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The taxation of mine workings. An endless controversy?

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Abstract

The problem of taxation of mine workings seems to be taking on the features of a traditional, even "classic" issue, which periodically resurfaces in the practice of tax authorities and administrative courts. In the face of constantly growing doubts, the Constitutional Tribunal issued an interpretative verdict which is of breakthrough significance for the practice of taxing mine workings. First and foremost, the Tribunal resolved the fundamental dilemma concerning mine workings in both the physical and general sense, determining that as such they do not constitute an object of taxation. Unfortunately, this interpretative judgement of the Constitutional Tribunal did not end the dispute between taxpayers and tax authorities. Moreover, a constitutional complaint was raised on 23 April 2019 (SK 80/19) with reference to the content of that judgement, arguing that the practice of administrative courts still violates not only the norms of substantive law, but also the pro-constitutional interpretation rules listed in the judgement of the Constitutional Tribunal of 13 September 2011 (P 33/09). In examining the complaint, the Constitutional Tribunal noticed the indicated deficiencies (lack of unambiguity and precision) in the structure of the legal norm encoded in the provision that defines the notion of a structure as an object of property tax, and issued a signalling decision. In this context, the main research objective was to present and analyse the problem and to formulate conclusions for future legislation. Given these circumstances, it seems justified to formulate a hypothesis that, despite its significant substantive meaning (putting the issue of taxation of mine workings in order to a significant extent), the judgement of the Constitutional Tribunal of 13 September 2011 is not sufficient for uniformly fashioning the tax practice. This is because the judgement does not resolve all dilemmas in this area, but rather directly causes fundamental divergences in decisions of administrative courts and tax authorities. After verifying the research hypothesis, the authors accepted the main argument that a proper amendment, which will in a clear and unambiguous way determine the subject scope of taxation, appears to be necessary. The article uses the dogmatic and historical research methods.

keywords: mine workings, building, property tax, signalling decision of the Constitutional Tribunal

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1. General remarks

The problem of taxation of mine workings seems to be taking on the features of a traditional, even "classic" issue, which periodically resurfaces in the practice of tax authorities and administrative courts. Doubts in this respect have appeared already in the legal environment existing before 1 January 2003 and were the result of unclear definitions related to the issues at hand. This applied to the construction of provisions of the Local Taxes and Charges Act of 12 January 1991, which in the period under consideration did not contain the legal definition of a "structure,"[3] the Construction Law Act of 7 July 1994[4] and the Geology and Mining Law Act[4] of 4 February 1994.[5]

Doubts are also found in the existing version of the Geology and Mining Law Act of 9 June 2011.[6] It is worth recalling that the divergences so far apparent in judicial decisions have persisted also in the legal environment in effect after 2003. Regrettably, this happened even though the amendment of the Local Taxes and Charges Act, by adopting the definition of a structure, aimed to dispel the doubts arising as to the objective scope of taxation.[7] It may come as a surprise that the difficulties persist even after the interpretative judgement of the Constitutional Tribunal of 13 September 2011 (P 33/09) which was supposed to clear up any ambiguities.[8] This is flagrantly demonstrated by the contents of a recently brought constitutional complaint.[9] The complaint argues that the practice of administrative courts is still violating norms of substantive law and the pro-constitutional interpretation rules listed in the judgement of the Constitutional Tribunal of

[3] Art. 1a dodany art. 1 pkt 2) ustawy z dnia 30 października 2002 r. o zmianie ustawy o podatkach i opłatach lokalnych oraz zmianie niektórych innych ustaw (Dz. U. 2002 nr 200 poz. 1683), dalej jako: ustawa zmieniająca.
[4] Art. 3 pkt 3) w zw. z art. 2 ust. 1 Prawa budowlanego.
[5] Art. 57–58 Ustawy z dnia 4 lutego 1994 r. – Prawo geologiczne i górnicze (Dz. U. 2005 nr 228 poz. 1947 ze zm.).
[6] Dz. U. 2019 poz. 868 ze zm.
[7] W istocie rzeczy dokonano recepcji wytworzonej w praktyce orzeczniczej definicję tego pojęcia. W założeniu miało to wyeliminować zaistniałe trudności interpretacyjne – zob. m.in. NSA w wyroku z dnia 27 stycznia 2006 r., FSK 2316/04, LEX nr 181362. Zob. M. Popławski, *Nowa definicja obiektu budowlanego w prawie budowlanym a opodatkowanie budowli podatkiem od nieruchomości*, „Przegląd Podatków Lokalnych i Finansów Samorządowych" 2016, nr 7 (185), s. 6–10.
[8] Wyrok TK z dnia 13 września 2011 r., P 33/09, LEX nr 929854, dalej cyt. jako „wyrok TK". Zob. m.in. B. Brzeziński, W. Morawski, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 13 września 2011 r.(P33/09) – opodatkowanie podatkiem od nieruchomości podziemnych wyrobisk górniczych*, „Przegląd Orzecznictwa Podatkowego" 2012, nr 1, s. 22–28; B. Brzeziński, A. Nita, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 13 września 2011 r., P 33/09 – pojęcie budowli w podatku od nieruchomości*, „Przegląd Orzecznictwa Podatkowego" 2013, nr 1, s. 7–11; W. Morawski, P. Banasik, *Wyrok TK z dnia 13 września 2011 r., P 33/09 a orzecznictwo sądów administracyjnych*, „Monitor Podatkowy" 2014, nr 1, s. 12, s. 11–19; J. Oziębło, *Opodatkowanie budowli w świetle wyroku TK z dnia 13 września 2011 r., P33/09*, „Przegląd Podatków Lokalnych i Finansów Samorządowych" 2013, nr 4 (146), s. 6–10; K. Radzikowski, *Opodatkowanie podatkiem od nieruchomości podziemnych wyrobisk górniczych po wyroku Trybunału Konstytucyjnego z 13 września 2011 r., P 33/09*, „Finanse Komunalne" 2013, nr 3, s. 75, s. 66–75.
[9] Skarga konstytucyjna wniesiona w dniu 23 kwietnia 2019 r. (SK 80/19).

13 September 2011. This prompts us to re-examine the issue of taxation of mine workings in the current legal environment. The main research objective was to present and analyse the problem and to formulate conclusions for future legislation. In this context, it seems justified to formulate a hypothesis that, despite its significant substantive meaning (putting the issue of taxation of mine workings in order to a significant extent), the judgement of the Constitutional Tribunal of 13 September 2011 is not sufficient for uniformly fashioning the tax practice. This is because the judgement does not resolve all dilemmas in this area, but indeed directly causes fundamental divergences in decisions of administrative courts and tax authorities. In order to verify this research hypothesis, the authors accepted the main argument that a proper amendment, which will in a clear and unambiguous way determine the object scope of taxation, appears to be necessary. The article uses the dogmatic and historical research methods.

2. Taxation of mine workings in light of the Constitutional Tribunal judgement of 13 September 2011

The aforesaid resolution of the Constitutional Tribunal of 13 September 2011 took the form of an interpretative judgement. Such verdicts, as is well known, are not meant to remove the ambiguity and divergence between various interpretations of legal provisions, but to eliminate those interpretative variants of the inspected provisions which are contrary to the Constitution.[10] The arguments found in the justification of the judgement are very extensive and have already been analysed in detail.[11] For the purposes of this study, it is enough to focus on the main tone of the Constitutional Tribunal's judgement. Its basic argument can be reduced to the statement that underground mine workings as such are not subject to taxation with property tax. The Constitutional Tribunal also argued that exempting a mine working from tax does not rule out the taxation of structures found in an underground mine working by operation of law. In the opinion of the Constitutional Tribunal and in light of applicable legal provisions, taxation of such workings should be deemed inadmissible from the constitutional point of view. Regardless of objective difficulties, it nevertheless appears possible to eliminate doubts regarding the taxation of underground mine workings and the facilities and installations found

[10] Ustawa z dnia 2 kwietnia 1997 r. – Konstytucja Rzeczypospolitej Polskiej (Dz. U. 1997 nr 78 poz. 483).

[11] Zob. P. Smoleń, M. Świstak, *Praktyka opodatkowania wyrobisk górniczych po wyroku Trybunału Konstytucyjnego z dnia 13 września 2011 r. (P 33/09)*, „Roczniki Nauk Prawnych" 2019, t. 29, nr 3, s. 123–137.

therein. This requires suitable use of interpretative rules, in particular systemic and functional rules.

As stressed by the Constitutional Tribunal, underground mine workings are not construction facilities (installations) in the meaning of the Construction Law Act, but a space resulting from mining works and consequently cannot be classified as structures under the provisions of the Construction Law Act. Accordingly, they are not an object of taxation with property tax either on their own (in the physical sense), or together with the infrastructure found therein (in the general sense). In this context, the Constitutional Tribunal distinguished three possible approaches to understanding mine workings: 1) in the physical sense – as a space in land real estate or in the orogen resulting from mining works; 2) in the technical sense – as a set of functionally interconnected facilities used to extract minerals, located in a space in land real estate or in the orogen resulting from mining works; 3) in the general sense – as a space in land real estate or in the orogen resulting from mining works, together with any facilities located therein and used to extract minerals.

It was also firmly asserted that mine workings, even when understood in line with the provisions of geology and mining law as spaces in land real estate or in the orogen resulting from mining works, cannot be subject to taxation with property tax either on their own (in the physical sense), or together with the infrastructure found therein (in the general sense), because they are not construction facilities. Adopting a contrary view would be equivalent to interpreting tax regulations broadly, a practice prohibited by the Constitution. Taxation with the property tax (as construction facilities) can, however, be applied to mine workings in the technical sense, i.e. sets of functionally interconnected facilities used to extract minerals, located in a space in land real estate or in the orogen resulting from mining works, provided that such sets can be classified as construction facilities in the meaning of the Construction Law Act. This, however, requires classifying those sets as one of the structures listed in the Construction Law Act. No provision exist that would exclude the possibility of classifying infrastructural components located in underground mine workings as construction facilities (installations) in the Construction Law Act view, and therefore as structures under the Local Taxes and Charges Act. Resolving this issue has therefore been left to tax authorities and administrative courts. The Constitutional Tribunal expressly stressed that each case of this kind requires determining in conducted proceedings which facilities and installations can be classified as structures in the meaning of the Local Taxes and Charges Act. One can hardly resist the impression that it is at this stage of

proceedings conducted by tax authorities that significant divergences which lead directly to disputes arise. Of course, the cited judgement of the Constitutional Tribunal of 13 September 2011 is of considerable importance for practice, primarily in the context of the general rule of taxation of mine workings (which as such do not constitute an object of taxation). In court decisions, this issue is no longer controversial. Unfortunately, taxation of "workings in the technical sense" still gives rise to numerous difficulties. This can be noticed not only in analysed court decisions,[12] but primarily in the constitutional complaint brought. A question therefore arises: is the Constitutional Tribunal judgement sufficient to efficiently resolve those long-standing doubts?

3. The constitutional complaint of 23 April 2019 (SK 80/19)

Unfortunately, this interpretative judgement of the Constitutional Tribunal did not end the dispute between taxpayers and tax authorities. Moreover, a constitutional complaint was raised on 23 April 2019 (SK 80/19) with reference to the content of that judgement, arguing that the practice of administrative courts still violates the norms of substantive law, but also the pro-constitutional interpretation rules listed in the judgement of the Constitutional Tribunal of 13 September 2011 (P 33/09). The complaint stressed that allowing (guiding by way of an interpretational directive) taxation of facilities found in mine workings as structures (provided that they are enumerated in the Construction Law Act as structures), the Constitutional Tribunal pointed to the condition that a facility must be expressly named in the respective provision of the act. In this context, it was stated that the notion of "roof support" or "working support" is not found in Article 3, point 3 of the Construction Law Act. Moreover, in specific situations a "roof support" cannot be definitely assigned to the "retaining structures" category.

In this sense, an autonomous interpretation of the notion of "retaining structure" arose in the practice of administrative courts. The complaint rightly alleged that the use of linguistic interpretation referring to general language (for notions of a technical nature) by the courts led to semantic deformation. The resulting meaning of the term was entirely different from that used in construction law practice. The complaint was also right in noting that due to decisions of administrative courts (without a clear legal basis), roof supports began to be classified as retaining

[12] Zob. m.in. wyrok WSA z dnia 6 maja 2016 r I SA/Lu 1344/15, LEX nr 2075060; wyrok WSA z dnia 27 czerwca 2018 r., I SA/Lu 337/18, LEX nr 2520156; wyrok NSA dnia 26 lipca 2018 r., II FSK 2616/16, LEX nr 2537175; wyrok NSA z dnia 17 stycznia 2019 r., II FSK 3270/18, LEX nr 2635794.

structures merely for the purposes of their taxation. Yet such classification was adopted neither by construction authorities nor by mining supervision authorities.

Of course, considering the autonomy of tax law, it is possible to redefine certain notions that occur in other branches of law. The tax authority of the state that results from Article 84 of the Constitution of the Republic of Poland includes the right to autonomously define notions used in other branches of law or to introduce new notions. The analysed constitutional complaint validly stressed that the requirement that norms concerning public charges must be definite means that any potential redefinition must occur: 1) in statute and 2) expressly and not implicitly or through more or less complicated interpretative stratagems. Defining provisions in particular, as the basis for applying the norms of any statute, must be characterised by unambiguity. Hence, in the view of the complaining party, in case of roof supports the notion of "retaining structures" was redefined improperly (by broadening its interpretation). It must be agreed that the act does not contain any provision which would imply that the notion of "retaining structures" includes "roof supports." The act does not expressly define the latter as structures, either.

In examining the complaint, the Constitutional Tribunal recognised the indicated deficiencies (lack of unambiguity and precision) in the structure of the legal norm encoded in the provision which defines the notion of a structure as an object of property tax.[13] The Tribunal considered that reference to the provisions of the Construction Law Act is invalid. In the view of the Tribunal, the current legal situation does not allow to recreate the subject of taxation with property tax solely on the basis of the Local Taxes and Charges Act provisions and strikes at certain principles derived from the Constitution of the Republic of Poland, namely the trust of citizens in the state, legal security and definiteness of law. Undoubtedly the very wording of tax law provisions should allow the taxpayers to recognise without any doubt whether particular actual circumstances make them subject to taxation or not.

The emergence of these doubts made it justified for the Constitutional Tribunal to issue a signalling decision.[14] This is a procedure which the Tribunal can initiate if significant deficiencies in law are discovered and must be removed in order to retain the consistency of the legal system.[15] A legal system is understood as the entirety of legal norms applicable at a particular time, ordered by certain predefined criteria, which should be characterised by, among others, a specific degree of

[13] Wprowadzona w art. 1a ust. 1 pkt 2 Ustawy z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych (Dz. U. 2019 poz. 1170 ze zm., dalej jako: u.p.o.l.).

[14] Postanowienie sygnalizacyjne Trybunału Konstytucyjnego z dnia 15 grudnia 2020 r., S 3/20, OTK-A 2020/73.

[15] Art. 35 ust. 1 Ustawy z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym (Dz. U. 2019 poz. 2393).

harmony (in both its internal and external dimensions)[16] and completeness.[17] In a real view, a legal system can be considered to meet the condition of harmony and completeness if it contains suitable means to eliminate discrepancies and fill the resulting gaps.

4. Final remarks

The intervention of the Constitutional Tribunal should be considered fully justified. The current legal definition does not comply with the rules of correctly establishing provisions of this kind. Definitions should be formulated so that the meaning given to a particular term is expressed in a manner that does not raise any doubts.[18] Even assuming that denotative definitions can be used, they should enumerate the components of a particular set (preferably completely).[19] In particular, such list of denotative components should take into account those that might cause major interpretative doubts.[20] It appears that the legislator should follow primarily these guidelines in complying with the signalling interpretation of the Constitutional Tribunal. Effective initiatives should be undertaken by the legislator to amend the current legal definition of a structure found in the Local Taxes and Charges Act. It seems necessary to introduce an autonomous, comprehensive legal definition of a structure that would enumerate the kinds of structures constituting objects of taxation.

It should be recalled that the Constitutional Tribunal has already in the judgement of 13 September 2011 noted the need for numerous legislative defects to be remedied by the legislator. First and foremost, the Tribunal stressed the need to properly embody the definitions found in the Construction Law Act and the definitions of the Local Taxes and Charges Act that refer to them, or to adopt relevant independent definitions in the Local Taxes and Charges Act (the latter concept was considered the most adequate by the Constitutional Tribunal). Introducing such solutions is also proposed by legal theorists.[21] The time appears ripe to take suitable actions in this area in the legislative process. The practices of

[16] G.L. Seidler, H. Groszyk, A. Pieniążek, *Wprowadzenie do nauki o państwie i prawie*, Lublin 2003, s. 172–173.
[17] A. Korybski, L. Leszczyński, A. Pieniążek, *Wstęp do prawoznawstwa*, Lublin 2001, s. 102.
[18] § 151 ust. 1 obwieszczenia Prezesa Rady Ministrów z dnia 29 lutego 2016 r. w sprawie ogłoszenia jednolitego tekstu rozporządzenia Prezesa Rady Ministrów w sprawie „Zasad techniki prawodawczej" (Dz. U. poz. 283), dalej jako: zasady techniki prawodawczej.
[19] § 153 ust. 1 zasad techniki prawodawczej.
[20] S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej*, Warszawa 2004, s. 290.
[21] Zob. R. Dowgier, *Projektowane zmiany w ustawie o podatkach i opłatach lokalnych*, „Przegląd Podatków Lokalnych i Finansów Samorządowych" 2014, nr 2 (156), s. 7.

the decade that elapsed since the Constitutional Tribunal judgement of 13 September 2011 unambiguously demonstrate that the Tribunal's decision is not sufficient to resolve the controversies that arise in practice. In addition, this highlights the pressing need to amend the Local Taxes and Charges Act.

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