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TAX NOT CLEAR ON WHAT?

Abstract

Property tax is the second, after VAT, most contested issue to administrative courts. The reason for such a situation is wrongly determined subject of tax. This paper presents basic weaknesses of the regulations regarding buildings, structures and land. These problems may be eliminated only by radical changes in the binding law. Without them, this tax will still cause difficulties in its practical implementation.

Keywords: real estate tax, building, structure, land

Introduction

The direct cause to write this paper was the information given by the media that cases regarding real estate tax, after value added tax, are the most commonly examined by administrative courts [Zalewski 2021, https://www.rp.pl/prawo-w-firmie/art288311-w-2020-roku-znow-najwiecej-sporow-o-podatki-dotyczylo-vat].

This is not a new situation, because for many years taxation on real estate has been leading in the statistics of cases brought before the courts. Perhaps that is why we are all used to the situation in which this uncomplicated wealth tax, regulated in seven articles of the Act on local taxes and charges (u.p.o.l.) [Journal of Laws of 2019, item 1170], is the cause of so many tax disputes. If one divided the number of articles by the number of court cases, real estate tax would be in the first place. Why is it so and what can be done to change it? This paper is devoted to answering these questions.

It should be stated at the beginning that establishing III Division of the Administrative Chamber in the Supreme Administrative Court (SAC), which, among others, deals with cases regarding real estate taxation, is not a solution to the problem mentioned above. This is a normal reaction of the court to an abnormal number of these cases. It does not, however, eliminate the causes of such a high amount of appeals against decisions regarding real estate tax. In my opinion, the basic cause of this state is an obsolete structure of the tax based on the surface area and not on the value of the property. This is a wealth tax, in which the assets for taxation purposes is measured in metres (except structures). And that is one of the major problems regarding whether a given object is a structure (taxed upon depreciation value) or a building (taxed upon surface area expressed in metres). If the real estate tax was calculated on their value and this value resulted from cadastre, in which every real estate with its components would be described, then this and other problems connected with the taxation of real estate would disappear. But there is no social acceptance to introduce cadastral tax (tax on value), even though it has been suggested in the professional literature for many years [Etel 1998, p. 209 and following pages]. The focus should be put on binding regulations which are far from being perfect. And poorly written provisions which regulate this tax, what has been widely known since u.p.o.l. was adopted 30 years ago, are commonly indicated as the main cause of such a huge amount of cases on real estate taxation in courts.[1]

[1] A similar view was expressed by SAC in the so-called signalling resolution of 22 October 2018 (II FSK 2983/17). In the resolution of 15 December 2020 (S 3/20) the Constitutional Tribunal (TK) decided to "signal the Sejm and the Senate as well as the Minister of Finance that there are weaknesses in the law which need to be addressed to ensure the coherence of the legal system of the Republic of Poland, in Art. 1a(1)(2) of the Act of 12 January 1991 on local taxes and charges (J of Laws of 2019, item 1170), consisting in inclusion in this provision a reference to the provisions of construction law, what does not allow to reconstruct the subject of taxation with the real estate tax exclusively on the basis of the provisions of the Act of 12 January 1991 on local taxes and charges."

These are not new cases, they take years and are well described in the subject literature [Etel, Dowgier 2013, p.113 and following pages]. Due to the limited volume of this paper, they cannot all be discussed comprehensively. I believe, the basic cause of confusion in real estate tax is the mediocre quality of provisions regulating its subject. This is a tax not clear on what, and this will be justified below.

What is a Structure?

There should not be a situation when a taxable person reading the act on tax does not know what they are to pay a tax on. This is the case of taxation of structures. First of all, it is unacceptable that the subject of tax – a structure – should be determined by reading a non-tax act, namely the Act Construction law (u.p.b.) [Journal of Laws of 2021, item 2351]. In this Act the most significant is Art. 3(3), in which are indicated only examples of building objects which are structures. It is the Act on tax, what is required by the Constitution, that should determine, among others, the subject of tax. And that is not the case since u.p.o.l. has been adopted. At first, there was no definition of a structure, then it was introduced (in 2003) but, assessing it with the benefit of hindsight, it is absolutely unsuccessful. It implies that a structure is a building object which in the understanding of the construction law is not a building. The problem lies in the fact that in the construction law, created for other needs, there is no clear definition of a building object and a structure. And in my opinion, this is the main cause of thousands of costly disputes between authorities and taxable persons, i.e. how to tax a structure. The result of these many-year disputes are the resolutions not only of administrative courts but also of the Constitutional Tribunal (TK). As a result, it is still unclear what a structure is for real estate taxation purposes. Such a flagship ruling of the TK regarding a structure was the judgement of 13 September 2011 (P 33/09) on taxation of mining excavations. TK, considering the constitutionality of the u.p.o.l. provisions regulating the definition of a structure, stated that, among others, a structure is a building object mentioned by name in u.p.b. However, in this act, and what has been mentioned above, the definition of a structure consists of examples of random types of objects. There is no need to prove that the subject of taxation should be precisely defined in the act, and not stated as an open catalogue of examples of objects considered as structures. This may be the case in construction law but not in tax law.

Unfortunately, TK suggested such an interpretation of the definition of a structure from Art. 1a(1)(2) of u.p.o.l. and its consequences continue to this day. If in 2011 TK had unambiguously stated that the way of defining a structure in u.p.o.l. was unconstitutional, what I believe is obvious, the legislator would have had to redefine what a structure was, and thus, it may be assumed, there would not be problems with taxation. This however did not happen and still, there is an effort in the jurisdiction to decipher what a structure is. But this brings weak results. In 2017 TK again addressed the issue of a structure in the context of differentiating it from a building [SK 48/15]. In the judgement, TK stated that if a given building object has all the features of a building determined in its definition included in u.p.o.l. then it cannot be taxed as a structure. However, this judgement, in my opinion correct, caused a number of disputes on what differentiates a building from a structure. This case had to be considered by SAC with a seven-judge panel, which in the resolution of 29 September 2021 (III FPS 1/21) once again tried to indicate the features unambiguously differentiating buildings from structures. A distinguishing feature of a building, according to SAC, is its surface area and in the case of a structure (reservoir) – its capacity. Unfortunately, also this resolution, although thoroughly justified and thoughtful, will not cause that it will be obvious what a structure and a building is as a subject of the real estate tax. Still, there will be disputes and new rulings in this case. This lasts over 30 years and therefore a quick reaction from the legislator is needed because these disputes take too long and cost too much.

Difficulties in identifying a structure as a subject of real estate tax are only one problem from the whole list of issues connected with its taxation. There are long-lasting and problematic matters regarding: building parts and technical parts, determining depreciation and market value, network structures, cables in technical and suspended infrastructure, technical installations, billboards not permanently connected with the ground, structures in buildings, construction parts of stadiums, etc., to name just a few. The importance and the number of these cases indicate the need to start work and change the principles for taxation of structures as quickly as possible. It would be unrealistic to think that these cases will be "dealt with" by the courts, since the latter do not have the possibility to create new law, which is a necessity in this case.

A Building

Despite the fact that in u.p.o.l. there is a definition of a building, what has been mentioned above, it is unknown what differentiates it from a structure, especially since construction law classifies an object which has all the features of a building as a structure. Another shortcoming of this definition, causing interpretation problems from the very beginning, is the permanent connection of the building with the ground. There is a dominating view in the jurisdiction that this connection means a "strong" connection with the foundation in a physical and not legal aspect. In the resolution of 29 September 2021 (III FPS 1/21) SAC when analysing this term emphasised two elements, namely: the fact that a building needs to have a foundation and its construction has to be "strongly" connected to this foundation. At the same time, a civil law understanding of this connection resulting from the definition of real estate and its components was rejected. Such an approach, created mainly for the needs of a particular object, gives freedom in interpreting what a permanent connection is. Here also other judgements will not make a change – there are already plenty of them. In my opinion, this problem may be solved not by a statutory definition of a permanent connection with the ground but by adopting clear principles of establishing what a building is for taxation purposes.

No smaller problems arise when establishing whether a building has a foundation, what only seemingly seems to be a simple case. The best example is the so-called garage barrack set on concrete paving. Taxable persons – natural persons indicate that such a garage has no foundation and therefore is not a building but a structure. They indicate so because a structure is subject to taxation only when it is bound to conducting economic activity. Thus, there will be no tax on such a garage if its owner is not an entrepreneur. In practice, such disputes may be resolved only in one way – a court expert prepares an opinion whether e.g. a garage has the foundation (then it is a building) or not (then it is a structure).

The participation of court experts in the proceedings regarding sometimes huge amounts of tax on building (structure) is another problem causing the case to be difficult and costly. Generally, in the majority of cases concerning taxation of building objects, special information is needed, and in consequence, it is the court experts – builders who settle tax matters. It arises from a reference to construction law included in the definition of a building. In fact, it is the construction law which decides if and how a building object should be taxed. It is not a weakness of the construction law but of the tax act. Tax provisions cannot refer to unprecise terms created for the needs of a building process. As long as this remains the case, courts will be flooded with complaints on the decision regarding taxation of buildings.

Difficulties arise also during determining the type of building (residential - chalet – service). Residential buildings are taxed according to the lowest rates, what encourages classifying buildings having no connection to residential aims (e.g. prison buildings or barracks) as such [Etel 1999].

The main problem arises from the fact that until recently in the jurisdiction there was understanding of a residential building as a place serving residential purposes[2].

As a result, taxable persons started to "live" in service buildings. The willingness to avoid taxation decides also about the fact that taxable persons consider chalets as residential buildings. This problem became visible after the change of the classification of residential buildings in the Land and Building Register, where now there is no identification of the main function of the building, allowing until recently to differentiate a chalet from a residential building.

Another problematic issue is the case of garage taxation. Currently, a garage in a residential building is taxed according to lower rates, so-called residential; a garage which is a separate building – according to other rates; a garage which is a separate property in the residential building – according to other rates; and a garage belonging to a flat – according to residential rates.[3]

Additionally, the highest rates appear when a garage is owned by an entrepreneur. Not all possibilities to tax a garage are presented here- there are more. Therefore, there should not be a situation in which an owner of such an uncomplicated subject of tax as a garage does not know what tax they should pay and courts resolve their doubts for decades.

Also, other problematic regulations may be indicated and they concern such issues as: determining useful floor area, taxation of a building occupied in a small part,

[2] The resolution of SAC of 1 July 2002 (FPK 3/02) stated that to classify a chalet to the category of residential buildings decides the criterion of fulfilling basic residential needs of the owner and people close to them.

[3] SAC resolution of 27 February 2021 (II FPS 4/11) concerned the problems of garage taxation.

temporary building objects, residential buildings occupied to conduct business activity, telecommunication containers, understanding of building partition, exclusion of newly built buildings, taxation of usable attics and storeys, area of stairwells, etc. They all are the result of unprecise regulation of u.p.o.l. Yet still, they are binding, what causes a further overload of courts with such cases.

Land

A lot of problems, but less than in the case of buildings and structures, are connected with taxation of land. Fortunately, there is no doubt what land is as the subject of taxation. Crucial importance here has the Land and Building Register, where land is classified. Problems arise, and they arise massively, due to the lack of current updates of its entries and changes in references of particular types of land. Owing to various reasons, the classification of land included in the Register is very often obsolete, what causes situations in which within the administrative boundaries of cities is still land classified as an agricultural area and thus it is taxed (or more often exempt from tax) as land used for farms. For the same reasons, built-up land where for many years are no trees is to be considered forests for taxation purposes. It is classified as "Ls" in the Register and taxed with a very low forestry tax. It needs to be emphasised that in this case, that it is the lack of updates in the Register and not the weaknesses of the tax provisions that cause these problems. Connecting the principles of land taxation with the Land and Building Register is a good solution provided that the heads of district administration will enter changes into the Register on an ongoing basis.

With land (as well as with a building and a structure) is related a constantly discussed problem of its connection to business activity. In this case, TK expressed it views twice in a short period of time. In the first judgement of 12 December 2017 (SK 13/15), TK stated that the sole fact of conducting business activity by one co-owner does not mean that the real estate is connected with conducting business activity, and thus taxed with the highest rates. This view has been commonly accepted [Dowgier 2018], what allowed to think that after many years of disputes the problem of real estate included in the personal assets of natural persons conducting economic activity seemed to reach a solution [Dowgier, Etel, Liszewski 2020, p. 167].

And this would be the case if there was no judgment of TK of 24 February 2021 (SK 39/19). It is not clear why TK decided to address the same case again. The problem in both cases was identical and it came down to decide whether real estate acquired to personal assets of natural persons might be treated as connected with conducting business activity pursuant to Art. 1a(1)(3) of u.p.o.l. In its first judgement, TK stated no because it is not in the possession of an entrepreneur, and in its second judgement, TK stated that it is in the possession of an entrepreneur but to tax it with the highest rates not only the possession but also its usage (actual or potential) to conduct business activity needs to be indicated. The dispute about how to understand the connection of real estate with business activity started all over, what will negatively affect courts which will receive complaints of taxable persons encouraged by the incomprehensible judgement of TK from which arises that sole possession by an entrepreneur is not enough to tax real estate with the highest rates of real estate tax.

The tax on land is connected to a whole range of unsolved interpretation problems regarding the taxation of: land occupied to conduct economic activity, land under power lines, rehabilitated land, agricultural area under service buildings, land in a protection zone, land connected with residential buildings, etc. As in the case of buildings and structures, the issues related to the taxation of land require legislative changes. It is the only way of really eliminating them and thus decreasing the number of cases on taxation of land in the courts.

Conclusions

It has been indicated above that real estate tax must have a precisely defined subject. Currently, this issue is excessively complicated and unclear for taxable persons, tax authorities and courts due to the fact that it is not obvious what building objects and land are subject to taxation. Legislative changes are required and they have been requested for a long time. I believe, the reform of real estate taxation should be directed towards introducing a tax on value (ad valorem) functioning in the majority of European countries. Every real estate subject to taxation together with its components and value would be indicated in the fiscal cadastre. This would solve most problems enumerated above. This proposal is, however, difficult to implement, which I do realize. Therefore, what remains is further "improvement" of a wrong structure of tax on

the immovable property based on the surface area of the assets and not on the value. This does not bring results but currently, there is no other way. What needs to be changed in the provisions regulating the subject of tax? Detailed suggestions for changes were already presented in 2013 and have been waiting to be introduced since then [Etel, Dowgier 2013, p. 113 and following pages]. Here, due to the problem included in the title of this paper, are presented suggestions of organising the regulations with respect to the subject of real estate tax. In my opinion, it is necessary to:

- stop using in u.p.o.l. the term "real estate" and "building object" in favour of "the subject of taxation";
- indicate in u.p.o.l. that the subject of tax besides land is also a building (a part thereof) in the meaning of the Land and Building Register (and the Classification of Fixed Assets) and to indicate in u.p.o.l. civil and hydrological engineering facilities with their symbols in the Classification of Fixed Assets.

Introduction of these changes will bring effects only if the Land and Building Register will operate properly, preferably covering also structures subject to taxation. This Register will fulfil the role of a register of subjects taxed with real estate tax. In the future, it will be possible to transform it into a fiscal cadastre, what also results from the binding provisions of the Act on real estate management.[4]

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[4] See: Chapter IV of the Act of 21 August 1997 on real estate management (unified text of 2021, item 1899)