, there is no justification for there being a difference between the level of taxation on garage spaces attached to a residential unit (which are taxed at the lowest rate) and the level of taxation on other garages. From a tax law perspective, there is no legal basis for garages in multi-apartment buildings to be treated as a non-uniform category. Property taxpayers who own such spaces should be treated the same under the law. In doing so, the Court postponed the entry into force of the effect of the judgment until 31.12.2024.

The above means that the rate differentiation – although unconstitutional – is still in force (until the end of 2024, unless the challenged provisions are amended earlier). The Const Trib. judgment does not have retrospective effect. Therefore, it does not, in principle, provide an opportunity to challenge legal rulings on the taxation of garages made prior to its issuance (with the exception of the very case in which the constitutional complaint concluded with the issuance of this TK ruling was filed).

Conclusions

Indeed, the Court found that both the definition of a building and the provisions on property tax rates are unconstitutional to the extent that they would result in garages with separate ownership located in residential buildings

being deemed to be taxed at the rate for other (higher) buildings rather than the rate provided for residential buildings.

It should be noted that this judgment reverses more than 11 years of unfavourable to taxpayers but well-established practice in the application of these provisions. Nevertheless, its entry into force will not be immediate. The lapsing of the challenged provisions has been postponed until the end of 2024 and will only apply to the manner of their interpretation indicated above. In other words, the provisions will remain in the Act in their current form, but will no longer be able to be applied in the manner described above.

It would seem, therefore, that the judgment in question has a very narrow application and only affects a specific scope of economic turnover – multi-stand garages constituting the object of separate ownership. However, the oral reasoning provided in the judgment seems to contradict this thesis, and the reasoning provided therein may have a much wider application in practice.

Firstly, the Court elaborated on the idea contained in the previous July judgment Judgment of the Constitutional Tribunal SK 14/21 – do entrepreneurs still have to pay property tax on structures? concerning the unconstitutionality of the definition of a structure on the grounds of real estate tax.

Indeed, in the judgment in question, he pointed out that the same problems that he perceived in the definition of a structure also exist in relation to the definition of a ‚building'. In particular, he found it inadmissible to determine what a ‚building' or a ‚residential building' is by reference to non-tax laws (the Construction Law and the Geodetic and Cartographic Law) and regulations (governing land and building registers, the Classification of Fixed Assets and the Polish Classification of Structures).

Thus, based on its oral reasoning – the Court deemed as unconstitutional in this case not only the reference to the broadly understood ‚construction law', but also other – applied in practice – legal acts – land and building registry or Classification of Fixed Assets. In other words – for example – adopting the Court's logic, it will no longer be possible to define a ‚residential building' by referring to the land and building register. This change therefore has the potential to significantly affect not only the taxation of garages, but also other aspects of the application of the Local Taxes and Fees Act.

The second issue raised by the judgment in question is to pay attention to the actual use of the facility in question. Indeed, the Court pointed out that, in the case of garages, the decisive factor is not their legal status, but their connection with the realisation of an individual's basic living needs, which is the need for housing.

In this context, the Court's reasoning was also very broad, considering as residential (and therefore taxed at a lower rate) not only premises belonging to a dwelling, but also garages, cellars, attics, etc., which may not even be located in the dwelling itself, may be adjacent to it, or may be entirely located outside the body of the building, but on the same land.

The decisive factor is that these premises constitute *an intrinsic element of the dwelling*, which *satisfies the basic needs of human habitation, even though they are not intrinsically habitable*.

These arguments therefore accentuate – appearing in the Court's case law – the premise of the actual use of the premises in question as a determinant feature of the tax rate. Thus, they may affect not only the tax treatment of garages – but of all buildings.

It should be noted, however, that the premise of the actual use of the real estate/building object in the jurisprudence practice of the NSA, as a rule, is understood very narrowly. It will therefore be necessary to wait to see how the above-mentioned position is reflected in practice in specific cases of dispute.

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