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Technical and legal reasons as prerequisites for the qualification of real estate connected with conducting business activities in the context of the real estate tax

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Summary

The object of the article is the analysis of issues of taking into account the technical condition in the case of charging the real estate tax. Until the end of 2015 lack of legal definition of the concept of 'technical reasons' for not using real estate in business activities caused doubts regarding its correct interpretation. This concept is not equivalent to 'inappropriate technical condition' within the meaning of construction law. Despite appearances of objectivity, in the case law concerning real estate tax, technical reasons were interpreted by reference to bad technical conditions. As of 1 January 2016, the concept of technical reasons was replaced by the requirement to issue a decision on the civil structure demolition order. The issue of a decision is an objective prerequisite for the qualification of the structure as not connected with conducting business activities and results in covering it by a lower tax rate. In turn, technical reasons constitute an objective prerequisite for the issue of a decision on the demolition order by a construction supervision authority. The replacement of the prerequisite of technical reasons in the context of the real estate tax by the requirement to obtain a decision on the demolition order really leads to taking into account the technical condition and making more objective the criteria of taxation of real estate connected with conducting business activities.

Key words: real estate tax, technical reasons, demolition order, taxation of real estate

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1. Introduction, research hypothesis and methodology

The object of the article is the analysis of issues of taking into account the technical condition in the case of charging buildings, structures and land with the real estate tax. The provisions of the Act of 12 January 1991 on local taxes and fees² in the wording effective until the end of 2015 provided for the possibility to reduce the tax rate if the object of taxation was not used for conducting business activities 'for technical reasons'. The provisions of the act in question, however, did not contain any legal definition of this concept, which led to doubts regarding its correct understanding and appropriate interpretation. As of 1 January 2016, this expression was replaced by the requirement to have a decision on the civil structure demolition order.

The purpose of this article is to compare the provisions in force until the end of 2015 regarding the qualification of real estate in the context of the real estate tax for technical reasons with the provisions which entered into force in 2016. The area of research covers charging land, buildings and structures connected with conducting business activities with the real estate tax. The research issue concerns taking into account in the context of the real estate tax reasons for which real estate is not used for conducting business activities. The research hypothesis is presented in the form of a question: Does the replacement of the prerequisite of technical reasons by the formal-legal prerequisite, i.e. the requirement to obtain a decision on the demolition order, lead to taking into account the technical condition of real estate connected with conducting business activities in the context of the real estate tax? Additional questions concern, first of all, how the concept of technical reasons was interpreted in the case law, secondly, whether this prerequisite was of an objective nature, and, thirdly, whether the change in the prerequisite for the demolition order (legal reasons) leads to making the taxation criteria more objective.

Research methods applied for the verification of the research hypothesis include the dogmatic-legal analysis in the context of tax law, the analysis of judicial rulings in the scope of the real estate tax, the comparative analysis and drawing conclusions.

2. Real estate connected with conducting business activities

Pursuant to Article 2(1)(1) of the Act on local taxes and fees, the following real estate or civil structures are subject to the real estate tax: land, buildings

² Consolidated text: Journal of Laws of 2019, item 1170 (hereinafter referred to as: the 'Act on local taxes and fees').

or their parts and structures or their parts connected with conducting business activities. Under Article 5(1) of the Act on local taxes and fees, the commune council by way of a resolution determines rates of the real estate tax, in the amount not exceeding the statutory threshold, while for real estate connected with conducting business activities, regardless of the way of their qualification in the land and property register, considerably higher rates are allowed than for other real estate. The determination that the given object of taxation is connected with conducting business activities is the *sine qua non* condition for charging structures with the tax, while in the case of land or building it means a significant increase in tax burdens.

Pursuant to Article 1a(1)(3) of the Act on local taxes and fees in the wording effective until 31 December 2015, the terms used in the act: 'land', 'buildings' and 'structures connected with conducting business activities' meant land, buildings and structures being in the possession of an entrepreneur or another entity conducting business activities, with the exception of residential buildings and land connected therewith as well as land referred to in Article 5(1)(1)(b), unless the object of taxation is not and cannot be used for conducting this business activity for technical reasons. By virtue of the above provision, the fact that the real estate in question is in the possession of an entity having the status of an entrepreneur and entered into the register of entrepreneurs decides whether this real estate is subject to tax rates in the increased amounts, not the way in which it is actually used³. It is irrelevant whether the entrepreneur actually conducts business activities with the use of the real estate⁴. Not using the real estate or its part for conducting business activities does not constitute grounds for lack of application of rates provided for real estate connected with conducting business activities to the amount of the real estate tax⁵. Therefore, the legislator

³ Judgement of the Supreme Administrative Court of 10 June 2011, file reference II FSK 226/10; judgement of the Supreme Administrative Court of 1 July 2014, file reference II FSK 1349/14; judgement of the Supreme Administrative Court of 18 February 2014, file reference II FSK 581/12; judgement of the Supreme Administrative Court of 16 May 2017, file reference II FSK 1123/15. At the same time in the judgement of the Constitutional Tribunal of 12 December 2017, file reference SK 13/15, it was indicated that the provision of Article 1a(1)(3) in connection with Article 5(1)(1)(a) of the Act on local taxes and fees understood in this way that the sufficient prerequisite for the qualification of land subject to the real estate tax to the category of land connected with conducting business activities by a natural person being its co-owner is non-compliance with the Constitution of the Republic of Poland. The Tribunal prohibited the application of provisions assuming that the possession of land by a person entered into the register of entrepreneurs means automatically the application of increased rate of the real estate tax. The determination whether the real estate in question constitutes part of a company, i.e. whether it can be potentially assigned for the performance of specific business tasks by the entity running the company is of key importance (see more in study of R. Dowgier, *Gloss to the Judgement of the Constitutional Tribunal of 12 December 2017 (file reference SK 13/15)*, 'Scientific Journals of Administrative Courts' (Zeszyty Naukowe Sądownictwa Administracyjnego) 2018, n. 3(78), p. 133.

⁴ Judgement of the Provincial Administrative Court in Rzeszów of 15 November 2016, file reference I SA/Rz/709/16.

⁵ See: judgement of the Supreme Administrative Court of 20 March 2009, file reference II FSK 1888/07;

conditioned the way of taxation on the objective status, applying the possession criterion, even if the entrepreneur stopped for some time using the real estate being in their possession for conducting business activities. Land or buildings which temporarily are not used by the taxpayer in business activities, but their features and kind of business activities conducted therein cause that they may be used for this purpose should be also included in real estate connected with conducting business activities⁶.

The exception is lack of possibility to use real estate for technical reasons. As an assumption, the exclusion of the application of the highest rate of the real estate tax for technical reasons is to provide taxpayers conducting business activities with the possibility to decrease tax burdens when for objective reasons beyond their control the object of taxation is not suitable for conducting business activities⁷.

3. Concept of technical reasons

Technical reasons constitute a negative prerequisite for recognising real estate as connected with conducting business activities. The concept of 'technical reasons' was not defined in the provisions of the Act on local taxes and fees either directly or by making reference to another legal act. Lack of legal definition means that this expression should be interpreted by the application in the first place of the linguistic interpretation⁸, i.e. by making reference to dictionary meaning of the indicated concept, taking into account the case law of administrative courts.

The expression 'reasons' means collectively certain reasons, circumstances, situations, causes and events. Pursuant to Article 1a(1)(3) of the Act on local taxes and fees, these circumstances must be of a technical nature.

judgement of the Supreme Administrative Court of 17 March 2009, file reference II FSK 1786/07; judgement of the Supreme Administrative Court of 9 January 2009, file reference II FSK 1354/07; judgement of the Provincial Administrative Court in Łódź of 21 October 2008, file reference I SA/Łd 242/08; judgement of the Provincial Administrative Court in Opole of 17 February 2010, file reference I SA/Op 546/09; judgement of the Provincial Administrative Court in Wrocław of 25 November 2008, file reference I SA/Wr 688/08; judgement of the Provincial Administrative Court in Wrocław of 30 January 2008, file reference I SA/Wr 1407/07.

⁶ Judgement of the Supreme Administrative Court of 17 July 2014, file reference II FSK 1846/13; judgements of the Supreme Administrative Court: of 8 April 1997, file reference SA/Po 3225/95; of 13 July 1994, file reference III SA 108/94; of 3 December 1992, file reference SA/Kr 1020/92; of 8 April 1997, file reference SA/Po 3225/95. These views were also expressed in the case law of the Provincial Administrative Court (compare judgement of the Provincial Administrative Court in Lublin of 19 May 2004, file reference I SA/Lu 59/04; judgement of the Provincial Administrative Court in Białystok of 30 May 2006, file reference I SA/Bk 95/06; judgement of the Provincial Administrative Court in Warsaw of 18 April 2007, file reference I Sa/Wr 1404/2006; judgement of the Provincial Administrative Court in Lublin of 11 June 2008, file reference I SA/Lu 83/08).

⁷ Judgement of 14 November 2014, file reference II FSK 3049/12.

⁸ Compare L. Etel, *Commentary to the Act on Local Taxes and Fees*, Legis 2005.

In colloquial language, the term 'technical' is defined as 'referring to technology, applied in technology, included in the scope of technology, dealing with technology'⁹. In turn the term 'technology' is defined as 'means, measures and activities connected with the creation of material means'¹⁰, as 'systems of material means created by humans for the implementation of business activity purposes and skills to use these means'¹¹, or as 'section of civilisation and culture covering means of work and technical production skills'¹². Colloquial language treats technical reasons as connected with technical condition or status as well as with the way of the performance (essence) of land, building or structure¹³.

Applying the rules of systemic interpretation, authors presented the position that as Article 1a(1)(1) and Article 1a(1)(2) of the Act on local taxes and fees contain definitions of a building and structure referring to the provisions of construction law, technical reasons in relation to these objects of taxation should be also interpreted on the basis of the provisions of construction law¹⁴, particularly that the assessment of the technical condition of a building and structure goes beyond the tax authority's activities¹⁵. Such an approach is not supported by the content of Article 1a(1)(3) of the Act on local taxes and fees and would lead to the interpretation narrowing it as this provision providing for 'technical reasons' does not contain references to construction law. The reference in the Act on local taxes and fees to the provisions of construction law concerns the determination of strictly specified concepts, not any categories and definitions which function in tax law. Hence, it should be concluded that the provisions of construction law may be applied in the interpretation of concepts 'building' and 'structure', but not in the interpretation of 'technical reasons'¹⁶.

The provisions of construction law or the provisions concerning environmental protection are not directly applicable in the sphere of tax law as they

⁹ Compare M. Szymczak (ed.), *Polish Language Dictionary. Volume 3*, Warsaw 1981.

¹⁰ W. Kopaliński, *Dictionary of Foreign Words*, Warsaw 1999.

¹¹ PWN *Universal Encyclopaedia. Volume IV*, Warsaw 1976.

¹² A. Karwowski (ed.), *PWN Lexicon*, Warsaw 1972.

¹³ Compare B. Pahl, *Problems of Interpretation of the 'Technical Reasons' Concept for the Purposes of Charging the Real Estate Tax in the Light of the Case Law of Administrative Courts*, 'Municipal Finance' (Finanse Komunalne) 2009, no. 11, p. 32.

¹⁴ Letter of the Director of the Department of Local Taxes and the Cadastre of 20 October 2003 (LK-1601/LP/03/PP) to the City Council (...) on the exclusion of buildings and structures connected with conducting business activities for technical reasons. Letter of the Director of the Department of Local Taxes and the Cadastre of 21 August 2003, LK-795/LP/03/PP, and letter of 13 March 2003, LK-72/LP/03/PP.

¹⁵ Judgement of the Provincial Administrative Court in Gliwice of 16 March 2005, file reference I SA/GI 868/04.

¹⁶ Judgement of the Provincial Administrative Court in Bydgoszcz of 29 October 2004, file reference I SA/Bd 461/04, now published in: B. Dauter (red.), *Local Taxes and Fees. Agricultural Tax. Forestry tax. Case Law of Administrative Courts in Tax Cases*, Warsaw 2007, p. 33.

regulate issues other than the amount of tax. Although these regulations can be helpful in the determination of technical reasons relevant for buildings and structures, there are no grounds for referring to the provisions of this part of law in the case of land¹⁷.

4. Technical reasons in case law

Lack of legal definition caused that the concept of technical reasons was the object of case law of administrative courts in many cases. In these judgments it is stated that real estate may be excluded from taxation at the rate provided for real estate connected with conducting business activities only if there are technical obstacles causing its economic uselessness. It is about objective causes, independent on the entrepreneur's will and not attributable thereto, but connected with the given object of taxation. The real estate cannot be used for conducting business, but moreover no possibility to conduct business activities in it should exist¹⁸. The wording of Article 1a(1)(3) of the Act on local taxes and fees, in the context of which the legislator used conjunction ('the object of taxation is not and cannot be used'), not only indicates the fact of lack of use of this object, but also lack of real possibility to use it¹⁹.

In the case law it is underlined that the expression 'is not and cannot be used' means that it is not enough if the real estate is in bad technical condition, but additionally this state should be permanent²⁰. Therefore, this is the case of such physical defects of buildings, structures and land which permanently, not temporarily, prevent the entrepreneur from using them pursuant to the purpose of their business activities²¹. Circumstances that make it impossible to use real estate for business purposes must exist in a given fiscal year and must be of a permanent nature, although they do not have to constitute an irreversible or irremovable obstacle to conducting business activities²². Therefore, it should be concluded that temporary lack of use by the entrepreneur of the real estate

¹⁷ B. Pahl, *Gloss to the Judgement of the Supreme Administrative Court of 17 January 2008 (II FSK 1517/07)*, 'Case Law of Polish Courts' (Orzecznictwo Sądów Polskich) 2009, no. 4, p. 327.

¹⁸ Response to the parliamentary question of 12 July 2012 concerning the clarification of the 'technical reasons' concept in the Act on local taxes and fees, no. SPS-023-6959/12.

¹⁹ Judgement of the Provincial Administrative Court in Wrocław of 18 February 2015, file reference I SA/Wr 2438/14, LEX no. 1683013.

²⁰ B. Pahl, *Problems of Interpretation of the 'Technical Reasons' Concept...*, *op. cit.*, p. 36.

²¹ Judgement of the Supreme Administrative Court of 1 June 2011, file reference II FSK 151/10.

²² For example judgement of the Provincial Administrative Court in Wrocław of 19 January 2011, file reference I SA/Wr 1662/11; judgement of the Provincial Administrative Court in Łódź of 6 September 2011, file reference I SA/Łd 830/11; judgement of the Provincial Administrative Court in Szczecin of 28 April 2011, file reference I SA/Sz 53/11; judgement of the Supreme Administrative Court of 1 June 2011, file reference II FSK 151/10.

or its part, resulting from their will or decisions taken within business activities conducted, does not constitute grounds for the application of different tax rates than those provided for real estate connected with conducting business activities²³. Such real estate, despite temporary lack of its use for different reasons, does not stop to be real estate connected with business activities conducted by the given entity²⁴.

At the same time, however, it should be underlined that the criterion of permanence does not result from the provisions of law. While the criterion of objective impossibility to use real estate results from the expression 'is not and cannot be used', the requirement of technical reasons should not be limited exclusively to the situation in which the correct technical condition of the real estate excluded from the use will never be restored. According to *the Polish Language Dictionary*, 'permanent' means 'existing for a longer time, not subject to fast changes'. The word 'permanence' is not the synonym of changelessness, timelessness. Therefore, the statement that permanence of technical circumstance resulting in impossibility to use the object of taxation with real estate tax for conducting business activities means its changelessness is unfounded. It does not have to be only such a circumstance that will never change over time or as a result of any activities. For example, even biological or chemical contamination by its nature is not timeless (unchangeable) as after the lapse of specific time or as a result of intentional human actions it may be eliminated.

The expression 'the object of taxation is not and cannot be used for conducting this business activity for technical reasons' indicates not only the current condition of this object, but also potential possibilities of using it. Therefore, a question should be asked whether technical reasons that prevent conducting business activities should be understood as a situation in which it is impossible to conduct any business activities or only business activities conducted by a given taxpayer.

The analysis of the case law does not allow giving a clear response to this question. On the one hand, in the opinion of the Supreme Administrative Court 'technical reasons' should be understood as construction conditions of a structure being in possession of the taxpayer and organisational reasons connected with the way in which the taxpayer conducts business activities²⁵. In this con-

²³ Compare judgement of the Supreme Administrative Court of 9 January 2009, file reference II FSK 1354/07, judgement of the Provincial Administrative Court in Gliwice of 11 July 2013, file reference I SA/GI 109/13.

²⁴ Ibidem; judgement of the Supreme Administrative Court of 16 February 2006, file reference II FSK 301/05.

²⁵ Judgement of the Supreme Administrative Court of 7 October 2010, file reference II FSK 2080/08.

text, the clause of technical reasons allows the reduction of the rate of the real estate tax if there are objective circumstances of a technical nature preventing the entity from using the real estate for purposes of its business activities²⁶. In another judgement however, the Supreme Administrative Court denied taking into account specific nature of the taxpayer's business activities, stating that the technical defect deciding on the occurrence of technical reason referred to in Article 1a(1)(3) of the Act on local taxes and fees must prevent business use of the real estate in any activities²⁷.

Analysing the case law in this scope, it can be stated that the second position according to which the uselessness of the object of taxation for conducting business activities for technical reasons should be considered in objective categories, not its specific nature, is more common. The object of taxation cannot be suitable for conducting activities by a specific entrepreneur and, at the same time, could not be used for other business activities by a different entrepreneur²⁸. In different judgements it was indicated that technical reasons which prevent conducting business activities should be understood as a situation in which it is impossible to conduct any business activities, not only business activities in the scope conducted by a given taxpayer²⁹.

However, we should agree with the argumentation that technical reasons that exclude facilities from categories connected with conducting business activities concern specific real estate in terms of its use in specific business activities conducted by a given taxpayer. The possibility to use given real estate for other purposes is irrelevant as the taxpayer does not conduct such activities³⁰. It is supported by the literal wording of the provision (the use of pronoun 'this' in the expression 'the object of taxation is not used for conducting this business activity') as well as the fact that the adoption of a different position would mean in fact that the provision would be never applied because in the realities of

²⁶ Compare M. Rusinek, *Commentary to Article 1(a) of the Act of 12 January 1991 on local taxes and fees*, LEX/el. 2005.

²⁷ Judgement of the Supreme Administrative Court of 6 December 2011, file reference II FSK 1116/10.

²⁸ Also commentators agree with this assessment, e.g. L. Etel: 'Technical reasons determine that a given object in technical terms is not suitable for use not only in the company conducted, but also in any other business activity'. L. Etel, *Commentary to Article 1a of the Real Estate Tax Act*, LEX 138626; B. Pahl, *Problems of Interpretation of the 'Technical Reasons'*..., *op. cit.*, p. 37.

²⁹ Judgement of the Provincial Administrative Court in Wrocław of 18 February 2015, file reference I SA/Wr 2438/14.

³⁰ K. Radzikowski, *Lack of Permission for Use or Operation of the Structure as 'Technical Reasons' Excluding Real Estate from Categories connected with Conducting Business Activities. Gloss to the Judgement of the Provincial Administrative Court in Warsaw of 27 June 2008 (file reference III SA/Wa 198/08)*, 'Municipal Finance' (Finanse Komunalne) 2009, no. 4, p. 63.

freedom of business activities it is always possible to use a given structure³¹.

When it comes to understanding technical reasons in the context of land, letters of the Ministry of Finance of 13 March 2003 and 21 August 2003 present the position according to which we could speak about technical reasons in the situation of e.g. chemical, radioactive or bacteriological contamination of land³². The case law confirmed that technical reasons in relation to land should be understood in particular as specific geological conditions preventing their use for conducting business activities until the performance of expensive ground works or change of the land designation, chemical, radioactive or bacteriological contamination of land preventing its use³³. However, the statement that in the case of land the occurrence of technical reasons would cover only exceptional situations of its contamination is not justified³⁴. This prerequisite covers real estate unsuitable for conducting business activities, which will be difficult to be disposed of due to its state, e.g. land damaged by natural disasters or flooding³⁵, contaminated, unstable (movable), slumping land, etc.

As an example, in one of judgements it was indicated that land remained after the liquidation of rail line cannot be used in business activities for technical reasons, as technically, by location of specific devices (sleepers, rails, etc.) thereon and possible specific features (tunnels, embankments) this land was adapted exclusively for its use as a railway line³⁶.

In turn, in another judgement the court stated that self-sowing bushes and trees that grew on the land as a result of lack of its treatment do not constitute an obstacle of a technical nature as their removal only requires undertaking appropriate cleaning and legal actions if self-sowing bushes and trees exceed

³¹ Even buildings and structures which are ruined to such an extent that they are not suitable for any use and which cannot be approached due to the danger of collapse could be, for example, the object of film set background (P. Banasik, M. Kukuła, *Concept of technical reasons vs. technical progress. Gloss to the Judgement of the Supreme Administrative Court of 10 September 2015, II FSK 1972/13* [in:] B. Brzeziński, W. Morawski, J. Rudowski, (ed.), *Case Law on Tax Cases*, LEX/el. 2019).

³² This view was presented in letter of the Director of the Department of Local Taxes and the Cadastre of 21 August 2003, LK-795/LP/03/PP, and in letter of 13 March 2003, LK-72/LP/03/PP; L. Etel, B. Pahl, *Concept of 'Technical Reasons' and Rules of Taxation of Forest Land being in the Possession of the Entrepreneur*, 'Review of Local taxes and Self-Government Finance' (Przegląd Podatków Lokalnych i Finansów Samorządowych) 2009, no 5, pp. 22-26.

³³ For example judgement of the Provincial Administrative Court in Lublin of 25 March 2011, file reference I SA/Lu 546/10.

³⁴ A. Laskowski, *Technical Causes – as a Prerequisite Justifying the Reduction of the Real Estate Tax Rate (Polemical Article)*, 'Review of Local Taxes and Self-Government Finance' (Przegląd Podatków Lokalnych i Finansów Samorządowych) 2007, no. 1, p. 6.

³⁵ Response to the parliamentary question of 12 July 2012 concerning the clarification of the 'technical reasons' concept in the Act on local taxes and fees, file reference: SPS-023-6959/12.

³⁶ Judgement of the Provincial Administrative Court in Gdańsk of 8 April 2014, file reference I SA/Gd 260/14.

certain age and are not fruit trees and bushes³⁷. The Supreme Administrative Court also indicated that devastation of land does not constitute technical reasons, in connection with which devastated land being in the possession of a mine will be subject to taxation at the highest rate, as post-mining land rehabilitation is multi-stage process prepared, planned and performed at each stage of business activities conducted. Rehabilitation activities become part of business activities in the scope of the extraction of minerals from the time of obtaining the concession³⁸.

5. Technical reasons vs. technical condition of real estate

Technical reasons refer to bad technical condition of the given object of taxation, unsuitable for business activities conducted³⁹, however they cannot be identified with technical condition of the real estate being in the possession of the taxpayer. It does not result from the content of Article 1a(1)(3) of the Act on local taxes and fees that technical reasons mean technical condition of the object of taxation⁴⁰. It is worth underlining that the issue of technical condition of real estate occurred in legal acts regulating the real estate tax just after the Second World War. According to Article 16(8) of the decree of 20 March 1946 on municipal taxes⁴¹, the exemption from the tax covered real estate or its parts unoccupied due to bad condition and not used in any other way. In turn, in Article 3(1)(8) of the Act of 19 December 1975 on certain land taxes and fees⁴² the exemption from the tax covered buildings or their parts unoccupied and not used due to bad technical condition.

The concept of inappropriate technical condition of a structure currently occurs in the context of construction law. Pursuant to Article 66(2) of the Act of 7 July 1994 – Construction Law⁴³, a construction supervision authority may prohibit the use of a civil structure or its part until the removal of irregularities indicated in Article 66(1)(1)–(3) of the Construction Law Act, i.e. in the case of statement that the civil structure:

- 1) may endanger human life or health and safety of property or environment or

³⁷ Judgement of the Provincial Administrative Court in Szczecin of 6 March 2008, file reference I SA/Sz 507/07.

³⁸ Judgement of the Supreme Administrative Court of 25 September 2015, file reference II FSK 2010/13.

³⁹ L. Etel, B. Pahl, *Concept of 'Technical Reasons'...*, *op. cit.*, pp. 22-26.

⁴⁰ Judgement of the Provincial Administrative Court in Gliwice of 17 June 2005, file reference I SA/GI 760/04.

⁴¹ Decree of 20 March 1946 on municipal taxes (consolidated text: Journal of Laws of 1947, no. 40, item 198, as amended).

⁴² Act of 19 December 1975 on certain land taxes and fees (Journal of Laws no. 45, item 229, as amended).

⁴³ Journal of Laws of 2018, item 1202, as amended (hereinafter referred to as: the 'Construction Law Act')

- 2) is used in a manner endangering human life or health and safety of property or environment or
- 3) is in inappropriate technical condition.

The purpose of Article 66 of the Construction Law Act is to ensure appropriate and safe technical condition of existing civil structures and their use in a manner not endangering protected goods indicated in the act. 'Inappropriate technical condition' referred to in Article 66(1)(3) of the Construction Law Act means the state resulting from improper use of the structure, occurred as a result of wear of its certain elements, the deterioration of its essence, lack of renovations and proper care for technical condition⁴⁴. Construction supervision authorities do not examine reasons which led to the inappropriate technical condition of the structure and the entity liable for this condition⁴⁵. In other words, circumstances which led to the fulfilment of prerequisites determined in this provision are irrelevant. The issue of inappropriate technical condition will usually result from technical wear of the civil structure over time, and sometimes improper use as well as lack of care for the structure, non-performance of periodic mandatory inspections or necessary repairs. This condition may also result from a breach of technical and construction regulations⁴⁶. Therefore, this prerequisite remains in the sphere of the way in which the civil structure is used, including the way non-compliant with its designation. The provision of Article 66(1) of the Construction Law Act does not contain the issue of culpable act or contributory negligence, and thus it is not necessary to determine who is liable for the situation in order to apply this provision⁴⁷. Issuing a decision on the basis of this regulation, the construction supervision authority does not have powers to examine reasons for the occurrence of inappropriate technical condition of the building⁴⁸. The only thing that matters is the determination that the condition of the building does not fulfil requirements concerning technical condition. Therefore, the objective approach to prerequisites for the issue of a decision under construction law is clear.

In the case law concerning technical reasons, numerous references to technical condition of real estate occurred. In the judgement of 17 June 2005

⁴⁴ Judgement of the Supreme Administrative Court of 6 October 2015, file reference II OSK 264/14.

⁴⁵ M. Wincenciak, *Legal Liability in Construction Law* [in:] Z. Duniewska, M. Stahl (ed.), *Liability of Administration and in Administration*, Warsaw 2013, p. 511.

⁴⁶ A. Despot-Mładanowicz [in:] A. Gliniecki (ed.), *Construction Law. Commentary*, Warsaw 2016, Article 66.

⁴⁷ Judgement of the Supreme Administrative Court of 20 May 2011, file reference II OSK 906/10.

⁴⁸ Judgement of the Supreme Administrative Court of 2 December 2015, file reference II OSK 838/14.

the Provincial Administrative Court in Gliwice indicated that technical reasons concern only the possibility to use specific object of taxation and constitute a factual circumstance independent of the entrepreneur's will, resulting directly from technical condition of this object⁴⁹. In turn, according to the Provincial Administrative Court in Olsztyn if bad technical condition of a building results only from circumstances dependent on the taxpayer, not from objective reasons, and is not of a permanent nature, there are no technical reasons justifying taxation at a lower rate⁵⁰. Inappropriate technical condition of a building does not disqualify it in terms of conducting business activities. The building is still suitable for conducting business activities despite the fact that its technical condition is bad. This assessment does not change the necessity to carry out a comprehensive revitalisation and modernisation of the structure. The taxpayer may objectively remove obstacles to conducting business activities and the use of the building for conducting business activities is actually possible. The 'technical reasons' concept should be understood as objective and permanent circumstances independent on the entrepreneur. They are physical defects of the object of taxation which permanently, not temporarily, prevent the entrepreneur from using it pursuant to the purpose of their business activities.

The Supreme Administrative Court indicated that technical reasons cannot be identified with obstacles of a temporary nature, resulting from the will of the taxpayer and decisions taken by them within business activities on renovations, alteration, adaptation or change in the designation of the structure. Technical reasons within the meaning of Article 1a(1)(3) of the Act on local taxes and fees mean a permanent and objective obstacle in the use of land, building or structure to conducting business activities⁵¹. This provision can be applied only in the case of occurrence of objective circumstances of a technical nature, completely preventing the use of the object of taxation for the purposes of business activities conducted by a given entity – both currently as well as in the future⁵².

The prerequisite of 'technical reasons' has the character of an exception, therefor it should be interpreted accurately, not extensively⁵³. Business decisions taken by the entrepreneur (e.g. on renovations, modernisation, adaptation or change in designation of the building) or the taxpayer's activities or lack

⁴⁹ Judgement of the Provincial Administrative Court in Gliwice of 17 June 2005, file reference I SA/GI 760/04.

⁵⁰ Judgement of the Provincial Administrative Court in Olsztyn of 8 September 2016, file reference I SA/OI 334/16.

⁵¹ Judgement of the Supreme Administrative Court of 20 January 2016, file reference II FSK 3186/13.

⁵² Judgements of the Supreme Administrative Court: of 14 November 2014, file reference II FSK 3049/12; of 25 November 2015, file reference II FSK 2450/13; of 21 January 2016, file reference II FSK 3337/13.

⁵³ L. Etel, B. Pahl, *Concept of 'Technical Reasons'...*, *op. cit.*, pp. 22-26.

of their reasonable activities which as a result led to bad technical condition of the real estate preventing its use (e.g. failure to bring utilities to the real estate as a result of the co-owners' dispute⁵⁴), are not classified as technical reasons referred to in Article 1a(1)(3) of the Act on local taxes and fees.⁵⁵ Technical reasons must be of an objective nature, i.e. independent of the entrepreneur's will. The requirement that the exemption from taxation for technical reasons should be the effect of events independent from the taxpayer does not result from the content of the provision⁵⁶. Nevertheless, it should be concluded that the 'technical reasons' concept does not include circumstances or factual and legal events leading to lack of use of real estate, being the effect of conscious and intentional action of the entrepreneur that for reasons other than technical ones stopped temporarily or permanently using for business purposes the given real estate being in their possession. For example, it cannot be stated that actual lack of use of objects of taxation for reasons consisting in permanent exclusion from operation and deletion of real estate in question from the fixed asset register constitute the circumstance which can be treated as resulting from 'technical reasons'⁵⁷. Technical reasons constitute a factual circumstance independent from the entrepreneur's will, resulting directly from technical condition of this object. They cannot be determined by the taxpayer's will (action or omission), but must result from external and physical circumstances concerning the essence of the object of taxation⁵⁸.

It was assumed in the case law that if the determined bad technical condition of real estate in a given fiscal year may be removed as a result of renovation, this is not the case described in Article 1a(1)(3) of the Act on local taxes and fees⁵⁹. Therefore, such real estate is subject to the highest rate of the real estate tax. In the context of renovation, the Supreme Administrative Court indicated that the performance of renovations, repairs or alterations in buildings

⁵⁴ Judgement of the Supreme Administrative Court of 16 September 2011, file reference II FSK 512/2010.

⁵⁵ Judgement of the Provincial Administrative Court in Wrocław of 19 January 2012, file reference I SA/Wr 1662/11.

⁵⁶ In the judgement of 28 June 2017, file reference II FSK 521/17, the Supreme Administrative Court dismissed the cassation complaint of the authority which argued that in the situation when bad technical condition of a building results only from circumstances dependent on the taxpayer, not from objective reasons, and additionally is not of a permanent nature, confirmed e.g. by the construction supervision authority's decisions, it cannot be concluded that technical reasons prevent the use of the structure from conducting business activities.

⁵⁷ K. Radzikowski, 'Technical Reasons' as the Prerequisite for the Exclusion of Real Estate from Categories connected with Conducting Business Activities. Judgement of the Provincial Administrative Court in Gliwice of 17 June 2005 (file reference I SA/GI 760/04), 'Municipal Finance' (Finanse Komunalne) 2008, no. 6, p. 68.

⁵⁸ Judgement of the Provincial Administrative Court in Gliwice of 17 June 2005, file reference I SA/GI 760/04.

⁵⁹ Judgement of the Provincial Administrative Court in Gliwice of 14 October 2005, file reference I SA/Ka 2250/03.

does not mean removal of connection of these buildings with business activities in the broad meaning. Temporary lack of use by the entrepreneur of real estate or its part in connection with renovations or adaptation works does not mean that the object of taxation is not and cannot be used for conducting business activities for technical reasons⁶⁰. The adaptation of buildings for conducting business activity intended in the future constitutes one of indicators of the performance of this activity⁶¹. If temporary lack of use of a building for conducting business activities results from the taxpayer's will and decisions on renovations or change in the way of its use taken thereby within business activity conducted, the prerequisite concerning lack of the possibility to use the structure for conducting this activity for technical reasons within the meaning of Article 1a(1) (3) of the Act on local taxes and fees does not occur⁶². The analysis of the above judgements leads to the conclusion that according to administrative courts the necessity to carry out thorough renovation or alteration of the real estate in order to allow conducting business activity does not constitute technical reasons. The courts' argumentation is most frequently based on the statement that as it is possible to carry out a renovation or alteration of a building, the impossibility to conduct a specific kind of business activity is not of a permanent nature⁶³. Equally often, it is further indicated that a renovation or alteration of a building is an element of the performance of business activity⁶⁴. Renovation works are only temporary condition, do not have a permanent character and do not cause that the building is not and cannot be used for business activities in the nearest period⁶⁵. Literature indicated, however, that for purposes of taxation with the real estate tax it is essential to distinguish thorough renovation of the structure during which it is emptied and not used by the entrepreneur or another entity conducting business activities from short-lasting adaptation connected with the change in designation of the building which is still used for conducting business activities⁶⁶. In the first case, the prerequisite concerning actual

⁶⁰ If the legislator intended to introduce a kind of tax relief for investing entrepreneurs, it would do it through a clear provision in the act (B. Pahl, *Problems of Interpretation of the 'Technical Reasons'...*, *op. cit.*, p. 36).

⁶¹ Judgement of the Supreme Administrative Court of 16 February 2006, file reference II FSK 301/05; judgement of the Provincial Administrative Court in Wrocław of 16 February 2015, file reference I SA/Wr 2367/14.

⁶² Judgement of the Supreme Administrative Court of 12 April 2011, file reference II FSK 2129/09.

⁶³ Judgement of the Provincial Administrative Court in Lublin of 31 January 2012, file reference SA/Lu 658/11.

⁶⁴ Judgement of the Supreme Administrative Court of 16 February 2006, file reference II FSK 301/05.

⁶⁵ B. Pahl, *Problems of Interpretation of the 'Technical Reasons' Concept...*, *op. cit.*, p. 37.

⁶⁶ K. Radzikowski, *Renovation of a Building connected with Conducting Business Activities vs. Real Estate Tax Rate – Gloss to the Judgement of the Supreme Administrative Court of 16/02/2006 (II FSK 301/05)*, 'Municipal Finance' (Finanse Komunalne) 2007, no. 12, p. 67.

non-performance of business activities and lack of such possibility due to its bad technical condition is met. In the second case, the adaptation of the structure for the change in its designation is one of the indicators of conducting this activity and does not cause the exclusion of the given structure from the class of structures connected with conducting business activities. The situation in which 'the structure existing in a given fiscal year is in such technical condition that cannot be used for conducting business activities even after the performance of renovation (restoration) and adaptation works which do not result in the construction of a new building' should be considered – in relation to buildings – as technical reasons⁶⁷. Therefore, it will be each objective technical circumstance not of an insignificant nature, e.g. circumstance which leads to the assessment that a given building is in a catastrophic condition and can collapse, not only unsuitable for renovation⁶⁸. In judgements concerning renovation it is visible that the taxpayer's behaviour, i.e. their actions and omissions in relation to the real estate, is indicated as one of elements determining the way of understanding and scope of application of the 'technical reasons' concept. Such an approach causes the introduction of subjective element to the analysis and departure from objective criterion of inappropriate technical condition.

The case law also indicated that in the context of the provisions of the Act on local taxes and fees the technical condition of a civil structure should be distinguished from the state of systems or devices of this structure which do not have impact on its qualification to the category of objects of taxation connected with conducting business activities. Lack of possibilities to use a building for business activities due to technical reasons must concern the building construction⁶⁹. This view, however, is not justified in the content of the provisions of the Act on local taxes and fees. Lack of sewage connection, electrical system and partial lack of windows and glazing have the character of circumstance of a technical nature, although it does not concern the building construction and does not constitute an objective obstacle excluding the possibility to use the building in the future⁷⁰. However, the Supreme Administrative Court confirmed that lack of the performance by the commune of connection to the water and

⁶⁷ Judgement of the Provincial Administrative Court in Gliwice of 5 July 2010, file reference I SA/GI 368/09; judgement of the Supreme Administrative Court of 24 February 2016, file reference II FSK 2398/14.

⁶⁸ Ł. Rogowski, *Verification of the Connection of Real Estate with Business Activities Conducted by Natural Persons*, 'Review of Local taxes and Self-Government Finance' (*Przegląd Podatków Lokalnych i Finansów Samorządowych*) 2017, no. 12, pp. 13-17.

⁶⁹ Judgement of the Provincial Administrative Court in Poznań of 9 June 2005, file reference I SA/Po 2213/03.

⁷⁰ Compare judgement of the Provincial Administrative Court in Olsztyn of 8 September 2016, file reference I SA/OI 334/16.

sewage network may be a prerequisite for the statement that the performance of business activities is impossible for technical reasons⁷¹.

As a summary, it results from the case law of the Supreme Administrative Court that the objective lack of possibility to bring a building to the condition in which it will be possible to conduct business activity in it should be distinguished from technical condition preventing the performance of this activity, resulting from the decision of the taxpayer that do not carry out appropriate construction works, e.g. for financial or economic reasons. The circumstance whether the obstacle to the use of the real estate for the purposes of business activities is not of a permanent nature and can be removed if the taxpayer decides to carry out specific renovation or modernisation works is decisive. Technical reasons concern bad technical condition of the given object of taxation, unsuitable for business activities conducted. Not every objective reason for bad technical condition prevents conducting business activities. Technical reasons cannot be identified with obstacles of a temporary nature, resulting from the will of the taxpayer and decisions taken within business activities on renovations, alterations, adaptations or change in the designation⁷².

The objective character of technical reasons is an important element of the definition of this concept. "Technical reasons" should be understood as objective and permanent circumstances constituting an obstacle to the use of real estate for conducting business activities⁷³. In other words, technical reasons preventing the entrepreneur from the use of the given real estate for conducting business activities are such factual (technical) circumstances which cause that the given real estate is permanently – due to the existing technical conditions – unsuitable for the use pursuant to the purpose of activities conducted by the entrepreneur⁷⁴. However, technical reasons and technical condition are not identical concepts. Technical reason is a broader concept and determining whether in the given case technical reasons occur we should take into account such technical condition of the object of taxation with the real estate tax which prevents conducting business activities.

⁷¹ Judgement of the Supreme Administrative Court of 17 November 2005, file reference FSK 2319/04.

⁷² Judgement of the Provincial Administrative Court in Lublin of 21 January 2015, file reference I SA/Lu 850/14.

⁷³ Judgement of the Supreme Administrative Court of 12 April 2011, file reference II FSK 2128/09. Compare T. Wołowicz, *Concept of Technical Reasons vs. Real Estate Tax Rate. Approving Gloss to the Judgement of the Supreme Administrative Court of 12 June 2019 (II FSK 1903/17)*, 'Case Law on Local Government Cases' (Orzecznictwo w Sprawach Samorządowych) 2020, no. 1, p. 33.

⁷⁴ K. Radzikowski, 'Technical Reasons' as the Prerequisite for the Exclusion..., *op. cit.*, p. 68

6. Causes of technical reasons and reasons other than technical on the example of access to real estate

Pursuant to the established case law, the prerequisite for the application of reduced tax rate is economic uselessness of the object of taxation, resulting from technical reasons. Therefore, uselessness resulting from business, organisational, legal or any other reasons does not constitute such a prerequisite⁷⁵. Hence, taking into account technological, business, financial and other reasons for lack of possibility to use the object of taxation for conducting business activities is excluded⁷⁶. Technical reasons do not include situations in which lack of use of given real estate is based on economic grounds (e.g. the extraction of minerals is unprofitable, costs of water treatment are too high), on administrative grounds (e.g. the concession for extraction was not obtained) or weather and climate grounds (minerals cannot be extracted in certain periods of the year)⁷⁷. The exclusion of objects of taxation from categories connected with conducting business activities will not take place if the performance of activities is impossible for technological reasons, e.g. disassembling the water and sewage system, closing the valves, reducing the demand for water, disconnecting sockets and power delivery points, shutting off gas or failure of devices⁷⁸. Objects of taxation connected with conducting business activities will not be excluded from this category for technical reasons also if the performance of activities is impossible for economic reasons, e.g. lack of resources. The described exclusion will not take place also in the case of the issue on the basis of the provisions of construction law of a decision on demolition of a civil structure constructed without

⁷⁵ Judgement of the Supreme Administrative Court of 14 February 2012, file reference II FSK 1492/10. In the letter of 20 October 2003 the Director of the Department of Local Taxes and the Cadastre indicated that situations justified by technological or economic reasons cannot be qualified to technical reasons (letter no. LK-1601/LP/03/PP on the exclusion of buildings and structures connected with conducting business activities for technical reasons). Compare e.g. judgement of the Provincial Administrative Court in Szczecin of 28 April 2011, file reference I SA/Sz 53/11, judgement of the Provincial Administrative Court in Lublin of 23 March 2011, file reference I SA/Lu 834/10, judgement of the Provincial Administrative Court in Gdańsk of 15 March 2011, file reference I SA/Gd 1170/10, judgement of the Provincial Administrative Court in Gliwice of 14 December 2010, file reference I SA/Gl 901/10, judgement of the Provincial Administrative Court in Opole of 12 October 2011, file reference I SA/Op 101/11.

⁷⁶ Judgement of the Voivodeship Administrative Court in Wrocław of 19 January 2012, file reference I SA/Wr 1662/11.

⁷⁷ R. Dowgier, *Gloss to the Judgement of the Provincial Administrative Court in Lublin of 19 May 2004 (I SA/Lu 59/04)*, 'Review of Tax Case Law' (Przegląd Orzecznictwa Podatkowego) 2005, no. 3, pp. 211–212; L. Etel, *Principles of Taxation with Real Estate Tax of Land connected with the Extraction of Peat, 'Municipal Finance' (Finanse Komunalne)* 2005, no. 5, pp. 24–25; L. Etel, *Gloss to the Judgement of the Supreme Administrative Court of 17 January 2008 (FSK 1517/07)*, 'Review of Local Taxes and Self-Government Finance' (Przegląd Podatków Lokalnych i Finansów Samorządowych) 2009, no. 1, pp. 4–5.

⁷⁸ Compare judgement of the Provincial Administrative Court in Gliwice of 17 June 2005, file reference I SA/Gl 760/04.

the required permission, because it is caused by lack of construction decision (legal defect), not the technical condition of the structure.

Similarly, in principle courts take the view that obstacles to access to and use of real estate cannot be considered as technical reasons within the meaning of Article 1a(1)(3) of the Act on local taxes and fees⁷⁹. In the case law it was indicated that lack of proper entry to a public road from a plot of land results from economic and organisational prerequisites, or legal prerequisites, because technical reasons do not preclude hardening the land or constructing appropriate embankment⁸⁰. Trees or bushes on the land or its general devastation are also effects of specific economic and organisational decisions (or lack of such decisions). If for technical reasons tidying up the plot of land or improvement of access to a public road was impossible and this, in turn, excluded the possibility to conduct business activities on this plot, only then the prerequisite for the application of the reduced real estate tax rate would be met.

Such an assessment of technical reasons led to the issue of judgements in which it was stated that even if the structure was a ruin, we could not speak of technical reasons which would allow the exclusion of an economically useless structure from taxation at the maximum rates because the taxpayer could renovate it⁸¹. In fact, such interpretation would make the prerequisite concerning technical reasons a dead letter as it is always possible to carry out renovation and adaptation works which will bring the structure to the working order for purposes of business activities. It should be noted that also different judgements were issued, in which the Supreme Administrative Court took into account economic realities, e.g. stating that the taxpayer has the right to refer to bad technical condition of the building if maintaining it in good technical condition is unjustified⁸².

It does not change the fact of formation of jurisprudence practice, bringing the issue of technical reasons to the original and exclusive cause of the structure uselessness. If the bad technical condition of the structure resulted from economic, legal or other reasons dependent on the taxpayer, it was usually

⁷⁹ Judgement of the Provincial Administrative Court in Olsztyn of 27 December 2012, file reference I SA/OI 610/12.

⁸⁰ Judgement of the Supreme Administrative Court of 14 February 2012, file reference II FSK 1490/10.

⁸¹ Judgements of the Supreme Administrative Court: of 7 February 2014, file reference II FSK 458/12; of 14 March 2014, file reference II FSK 944/12; of 5 June 2014, file reference II FSK 1626/12. In principle, this position excluded the application of this provision if the taxpayer could renovate given structures, even for substantial expenses.

⁸² The Supreme Administrative Court in judgement of 14 October 2009, file reference II FSK 747/08.

stated that technical reasons did not occur as circumstances conditioning the application of a lower real estate tax rate. The case law concerning the concept of technical reasons adopts the assumption that these reasons must be of primary, not secondary (subsequent) nature. In the practice of the application of the technical reason prerequisite, courts seem to observe it in such a way that the reason for the occurrence of technical reasons of an objective and factual nature cannot be other than e.g. legal or economic reasons.

The example of a situation in which impossibility to use the real estate for conducting business activities results from legal and financial reasons, according to courts, is lack of access. The commune is not obliged to provide each real estate with access to a public road and to renovate or to adapt an internal road belonging to the commune for business activities. It is an optional task whose performance requires previous planning of resources for this purpose in the commune budget⁸³. If the access to the real estate is hindered due to bad technical condition of the road, e.g. it is bumpy, partially flushed by groundwater and does not fulfil its functions for the taxpayer's activities, the adaptation of the road falls within the powers of the commune if this road has the status of an internal road in relation to which the commune performs ownership obligations, including maintenance of the road in good condition. Due to its priorities, the commune has the right not to adjust the road parameters to the taxpayer's requirements. In such a case, reasons for lack of access to the real estate are of a legal nature (determination of the scope of the commune obligations) and of an economic nature (lack of resources in the commune budget for this purpose). Bad technical condition of the access road to the taxpayer's real estate results from reasons of a legal and financial nature. This position was expressed by the Provincial Administrative Court in Szczecin, which stated that lack of access to a public road does not constitute technical reasons referred to in Article 1a(1)(3) of the Act on local taxes and fees⁸⁴. Reasons for lack of access are of a legal and economic, not technical nature, and do not affect the qualification of this land for purposes of the real estate tax. This view

⁸³ Judgement of the Provincial Administrative Court in Szczecin of 28 April 2010, file reference II SAB/Sz 174/09, in which it was indicated: 'Pursuant to Article 8(2) and (3) of the Act on public roads, the construction, alteration, renovation, maintenance, protection, marking and management of internal roads and financing these tasks lay within the tasks of the administrator of the land on which the road is located and in the case of its lack – to the owner of this land. Therefore, if the road owner is the commune, it is obliged to maintain the road in good condition. However, the analysis of the provisions concerning the commune obligations confirms that the commune is not obliged to adjust internal roads for business activities'.

⁸⁴ Judgement of the Provincial Administrative Court in Szczecin of 6 March 2008, file reference I SA/Sz 507/07.

was approved by the Supreme Administrative Court⁸⁵, and then was established by the Provincial Administrative Court in Wrocław, which confirmed that if it is possible to adjust the road (e.g. through its hardening), there are no grounds for stating technical reasons⁸⁶. Such a circumstance will also not occur if the road cannot be adjusted to the movement of heavy machinery necessary in the taxpayer's business activities in the case of possibility to use this land for another purpose in business activities. The obstacle in the form of a road not adjusted to the taxpayer's activities (e.g. for transport of heavy machinery) may be removed as a result of undertaking by the taxpayer legal actions aimed at the execution with the commune of an arrangement whose object would be the agreement of technical and construction conditions concerning hardening the road and incurring costs of its performance⁸⁷. That is why lack of access caused by the fact that the road exists but is not adjusted to transport of heavy machinery cannot be considered as 'technical reasons' within the meaning of Article 1a(1)(3) of the Act on local taxes and fees. According to the Court, the fact of the existence of access to the real estate (land) – although inconvenient for the taxpayer's needs and the profile of their activities – and the circumstance of impossibility to reach an agreement with the commune in relation to the performance of investment in order to obtain the passability of the road to the real estate prove that economic reasons decide on the use of land for business activities (the commune does not have resources for this purpose). The negative processing by the commune of the request for the construction of the road may be also analysed in the context of the existence of legal reasons (the performance by the commune of the obligation to ensure access to the road).

Lack of access due to non-adjustment of the road to transport of heavy machinery, resulting from the fact that the commune is not obliged to adjust roads for the taxpayer's activities and the taxpayer does not want to incur all costs connected with its performance, does not fulfil the condition according to which 'the object of taxation is not and cannot be used' as in this case the use of the road depends on economic factor (cost of performance) or legal factor (agreement on the entity that is to carry out this road). Situations in which the physical condition of the real estate prevents or significantly hinders its use for conducting business activities, while reasons for such condition do not result

⁸⁵ Judgement of the Supreme Administrative Court of 3 December 2009, file reference II FSK 1048/08.

⁸⁶ Judgement of the Provincial Administrative Court in Wrocław of 18 February 2015, file reference I SA/Wr 2438/14.

⁸⁷ Judgement of the Supreme Administrative Court of 14 February 2012, file reference II FSK 1490/10

from the characteristics of the real estate, but from different circumstances, are not technical reasons within the meaning of Article 1a(1)(3) of the Act on local taxes and fees. As the Supreme Administrative Court stated, the 'technical reasons' concept does not include limitations in the use of the real estate resulting from the provisions of law as well as from the way of the land use⁸⁸. The situation would be different if the road ran along moving sands. Then, the construction of road would not be possible due to purely technical reasons – the road would collapse in the soft ground. Such a circumstance certainly does not come down only to economic aspects (costs of the road construction) or legal aspects (arrangement with the commune), but constitutes a technical condition.

To sum up, if the tax authority determines that there is technical possibility to ensure the passability of the road, lack of such a road cannot be considered as 'technical reasons' within the meaning of Article 1a(1)(3) of the Act on local taxes and fees as the 'technical reasons' concept should be connected only with objective obstacles. In this case, lack of convenient access is of a temporary nature and can be removed through the road renovation. Circumstances concerning the impossibility to use the plot of land due to uneven and unhardened access road would have to be confirmed by the taxpayer in the form of evidence from which it would result that these obstacles are of a permanent nature. Technical lack of possibility to adjust the access road for any transport for reasons connected with the terrain features decides on the economic uselessness of the real estate. Legal and economic reasons connected with the performance of convenient access to the real estate do not affect the assessment of possibility to conduct business activities as they fall within the scope of the 'technical reasons' concept. In such a case the presumption that the taxpayer's real estate is connected with conducting business activities is not refuted, which means the obligation to apply the highest tax rate.

It is worth noting that the issue of technical reasons should be considered in principle in relation to the given real estate being the object of taxation, not its access road⁸⁹. Nevertheless, the issue of access affects the possibility to use the given real estate, hence lack of access may be understood in the context of technical reasons due to which it is impossible to use the real estate⁹⁰.

⁸⁸ Judgement of the Supreme Administrative Court of 14 March 2012, file reference II FSK 1748/10.

⁸⁹ In the judgement of 17 February 2010, file reference I SA/Sz 712/09, the Provincial Administrative Court in Szczecin drew the conclusion that 'technical reasons must be inherent in the land itself and relate to technology, i.e. they must be insurmountable and permanent circumstances, not a temporary obstacle'.

⁹⁰ The same problem concerns systems and devices (equipment) of the civil structure whose technical condition may affect the qualification of the structure to the category of objects of taxation not connected with conducting

The matter in the above reasoning of courts which is worth stressing is the indication that reasons for lack of access to a public road are of a legal and economic, not technical nature. It is evident here that instead of focusing on the nature of lack of access to a public road, its reasons became the object of considerations. This shift caused the distortion of understanding of the technical reason condition. It was assumed that the exclusion of real estate from the category of real estate used for business activities requires the consideration of the kind and nature of the obstacle as well as the determination of reasons and time of the obstacle occurrence⁹¹.

7. Legal reasons on the example of the permission for use

In the context of inappropriate technical condition of real estate and the hierarchy of 'reasons', it should be considered whether lack of permission of relevant authorities, within competences assigned thereto by law, for the use of real estate for economic purposes may be considered as excluding the given real estate from the category of real estate connected with conducting business activities. It should be noted that while evaluating the admissibility of the use of real estate, the construction supervision authority assesses its technical condition. Therefore, it is the original reason (cause) for granting the consent or its lack. Consent understood as a legal circumstance is the direct and secondary⁹² (subsequent) reason for the possibility to use the real estate in activities or lack of such possibility. The construction supervision authority does not assess reasons for which the real estate is in inappropriate technical condition – it focuses on the objectively existing condition of the structure. Looking for consequence and logic in the approach to the issue of technical reasons in the context of the real estate tax, we should answer the question whether, as courts refused to acknowledge that the real estate is not used in activities for technical reasons when the bad condition of the real estate resulted from legal and economic reasons, they consequently concluded that in the case of lack of obtaining the consent for the use of the real estate the technical reasons constituted the cause or whether they treated it as legal (direct) reasons or – which would be also consistent – sought legal or economic reasons behind bad technical condition, which caused the relevant authority's refusal to issue the consent for the use of the real estate for purposes of business activities.

business activities.

⁹¹ Judgement of the Provincial Administrative Court in Wrocław of 19 January 2012, file reference I SA/Wr 1662/11.

⁹² See K. Radzikowski, *Lack of Permission for Use...*, *op. cit.*, p. 63.

In the judgement of 24 April 2009 the Supreme Administrative Court stated that lack of consent for the use of the real estate may be caused by technical reasons connected with this activity, e.g. when structures which the taxpayer plans to use for conducting the activity were constructed in a way not providing the neighbouring real estate with the proper protection against harmful emission from the taxpayer's real estate⁹³. Then, technical reasons (construction conditions of structures included in the taxpayer's enterprise) may cause excessive nuisance of the taxpayer's activity for the surroundings, similarly as organisational reasons (the way of conducting the activity will be too burdensome for the environment or local population). In such a case, lack of consent of relevant authorities for the use of the real estate for purposes of specific business activity will be of a secondary nature in relation to technical reasons justifying lack of this consent. As a result, the Court concluded that lack of consent due to technical reasons connected with this activity may be considered as the prerequisite excluding the real estate from the category of real estate connected with conducting business activities.

An interesting example of the judgement in which opposite reasoning focused on the direct cause of impossibility to use the real estate was adopted is the judgement in which the Supreme Administrative Court ruled that technical reasons referred to in Article 1a(1)(3) of the Act on local taxes and fees, excluding the possibility to use the building or structure in business activities, may also result from technological progress⁹⁴. However, in fact the Court referred to legal requirements which may change under the influence of technology development and – in the case of their amendment – cause that the structure does not meet standards required by law⁹⁵. In the discussed case, lack of possibility to use the questionable building for technical reasons was caused by the amendment in the provisions concerning the prevention of fire risks. Therefore, the direct causes of lack of possibility to use the structure were technical reasons which did not meet legal criteria, although the Court could just as well conclude

⁹³ Judgement of the Supreme Administrative Court of 24 April 2009, file reference II FSK 47/08.

⁹⁴ Judgement of the Supreme Administrative Court of 10 September 2015, file reference II FSK 1972/13; P. Banasik, M. Kukuła, *Concept of Technical Reasons vs. Technical Progress...*, *op. cit.*

⁹⁵ Similarly, lack of appropriate decision on the permission for operation of the yard constitutes the official confirmation of the fact that the yard could not be used for technical reasons, in this case due to environmental protection requirements. Lack of the administration authority's consent results from technical reasons and confirms them in a way. This problem also concerns the issue of lack of the district veterinary officer's decision (consent) caused by non-adjustment of the building to requirements resulting from the provisions that regulate combating infectious diseases of animals or the issue of health conditions of feed and feeding. In the judgement of 16 April 2008, file reference I SA/Po 33/08 ('Tax Monitor' (Monitor Podatkowy) 2008, no. 10, pp. 40-44), the Provincial Administrative Court in Poznań stated that temporary lack of possibility to use a building or structure, resulting from circumstances depending on the taxpayer (e.g. the need to adjust the building to sanitary demands), is irrelevant for the application of the exclusion in question (for technical reasons).

that legal reasons which excluded the use of the building of certain parameters, even though the building could be used technically in given activity, were of key importance here, as it was possible to renovate the building in order to ensure safety conditions provided for in law. The Court indicated that 'Progress may cause that technical solutions applied in the construction of the building or structure do not allow the use of the real estate in accordance with its intended purpose due to amendments in requirements concerning safety rules, being the effect of the development of new technologies. Without the alteration or adaptation, the use of the building or structure in accordance with its original purpose may be impossible due to technical conditions determined by law, while this impossibility is of a permanent nature even if the building can be adjusted to new technical standards in force. Until such changes are not performed (irrespective of reasons for which they are not performed), technical reasons make it impossible (in an objective manner, independent from the taxpayer's will or fault) to use the building or structure for conducting business activities, as the essential role is played by the original cause which makes it impossible to use the object of taxation, not subsequent causes for which the real estate was not bring to the working order making it possible to conduct business activities'.

This judgement is important because earlier judgements focused on the cause of the bad technical condition (cause of the occurrence of technical reasons) which made it impossible to use the real estate, whereas in this case the Court referred to the inappropriate technical condition of the building – and although it indicated its possible cause, it did not distinguish original and secondary causes of the occurrence of specific circumstances. Contrary to previous decisions, the Supreme Administrative Court concluded that the possibility to carry out the renovation or adaptation of the building does not exclude the fact that the given structure cannot be used for technical reasons to conduct business activities. The opposite view previously dominant in decisions of tax authorities and law case of administrative courts caused that the analysed provision in practice had never been applied. Some causes which could be considered as other than technical reasons for lack of use of the real estate are always behind bad technical condition. Due to the technology progress it is always possible to undertake actions restoring technical efficiency to the given real estate and thus – to use it for conducting business activities.

Interestingly, in the case law the approach to structures intended for demolition was liberalised, while quite high formal conditions were set: 'Determination that the given civil structure (building or structure) is not used for conducting the

taxpayer's business activities and cannot be used in such a way in the future (e.g. due to obtaining a permission for its demolition) excludes it from categories connected with conducting business activities (Article 1a(1)(3) of the Act on local taxes and fees). In the case of a structure in relation to which the demolition decision was issued, it is not the case of its temporary lack of use for conducting business activities, but definitive exclusion of this structure from such activities. The structure designated for demolition, irrespective of causes of such a decision, intrinsically cannot be used for conducting business activity, while the statement that it is not used in this activity constitutes 'technical reason' referred to in Article 1a(1)(3) of the Act on local taxes and fees⁹⁶.

Analysing the approach to legal reasons for lack of use of the real estate, it should be also noted that lack of possibility to use buildings and structures covered by the exclusion for purposes of business activities conducted does not have to be confirmed by the construction supervision authority's decision, similarly as in the case of land lack of its use does not have to be confirmed by the administrative authority competent for environmental protection. Such a view occurred in letters of the Ministry of Finance of 13 March 2003 and 21 August 2003, in which it was explained that the determination of technical reasons is possible only on the basis of official confirmation by construction supervision authorities or environmental protection authorities of lack of possibility to use the given structure. However, this view is unfounded, similarly as there is no justification for the statement that only the construction supervision authorities' decision is the basis for the demonstration that business activities cannot be conducted in the building for technical reasons⁹⁷. If it was the legislator's intention to make dependant the exclusion from objects of taxation of only such structures in relation to which the impossibility to use them was ruled by a separate decision, it would be expressed in the content of the provision. Decisions of authorities other than tax authorities, concerning directly the object of taxation, have crucial, although not decisive importance for the assessment of legal and tax effects of the technical condition of the given real estate, the way of its use or its qualification to a specific tax category. Lack of decision of an appropriate construction supervision authority or environmental protection authority does

⁹⁶ The Provincial Administrative Court in Gliwice in judgement of 29 May 2013, file reference I SA/GI 1070/12.

⁹⁷ Judgement of the Provincial Administrative Court in Rzeszów of 23 March 2006, file reference I SA/Rz 517/05. In the judgement of the Provincial Administrative Court in Olsztyn of 8 September 2016, file reference I SA/OI 334/16, the Court did not share the tax authority's position that lack of decision excluding the questionable building from the use due to technical condition and its possible renovation, adaptation or modernisation did not allow the conclusion that technical reasons make it impossible to use the building for conducting business activities. The Court stated that if the building was in a catastrophic condition and could collapse, it should be considered that business activities could not be conducted therein, without referring to construction law.

not make it impossible to refer to circumstances and features of the object of taxation affecting the existence and scope of the tax obligation, and concerning its technical condition⁹⁸. Therefore, the 'technical reasons' concept cannot be understood exclusively on the basis of the provisions of construction law and decision on lack of possibility of economic use of the real estate. In the Act on local taxes and fees there is lack of reference in the scope of determination of technical reasons to any decisions of construction supervision authorities or environmental protection authorities issued on the basis of separate provisions, in particular the legislator did not make such decisions a prejudicial issue⁹⁹. Therefore, the statement that the construction supervision authority has the exclusive competence in the determination of impossibility to use the given real estate for conducting business activities for technical reasons is unauthorised¹⁰⁰. Such an interpretation would lead, on the one hand, to the narrowing interpretation of the analysed provision of Article 1a(1)(3) of the Act on local taxes and fees.¹⁰¹ On the other hand, if the construction supervision authority ruled that the building was unsuitable for the operation and would not be admitted to the use for the purpose of conducting business activities due to construction, sanitary or OHS regulations, the omission by the tax authority of this position and recognition that the building in such technical condition may be used for conducting business activities may mean the violation of the principle of legality of actions, the principle of objective truth and the principle of free assessment of evidence. In cases concerning impossibility to use objects of taxation for conducting business activities for technical reasons, circumstances occurring in a specific case are of primary importance. The tax authority has many means of evidence which make it possible to carry out the assessment whether the real estate cannot be used for conducting activities for technical reasons, including decisions of construction supervision authorities, opinions of experts from the field of construction as well as other evidence admitted pursuant to Article 180 of the Tax Ordinance Act¹⁰².

⁹⁸ K. Radzikowski, 'Technical Reasons' as the Prerequisite..., *op. cit.*, p. 68

⁹⁹ K. Laskowski, 'Technical Reasons' as the Prerequisite Justifying..., *op. cit.*, p. 6

¹⁰⁰ Judgement of the Provincial Administrative Court in Łódź of 11 December 2008, file reference I SA/Łd 984/08.

¹⁰¹ D. Reško, T. Wołowicz, *Taxation of Real Estate vs. Exclusion from the Tax Basis due to 'Technical Reasons'*, 'Municipal Finance' (Finanse Komunalne) 2011, no. 7–8, p. 54.

¹⁰² Compare judgement of the Supreme Administrative Court of 9 December 2008, file reference II FSK 1499/07; judgement of the Supreme Administrative Court of 7 October 2010, file reference II FSK 2080/08; judgement of the Provincial Administrative Court in Łódź of 6 September 2011, file reference I SA/Łd 830/11.

8. Resignation from the prerequisite of technical reasons since 2016

As of 1 January 2016, the prerequisite of technical reasons was eliminated from the Act on local taxes and fees and, therefore, it cannot be the basis for the exclusion of real estate being in the possession of an entrepreneur from taxation at the rate for land and buildings connected with conducting business activities. According to Article 1a(2a)(3) of the Act on local taxes and fees in the wording applicable as of 1 January 2016, buildings, structures or their parts in relation to which the construction supervision authority's final decision¹⁰³ referred to in Article 67(1) of the Construction Law Act or the mining supervision authority's final decision on the basis of which the building, structure or their parts was permanently excluded from use was issued are not included in land, buildings and structures connected with conducting business activities¹⁰⁴.

Pursuant to Article 67 of the Construction Law Act, if an unused or unfinished civil structure is unsuitable for renovation, reconstruction or finishing, the competent authority issues a decision obliging the owner or administrator to demolish this structure and to clean the area as well as determining deadlines for the commencement of these works and their completion. This provision does not apply to civil structures recorded in the register of monuments of culture.

In the light of the above provisions, as of 1 January 2016 land, buildings and structures connected with conducting business activities are land, building and structures being in the possession of an entrepreneur of another entity conducting business activities, except for:

- 1) buildings, structures or their parts in relation to which the construction supervision authority issued a final decision obliging the owner or the administrator to demolish an unused or unfinished civil structure unsuitable for renovation, reconstruction or finishing and to clean the area as well as determining deadlines for the commencement of these works and their completion;
- 2) buildings, structures or their parts in relation to which the mining supervision authority issued a final decision on the

¹⁰³ We should critically address the requirement concerning the issue of a final decision, used in the discussed provision. This statement is burdened with defectiveness as it is not possible to issue a final decision. The decision of the first instance authority becomes final if e.g. the party does not file an appeal. This gives rise to doubts whether the reduction in the tax rate is applicable from the time of the decision issue, the time of its delivery or the time when it becomes final.

¹⁰⁴ This amendment was introduced by the Act of 25 June 2015 on the amendment of the act on local government and some other acts (Journal of Laws, item 1045 as amended).

basis of which the building, structure or their parts were excluded permanently from use.

It should be noted that in the amended provisions two kinds of decisions resulting in the exclusion of the real estate from the category of objects of taxation connected with conducting business activities were indicated, whereas these decisions do not apply to land. This means that the entrepreneur's land will be always connected with conducting business activities, even if an order on the demolition of a building located thereon is issued. This solution is reasonable insofar as the construction supervision is entitled to inspect civil structures, while land does not fall within this category, hence no decision on bad technical condition can be issued in relation to it¹⁰⁵.

The first kind of decisions referred to in Article 1a(2a)(3) of the Act on local taxes and fees is an order on demolition of a structure, issued when the unused or unfinished civil structure is unsuitable for renovation, reconstruction or finishing. The order on demolition of a civil structure on the basis of Article 67(1) of the Construction Law Act is issued in the case of joint occurrence of prerequisites of two kinds. First of all, the structure must be unused or unfinished. This prerequisite is of an objective nature referring to the real estate, however the owner's intention are behind it. The second prerequisite covers issues connected with bad technical condition of the civil structure, which is expressed in the wording 'is unsuitable for renovation, reconstruction or finishing'. The case law concerning this wording indicates that it refers not only to objective impossibility to carry out renovation, reconstruction or finishing, but also to the situation in which the entity disposing of the structure does not plan to bring it to the condition compliant with law¹⁰⁶. It means that within the second prerequisite allowing the order regarding the civil structure demolition, it is necessary to determine the given structure owner's intention concerning the commencement of activities aimed at the performance of renovation, finishing or reconstruction works¹⁰⁷. If the owner concludes that they are able to undertake works leading to the renovation, reconstruction or finishing of the civil structure, there are no grounds for the issue of the demolition order¹⁰⁸. If the performance of such works

¹⁰⁵ R. Dowgier, L. Etel, B. Pahl, M. Popławski, *Lexicon of Local Taxes and Fees. 517 Questions and Responses*, Warsaw 2010, pp. 178–181.

¹⁰⁶ Judgement of the Provincial Administrative Court in Kielce of 21 November 2019, file reference II SA/Ke 721/19.

¹⁰⁷ The purpose of the explanatory proceedings is also to determine whether and in what way the owner or administrator of the civil structure plans to remove the existing violation of the legal order in construction. Compare judgement of the Supreme Administrative Court of 8 April 2009, file reference II OSK 515/08.

¹⁰⁸ Judgement of the Provincial Administrative Court in Gdańsk of 27 February 2019, file reference

was objectively and technically possible, the authority should issue a decision on the basis of Article 66 of the Construction Law Act, determining the kind of works which must be performed and the deadline for their performance, and further – in the case of non-fulfilment by the owner of the obligation imposed thereon – it should issue the demolition order on the basis of Article 67(1) of the Construction Law Act.¹⁰⁹

Before the issue of a decision on demolition of an unused or unfinished structure, the relevant construction supervision authority determines causes of non-performance by the owner or administrator of the renovation, reconstruction or finishing of the civil structure, carries out the inspection and assessment of its technical condition and, in the case when as a result of the inspection it has justified doubts concerning the technical condition of the civil structure, it orders the owner or administrator of the civil structure to carry out a technical expertise of this structure. The report of the inspection of the civil structure includes: (1) description of the technical condition of the civil structure; (2) reasons for the occurrence of damage to or destruction of the civil structure; (3) determination of the state of threat to the safety of people or property and threat to the environment and human health; (4) description of the progress of construction works – in the case of an unfinished structure¹¹⁰.

In the course of the administrative proceedings before the issue of a decision, the authority should, therefore, determine the technical condition of the civil structure and the owner's intention, while the decision ordering demolition may be issued only after the determination that the civil structure or its part is unsuitable for renovation, finishing or reconstruction. The prerequisite for the application of Article 67(1) of the Construction Law Act is only of an objective nature. This provision does not make the sanction of the civil structure demolition conditional on the fault of the person on whom this obligation is imposed¹¹¹. It refers to the situation when the condition of the structure makes it impossible to bring it to the appropriate technical condition, e.g. if the structure pose a direct threat of collapsing or a direct threat to safety which cannot be eliminated¹¹². It should be underlined that the discussed exclusion of the real es-

II SA/Gd 635/18

¹⁰⁹ K. Małysa-Sulińska, *Administrative and Legal Aspects of Construction Investments*, chapter 6.2.5. *Order on Demolition of Unused or Unfinished Civil Structure*, LEX 2012.

¹¹⁰ Article 3 of the Regulation of the Minister of Infrastructure of 30 August 2004 on the conditions and procedure in the case of demolition of unused or unfinished civil structures, *Journal of Laws* of 2004, no. 198, item 2043.

¹¹¹ Judgement of the Provincial Administrative Court in Lublin of 9 March 2017, file reference II SA/Lu 1006/16.

¹¹² Judgement of the Provincial Administrative Court in Kraków of 18 October 2019, file reference II SA/Kr

tate from the 'business' category does not concern structures which currently are not suitable for the use in business activities, but can be subject to renovation. The factual circumstance that the real estate being in the possession of an entrepreneur is e.g. a vacant building, wasteland or ruin, even if it is suitable for demolition, does not mean that it can benefit from a lower tax rate. The fact of reporting the building for demolition does not constitute a prerequisite for considering the given building as not connected with conducting business activities¹¹³. The demolition order must be issued.

The fact that Article 1a(2a)(3) of the Act on local taxes and fees refers only to Article 67(1) of the Construction Law Act should be assessed critically. It means that a different procedure applied in the case of irreversible devastation of the structure, i.e. the owner's request for the permission for demolition on the basis of Article 28 of the Construction Law Act, does not result in the reduction of tax burdens concerning the structure. In the case law it is underlined that if the construction supervision authority has not issued a final decision on the basis of Article 67(1) of the Construction Law Act, it is not possible to exclude the real estate from the category of structures connected with conducting business activities. Only such strictly determined decision justifies the application of the above mentioned exclusion and it cannot be replaced by or identified with the decision on permission for demolition¹¹⁴. Such a solution, in fact, promotes slowness in demolition of dilapidated structures and lack of the owner's interest in it¹¹⁵, as the person submitting the request for permission for demolition of the structure which is unsuitable for renovation will pay the real estate tax in the maximum amount, while the entity that will not submit the request for demolition, in relation to which the construction supervision authority will issue an order on the structure demolition ex officio on the basis of Article 67(1) of the Construction Law Act, as a result e.g. of self-denunciation submitted by the owner, will benefit from a lower tax rate¹¹⁶.

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¹¹³ Judgement of the Provincial Administrative Court in Kraków of 19 December 2017, file reference I SA/Kr 1056/17. It results from the judgement of the Provincial Administrative Court in Poznań of 20 December 2018, file reference I SA/Po 753/18 that the fact of reporting the intention to demolish a building does not constitute grounds for not taking it into account in the real estate tax declaration.

¹¹⁴ Judgement of the Provincial Administrative Court in Białystok of 16 October 2019, file reference I SA/Bk 490/19.

¹¹⁵ W. Morawski, *Changes in the Real Estate Tax Regulations in 2016 – Minor Renovations in the Open-Air Ethnographic Museum*, 'Tax Review' (Przegląd Podatkowy) 2014, no. 11, p. 13.

¹¹⁶ T. Brzeziński, K. Lasiński-Sulecki, P. Majka, W. Morawski (ed.), *Act on Local Taxes and Fees. Commentary*, Gdańsk 2016, p. 147.

The second kind of decision which results in the exclusion of real estate from the category of objects of taxation connected with conducting business activities is the mining supervision authority's final decision on the basis of which a building, structure or their parts were permanently excluded from use. Pursuant to Article 68(1) of the Construction Law Act, in the case of determination of the need to empty in whole or in part a building intended for human habitation, posing a direct threat of collapsing, the construction supervision authority is obliged to order the owner or administrator of the civil structure by way of a decision, on the basis of an inspection report, to empty or exclude from use within specific deadline the whole building or its part. It should be noted that the decision issued on the basis of this provision by the construction supervision authority does not result in the change of the building qualification for the purposes of the real estate tax¹¹⁷, whereas in the case of the mining supervision authority's decision it has such an effect. The exclusion of a mining facility from the use results in breaking the connection of the facility with business activities, which in the case of a building means the reduction in the tax rate, and in the case of a structure – lack of taxation.

It is worth underlining that even the exclusion of a structure from the use due to bad technical condition and the threat it poses does not cause the reduction in real estate tax rates. Bad technical condition does not result in the reduction in the tax applicable to buildings being in the possession of an entrepreneur. In such a case, the proper rate is the highest real estate tax rate for buildings connected with conducting business activities. Even catastrophic technical condition of buildings which makes it impossible to conduct business activities therein does not allow the reduction in the tax rate applicable to buildings¹¹⁸. The only prerequisite allowing it in the current legal status is to obtain an appropriate decision of the construction or mining supervision authority.

¹¹⁷ On the grounds of previously applicable provisions concerning technical reasons, in the letter of 20 October 2003 the Director of the Department of Local Taxes and the Cadastre indicated that the exclusion of a building from the category of buildings connected with conducting business activities may take place on the basis of the provisions of construction law, in particular in the case of the issue by the construction supervision authority on the basis of Article 68 of the Construction Law Act of a decision to empty or exclude from the use the whole building or its part due to its bad technical condition or a decision on the basis of Article 66(2) of the Construction Law Act (letter no. LK-1601/LP/03/ PP on the case of exclusion of buildings and structures connected with conducting business activities for technical reasons).

¹¹⁸ Judgement of the Provincial Administrative Court in Kraków of 20 August 2020, file reference I SA/Kr 1211/19.

9. Comparison of prerequisites for the exclusion of real estate from categories connected with conducting business activities applicable until the end of 2015 with prerequisites applicable currently

The meaning of the concept of reasons making it impossible to actually use real estate for conducting business activities covers many different conditions of a technical, organisational, financial or legal nature. The 'technical reasons' concept was not defined in the Act on local taxes and fees or in any other legal act, which caused numerous doubts. As a consequence, issues of technical reasons in the context of the real estate tax were the object of many decisions issued by administrative courts. This concept was defined as objective circumstances of a technical nature, making it impossible to use real estate for the purposes of business activities. However, it should be underlined that the discussed provision provided not for reasons being the cause of bad technical condition of the structure, but lack of use of real estate for technical reasons, while technical reasons on the grounds of the Act on local taxes and fees may be connected with bad technical condition unsuitable for business activities conducted¹¹⁹. These concepts are not identical, but in the case law based on the previous legal status some bodies had an approach that structures designated for demolition (e.g. due to obtaining the permission for demolition) are definitively subject to exclusion from categories connected with conducting business activities, as this circumstance constitutes 'technical reason' referred to in Article 1a(1)(3) of the Act on local taxes and fees¹²⁰.

In the current legal status in the context of the real estate tax, the necessity to examine whether the technical reasons making it impossible to use real estate for business activities is not provided for. In the applicable legal status, referring to technical reasons cannot be the basis for the exclusion of real estate from taxation with the rate appropriate for real estate connected with conducting business activities. Although the provision on 'technical reasons' does not exist, but the exclusion of a structure from taxation due to bad technical condition is limited to cases indicated in Article 2(2a)(3) of the Act on local taxes and fees, which refers to Article 67(1) of the Construction Law Act. The provision of Article 67 of the Construction Law Act cannot be treated as regulation detached from the issue of the technical condition of a civil structure. Therefore, only these

¹¹⁹ L. Etel, B. Pahl, *Concept of 'Technical Reasons'...*, *op. cit.* The concept of technical reasons has a normative context determined by formal criteria appropriate for the provisions of construction law (judgement of the Supreme Administrative Court of 7 February 2014, file reference II FSK 458/12).

¹²⁰ Judgement of the Provincial Administrative Court in Gliwice of 29 May 2013, file reference I SA/GI 1070/12.

objects can be considered as not connected with business activities in relation to which a decision on their demolition was issued or the mining supervision authority's decision on the basis of which a building, structure of their parts were permanently excluded from the use was issued, which is the *sine qua non* condition for the application of the above mentioned exclusion. Any temporary exclusion of a building or structure from activities will not result in the exclusion from taxation with the real estate tax or the application of a reduced rate.

Comparing the scope of this exclusion with technical reasons functioning previously, it should be concluded that it was significantly narrowed¹²¹. The replacement of technical reasons by the requirement to have a demolition decision issued by an appropriate supervision authority significantly narrows the possibility to exclude real estate from categories connected with conducting business activities and to apply a lower tax rate in comparison with the legal status applicable until 31 December 2015. As a rule, all land being in the possession of an entrepreneur (not actually used thereby) is connected with business activities conducted. Current regulations do not cover land. However as it was mentioned, the 'technical reasons' concept in relation to land turned out to be even more unreliable than in the case of buildings or structures, defined by referring to the provisions of construction law. Currently, nearly all buildings (except for residential buildings) and structures are connected with conducting business activities if they are in possession of an entrepreneur. The discussed change significantly limits preferences in taxation of real estate connected with conducting business activities. In this situation, the circumstances of bad technical condition of buildings as well as lack of their use do not affect considering buildings as connected with conducting business activities pursuant to Article 1a(1)(3) of the Act on local taxes and fees.

It was underlined in the doctrine that the change in the provisions seems to be reasonable as it ends many years of disputes regarding technical reasons. Undoubtedly, the purpose of the amendment was to remove practical problems connected with the application of the previous regulation¹²². The solution combining the exclusion of the category of objects of taxation related to conducting business activities with the construction supervision authority's opinion gained the approval due to issues of competence. The assessment of technical condition of a building or structure as well as the qualification of a civil structure

¹²¹ Compare A. Krajewska, sub-chapter 5.1.2. *Object of Taxation* [in:] *Taxation of Business Activities in Poland*, A. Mariański (ed.), Warsaw 2016.

¹²² B. Brzeziński, K. Lasiński-Sulecki, W. Morawski (red.), *New Legal Tools in Income and Property Taxes*, LEX 2018.

to the appropriate category of structures referred to in the provisions of construction law should not lie within the power of the tax authority as architectural and construction administration authorities and construction supervision authorities have been appointed for the performance of tasks in this scope¹²³. Lack of possibility to use objects of taxation for technical reasons should be confirmed by an appropriate authority on the basis of the provisions of construction law, while as it was mentioned previously it may happen e.g. on the basis of decisions issued pursuant to Article 66, 67 or 68 of the Construction Law Act. The issue of a decision to empty or exclude from the use the whole building or its part due to its bad technical condition (Article 68 of the Construction Law Act) as well as a decision prohibiting the use of a civil structure due to inappropriate technical condition or the use posing a threat to human life or health, environment or safety of property (Article 66 of the Construction Law Act) on the grounds of currently applicable provisions does not translate into the tax status of the real estate. On the grounds of the previous legal status, the mere fact that the technical condition of a building was catastrophic and the structure might collapse could be the basis for considering that for technical reasons business activities cannot be conducted in it, and therefore it should be taxed at lower rates – as other buildings. The tax authority could adopt such a position even in the case of lack of the construction supervision authority's appropriate decision¹²⁴. In such a case, any decision of the construction supervision authority on the exclusion from the use (e.g. permission for demolition¹²⁵) could constitute an important argument for the occurrence of technical reasons and the application of lower tax rates. However, there was a considerable risk that the court would consider the fact of existence of such a decision as legal reasons for impossibility to use the real estate for business activities. Despite the objective character of the prerequisite of technical reasons, the case law adopted the practice of examining causes of their occurrence; quite frequently even devastation of a building was not regarded as 'technical reasons' justifying its exclusion from business activities¹²⁶.

¹²³ D. Reško, T. Wołowicz, *Taxation of Real Estate...*, *op. cit.*, p. 54.

¹²⁴ In the judgement of the Provincial Administrative Court in Gdańsk of 20 May 2008, file reference I SA/Gd 1045/07, the Court stated that it did not result from Article 1a(1)(3) of the Act on local taxes and fees that only the construction supervision authorities' decision constitutes the basis for the demonstration that the object of taxation cannot be used for business activities for technical reasons. Moreover, the party to the proceedings did not have to submit to tax authorities official documents or other evidence, i.e. the construction authority's appropriate decision, construction appraiser's opinion, construction expert's technical opinion, etc., from which it would result that a given building was unsuitable for any business activities due to bad technical condition.

¹²⁵ The Provincial Administrative Court in Gliwice in judgement of 29 May 2013, file reference I SA/GI 1070/12.

¹²⁶ Judgement of the Provincial Administrative Court in Gliwice of 3 April 2012, file reference I SA/GI 987/11.

In the current legal status, even catastrophic condition of a structure does not result in its exclusion from the category of objects of taxation connected with business activities. Only the decision ordering the demolition is the basis for the application of a lower tax rate. Alternatively, this effect will also occur when the structure is in such a bad condition that it loses features of a building indicated in Article 1a(1)(1) of the Act on local taxes and fees.¹²⁷

In both case structures being in the possession of an entrepreneur that require thorough renovation or alteration in order to allow the performance of business activities should be considered as connected with business activities

10. Conclusions

On the grounds of Article 1a(1)(3) of the Act on local taxes and fees applicable until the end of 2015, courts interpreted very strictly the prerequisite of 'technical reasons', which is correct from the point of view of not taking into account circumstances of a different nature. However, the unclear character of this concept led to numerous disputes between tax authorities and taxpayers, while these disputes did not concern the 'technical' term, but the reasons for lack of use of the real estate. Tax authorities did not confine themselves to the statement of the occurrence of inappropriate technical condition of the real estate, treated economic, legal and other reasons as different from technical reasons for lack of use of the real estate. In turn, taxpayers were of the opinion that the prerequisite of technical reasons required that reasons for lack of use of the real estate in business activities were of a factual and objective nature and were limited to the statement of circumstances of the occurrence of bad or inappropriate technical condition of the real estate, regardless of the cause, even if they were dependent on the taxpayer, and regardless of the fact whether it was possible to restore the economic usefulness of the real estate.

Although the prerequisite of technical reasons seems to be objective and direct, the case law took into account original causes of the occurrence

¹²⁷ Judgement of the Provincial Administrative Court in Łódź of 25 January 2018, file reference I SA/Łd 950/17. Lack of windows, interior stairs, passenger lift or part of the roof or general devastation of the building, lack of utilities in its premises, 'abandoning' it or lack of use do not cause that the civil structure loses features of a building within the meaning of the tax act. The building remains a building even if it has been excluded from current operation. Until the given structure meets statutory criteria from Article 1a(1)(1) of the Act on local taxes and fees, i.e. there are foundations, walls and the roof, the building is subject to the real estate tax. The fact that the building is designated for demolition, its bad technical condition or lack of suitability for the use are not sufficient to conclude that the given structure does not constitute a building within the meaning of the above mentioned act and is not subject to taxation. The tax obligation ceases to be applicable only if the structure loses constitutive features of a building within the meaning of the Act on local taxes and fees (judgement of the Supreme Administrative Court of 16 October 2020, file reference II FSK 1729/18).

of bad technical condition of the object of taxation, frequently of subjective (e.g. business or financial) or legal nature. Therefore, the literal wording of the provision was omitted, the provision was interpreted extremely narrowly and it was examined whether lack of use of the real estate resulted from technical reasons of an original nature. The prerequisite for the application of reduced tax rate was economic uselessness of the object of taxation, resulting from technical reasons. Therefore, uselessness resulting from economic, financial, organisational, legal, technological or any other reasons did not constitute such a prerequisite¹²⁸, even if they resulted in bad technical condition, i.e. technical reasons directly preventing the use of the real estate for the purposes of business activities. The emphasis on the original (indirect) reason, not secondary or subsequent (direct) technical reasons, was characteristic in this approach. Hence, legal causes of the occurrence of technical reasons for which the real estate could not be used were treated as legal reasons ruling out the exclusion of the real estate from the category of objects of taxation connected with conducting business activities for technical reasons.

Currently, the criterion for excluding the object of taxation from categories connected with conducting business activities is the decision ordering the demolition, which is of a formal and objective nature. Although its issue depends on the fulfilment of the criterion of the structure bad technical condition and the owner's intention, but the construction supervision authority does not examine causes of this condition, which can be of a legal, business or economic nature. The tax authority does not analyse technical issues decisive in the case of possibility to issue a demolition decision or reasons behind them. Hence, the discussed changes led to the objectification and formalisation of prerequisites for the exclusion of the structure from categories connected with business activities. Currently, the condition for the exclusion is the decision ordering the demolition (i.e. legal reason), whose issue is based on technical reasons. In turn, the bad technical condition of the structure may result from economic, legal, technological and other reasons, but this is not crucial from the point of view of the provisions of tax law, for which in the current wording the decisive meaning has the formal matter, i.e. the issue of the decision ordering the demolition.

¹²⁸ Judgement of the Supreme Administrative Court of 14 February 2012, file reference II FSK 1492/10. Compare e.g. judgement of the Provincial Administrative Court in Szczecin of 28 April 2011, file reference I SA/Sz 53/11, judgement of the Provincial Administrative Court in Lublin of 23 March 2011, file reference I SA/Lu 834/10, judgement of the Provincial Administrative Court in Gdańsk of 15 March 2011, file reference I SA Gd 1170/10, judgement of the Provincial Administrative Court in Gliwice of 14 December 2010, file reference I SA GI 901/10, judgement of the Provincial Administrative Court in Opole of 12 October 2011, file reference I SA/Op 101/11.

The introduction of the requirement concerning the issue of the decision ordering the demolition caused the change in the approach to the character of causes (original or secondary) of lack of use of the real estate for business purposes and the shift of the emphasis to the objective and direct criterion of a binding nature, contrary to the previous unclear criterion of technical reasons of a secondary nature, although it was in principle objective. This solution should be assessed positively, although the previously mentioned issue of selective choice of decision ordering the demolition from among several kinds of decisions resulting in the exclusion of the structure from the use as well as the fact that from the tax point of view obtaining the demolition order is more advantageous than the submission of the request for permission for the structure demolition give rise to reservations. Therefore, the construction supervision authority decides from when the real estate ceases to be economically useful and subject to higher tax rate. On the grounds of changes in the provisions of the Act on local taxes and fees, the prerequisites for the exclusion of real estate from categories connected with business activities were made objective. Moreover, the emphasis was shifted to technical reasons, despite the formal removal of this prerequisite from the Act. Paradoxically, when the provisions addressed objective technical reasons, authorities looked for causes (including legal ones) of their occurrence. Currently when the criterion for excluding the real estate from categories connected with business activities is of a legal nature, it in fact comes down to technical reasons, the causes of whose occurrence are not examined by the construction supervision authority issuing the demolition decision. Therefore, legal reasons turn out to be objective when they became the criterion of the exclusion. They lead to taking into account technical issues which in principle are also of an objective nature. Problems with the application of the prerequisite of technical reasons were connected with inconsistent approach to the fact whether the technical condition was to be an indirect or direct cause of lack of use of the real estate. In the light of the previous wording of the provision, the case law gave it a direct nature, however it examined the actual, i.e. indirect cause of lack of use of the structure or the direct cause of the occurrence of inappropriate technical condition. In the light of the current wording of the provision, the issue of technical condition is of an indirect nature as it is the cause of the issue of the demolition decision, while the direct cause of the exclusion of the real estate from categories connected with conducting business activities is the issue of the demolition

decision, i.e. legal reasons. The change in the provisions also introduced clear division of public administration authorities' competences in relation to the impact of the technical condition of a civil structure on its tax status.

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