Dominika Łukawska-Białogłowska[1]

Czy opłata z tytułu przekształcenia użytkowania wieczystego nieruchomości we własność powinna być podwyższana o podatek od towarów i usług? (Uwagi na kanwie wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-604/19)

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Streszczenie:

W wyroku z 25 lutego 2021 r. w sprawie C-604/19 Trybunał Sprawiedliwości Unii Europejskiej uznał, że przekształcenie prawa użytkowania wieczystego nieruchomości w prawo pełnej własności przewidziane w przepisach krajowych w zamian za uiszczenie opłaty stanowi dostawę towarów, a jednostka samorządu terytorialnego pobierająca rzeczoną opłatę działa w charakterze podatnika, a nie jako organ władzy publicznej. Przedmiotem niniejszego opracowania jest próba odpowiedzi na pytanie, czy w świetle powyższego rozstrzygnięcia dopuszczalne jest, aby gmina powiększała opłatę przekształceniową o kwotę należnego podatku od towarów i usług.

Słowa kluczowe: opłata przekształceniowa, użytkowanie wieczyste nieruchomości, własność nieruchomości, podatek od towarów i usług, Trybunał Sprawiedliwości Unii Europejskiej

Should the value added tax be added to the fee for the transformation of the right of perpetual usufruct to real property into ownership rights? (Comments on the margin of the judgment of the Court of Justice of the European Union in Case C-604/19)

Abstract

In its judgment of 25th February 2021, in Case C-604/19, the Court of Justice of the European Union acknowledged that the transformation of the right of perpetual usufruct to real property into full ownership rights provided for in national law against payment of a fee constitutes a supply of goods, and a local government unit being a collector of that fee acts as a taxable person and not as a public authority. This paper addresses the issue whether, in the light of the above decision, it is admissible for a municipality to add the amount of the value added tax to the transformation fee.

Key words: transformation fee, right of perpetual usufruct to real property, ownership rights to real property, value added tax, Court of Justice of the European Union

[1] Doktor nauk prawnych, adiunkt w Katedrze Prawa Finansowego Wydziału Prawa i Administracji Uniwersytetu Łódzkiego, radca orzecznictwa w Biurze Służby Prawnej Trybunału Konstytucyjnego; ORCID: 0000-0001-6243-7118.

1. Introduction

Pursuant to Article 1(1) of the Act of 20 July 2018 on the transformation of right of perpetual usufruct to land developed for residential purposes into ownership right to such land[2] (hereinafter referred to as the "Transformation Act"), "as of 1 January 2019, the right of perpetual usufruct to land developed for residential purposes shall be transformed into ownership rights to such land." In turn, pursuant to Article 7 of the act:

- on account of the transformation, the new landowner shall pay a fee to the existing landowner (paragraph 1);
- the amount of the fee shall be equal to the annual fee for perpetual usufruct that would be in effect on the date of transformation (paragraph 2);
- the fee is to be paid for 20 years from the date of transformation (paragraph 6);
- the landowner, at any time when he/she is obliged to pay the fee, may notify the competent authority in writing of his/her intention to pay the fee once in the outstanding amount (one-off fee). The amount of the one-off fee corresponds to the product of the amount of the fee in effect in the year in which the intention to pay the one-off fee was declared and the number of years remaining until the expiry of the period referred to in Articles 7(6) or (6a) of the Transformation Act (paragraph 7).

In the **judgment of the Court of Justice of the European Union in Luxemburg[3] of 25 February 2021 (Case C-604/19), *Gmina Wrocław v Dyrektor Krajowej Administracji Skarbowej*[4]**, it was held that:

- Article 14(2)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[5] (hereinafter referred to as "Directive 2006/112") must be interpreted as meaning that the transformation of the right of perpetual usufruct to real property into full ownership rights provided for by national legislation against payment of a fee constitutes a supply of goods within the meaning of that provision (paragraph 1 of the operative part);
- Directive 2006/112 must be interpreted as meaning that, where the transformation of the right of perpetual usufruct to real property into full ownership rights provided for by national legislation takes place against payment of a fee to the municipality which owns the property, enabling it to obtain income therefrom on a continuing basis, that municipality, subject to the verifications to be made by the referring court, acts as a taxable person within the meaning of Article 9(1) of Directive 2006/112, and not as a public authority for the purposes of Article 13(1) of that directive (paragraph

[2] Dz.U. 2018 r. poz. 1716, ze zm.; t.j. Dz.U. 2020 poz. 2040 (dalej jako: ustawa przekształceniowa).
[3] Dalej też: Trybunał lub TSUE.
[4] LEX nr 3123493.
[5] Dz. Urz. UE L 347 z 11.12.2006 r., s. 1 (dalej jako: Dyrektywa 112).

2 of the operative part).

This article seeks to answer the question of **whether, in light of the above judgment, a municipality is allowed to increase the transformation fee by the amount of due VAT?**

2. Background to the CJEU judgment

The CJEU judgment was based on the following facts:

By request of 5 January 2019, the Municipality of Wrocław applied to the Director of the National Revenue Administration for an individual tax ruling concerning, among other things, the application of VAT to fees payable under the Transformation Act. The municipality submitted that it was registered as a taxable person for the purposes of VAT and the owner of real property leased in perpetual usufruct. The municipality stressed that pursuant to Article 5(1)(1) and Article 7(1)(6) of the VAT Act of 11 March 2004[6] (hereinafter referred to as the "VAT Act"), the leasing of land in perpetual usufruct[7] constitutes a supply of goods and, therefore, is subject to VAT. It referred, among other things, to the provisions of Articles 1(1), 4(1)(3), 4(5), and 7 of the Transformation Act and argued that on 1 January 2019, the municipality ceased to be the owner of the real property leased in perpetual usufruct, while the existing perpetual usufructuaries would become, by operation of law, the owners of the land to which they previously had the right of perpetual usufruct. The new owners of the land would pay a transformation fee to the municipality on account of the transformation of right of perpetual usufruct into ownership rights. Such fee would be payable by 31 March of each year for 20 years from the date of transformation, or in the form of a one-off fee corresponding to the product of the amount of the fee in effect in the year in which the intention to pay the one-off fee is declared and the number of years remaining until the expiry of the 20-year period from the date of transformation. Once the right of perpetual usufruct to land developed for residential purposes is transformed, as referred to in the Transformation Act, into ownership rights, the municipality would no longer be the owner of the land.

According to the Municipality of Wrocław, establishment of the right of perpetual usufruct results in the economic transfer of control over land to the perpetual usufructuary, which empowers the same to dispose thereof as if he/she were its owner. Meanwhile, the act of transforming the right of perpetual usufruct to real property into ownership rights does not affect the "control over a thing" that the user has already obtained at the time of acquiring the right of perpetual usufruct and cannot be treated as a new supply of the same product. According to the municipality, in such circumstances, the transformation of the right of

[6] Dz.U. 2004 r. poz. 535, ze zm.; t.j. Dz.U. 2021 r. poz. 685, ze zm.; t.j. (dalej jako: ustawa o VAT).

[7] Odnośnie do instytucji użytkowania wieczystego zob. szerzej m.in.: J. Winiarz, *Prawo użytkowania wieczystego*, Warszawa 1970; Z. Truszkiewicz, *Użytkowanie wieczyste. Zagadnienia konstrukcyjne*, Kraków 2006; C. Woźniak, *Użytkowanie wieczyste*, Warszawa 2006; E. Klat-Górska, *Przekształcenie użytkowania wieczystego we własność. Zagadnienia prawne*, Warszawa 2019.

perpetual usufruct to land into ownership rights to the same land is not subject to VAT; the transformation of the right of perpetual usufruct into ownership rights is not a consequence of the arrangements made while establishing the right of perpetual usufruct, but as a result of such transformation, the right of perpetual usufruct ceases to exist by operation of law, and the existing right holder acquires ownership rights for which he/she must pay a transformation fee. The Municipality of Wrocław also submitted that when leasing land in perpetual usufruct under civil law contracts, it acts as a taxable person for VAT purposes, but when collecting the transformation fee, it does not act as such, which follows from Articles 15(1), (2) and (6) of the VAT Act. In the municipality's view, when collecting the transformation fee, the municipality acts as a public authority, i.e. with authority to the extent specified in the Transformation Act. No civil law contract is concluded in respect of the transformation, which takes place solely by operation of law, without the possibility of negotiating its terms, which also applies to the terms for paying transformation fees. Moreover, no other private entity can perform a similar transaction since it can only be performed by a public authority, which – in this case – is the municipality. In conclusion, the Municipality of Wrocław submitted that transformation fees paid by new owners under the Transformation Act are not subject to VAT, as they relate to a transaction that is not subject to VAT.

In **the individual tax ruling of 15 January 2019 (No. 0115KDIT12.4 012.824.2018.1.KK)**[8], the Director of the National Revenue Administration found the position of the Municipality of Wrocław in this regard to be incorrect. According to the authority, after 1 May 2004, the establishment of perpetual usufruct constitutes a supply of goods subject to VAT. In connection with the transformation of the right of perpetual usufruct to land developed for residential purposes into ownership rights, an amount due in the form of an annual transformation fee or a one-off fee remains outstanding, and therefore the municipality will – in respect of transactions for which it will collect transformation fees – act as a taxable person for the purposes of VAT. As such, the fees payable to the municipality for the transformation of the right of perpetual usufruct into ownership rights, determined under the Transformation Act, will be subject to VAT as the outstanding portion of the amount due for the establishment of the right of perpetual usufruct to land.

The Municipality of Wrocław brought an action against the tax ruling before the Regional Administrative Court in Wrocław which, **by decision of 19 June 2019 (ref. I SA/Wr 295/19)**[9] submitted the following questions to the Court for a preliminary ruling:

- Does the transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law, such as in the circumstances of the present case, constitute a supply of goods within the meaning of Article 14(2)(a) of Directive

[8] Legalis.
[9] LEX nr 2691246.

2006/112, read in conjunction with Article 2(1)(a) thereof, which is subject to VAT?

- If the answer to the above question is in the negative, does the transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law constitute a supply of goods within the meaning of Article 14(1) of Directive 2006/112, read in conjunction with Article 2(1)(a) thereof, which is subject to VAT?
- Does a municipality that charges fees for the transformation of the right of perpetual usufruct into immovable property ownership rights by operation of law, such as in the circumstances of the present case, act as a taxable person within the meaning of Article 9(1) of Directive 2006/112, read in conjunction with Article 2(1)(a) thereof, or as a public authority within the meaning of Article 13 of that directive?

3. CJEU judgment in Case C-604/19 and the issue of including the amount of VAT due in the transformation fee

The CJEU judgment in Case C-604/19 determined unequivocally that, under EU law, the transformation of the right of perpetual usufruct to real property into full ownership rights in connection with the payment of the prescribed transformation fee constitutes a supply of goods within the meaning of Directive 2006/112, and is therefore subject to VAT under national law. **However, this judgment gives rise to a question whether the amount of VAT due should be added to or included in the transformation fee**.

Pursuant to Article 29a(1) of the VAT Act, the taxable base, subject to Articles 29a(2), (3) and (5), 30a–30c, 32, 119 and 120(4) and (5) thereof, is everything that constitutes payment that the supplier of goods or services has received or is to receive on account of sales from the purchaser, customer or a third party, including received grants, subsidies and other subsidies of similar nature having a direct impact on the price of goods supplied or services rendered by the taxable person. In turn, it follows from Article 7(1)(7) of the VAT Act that the disposal of the right of perpetual usufruct to land is also understood as a supply of goods and services against payment on the territory of the country. As such – especially in light of the CJEU judgment in Case C-604/19 – the transformation fee (as inherently related to the situation covered by Article 7(1)(7) of the VAT Act) is subject to VAT, but Article 7 of the Transformation Law (or *de lege lata* any other provision of Polish law) does not explicitly refer to VAT as a component charged in addition to the transformation fee. **Although the amount of the transformation fee is determined in a certificate (with regard to the annual fee) or an administrative decision (with regard to the one-off fee), it cannot be assumed that it is *strictly* a public law receivable. On the contrary, since perpetual usufruct is, by the express will of the legislator, a specific civil law relationship**

between a natural or legal person and a local government unit,[10] **and therefore the perpetual usufruct fee has a civil law nature, then – *a fortiori* – the transformation fee is of the same nature**.[11] However, this does not justify adding the amount of VAT due to the transformation fee (whether annual or one-off) for the following reasons:

- firstly – the principle of one and only amount of tax (which also derives to some extent from the principle of universality of taxation) is that the legislator is obliged to ensure uniformity in the application of substantive tax law to all taxable persons.[12] The tax norm should be predictable, that is, it should give sufficient specificity to the tax obligation (define the object of taxation). In other words, when creating a tax norm, the legislator is obliged: on the one hand, to refer in the object of taxation to things or elements that directly or indirectly indicate the ability to bear the tax burden, and on the other hand, to define these things or elements in such a way as to give clarity and certainty regarding their conversion into a calculable basis as a reference point for the application of tax rates;[13]
- secondly, **it follows from the principle adopted by the Polish legislator in Articles 84 and 217 of the Constitution of the Republic of Poland of 2 April 1997[14] requiring a statutory basis for the obligation to bear public burdens and benefits, coupled with the norm derived from Article 29a(1) of the VAT Act, read in conjunction with Articles 73 and 78 of Directive 2006/112, that VAT cannot be added to the transformation fee unless expressly allowed in a statutory provision. The legislator's silence as to the purpose of the transformation fee (paid to the municipality) as strictly a public levy cannot replace the provision of positive law requiring the existing perpetual usufructuary to pay VAT in addition to the transformation fee**;
- thirdly, in **the judgment of 7 November 2013 (Joined Cases C-249/12 and C-250/12) in the joined cases of *Corina-Hrisi Tulică v Agenția Națională de Administrare Fiscală – Direcția Generală de Soluționare a Contestațiilor* and *Călin Ion Plavoșin v Direcția Generală a Finanțelor Publice Timiș – Serviciul Soluționare Contestații, Activitatea de Inspecție Fiscală – Serviciul de Inspecție***

[10] Tak ujął to Trybunał Konstytucyjny w uzasadnieniu wyroku z 15 grudnia 2020 r., sygn. akt SK 12/20 (OTK ZU 2021, seria A, poz. 2).

[11] Przed wejściem w życie ustawy przekształceniowej, we wcześniejszym orzecznictwie dotyczącym przekształcenia użytkowania wieczystego w prawo własności również uznawano, że opłata z tego tytułu ma charakter cywilnoprawny - zob. m.in.: wyrok SN z 27 listopada 2003 r., sygn. akt I CK 316/02 (LEX nr 1129606); wyrok WSA w Łodzi z 15 października 2007 r., sygn. akt II SA/Łd 544/07 (LEX nr 384123); wyrok WSA w Poznaniu z 30 kwietnia 2014 r., sygn. akt IV SA/Po 1255/13 (LEX nr 1462461).

[12] D. Łukawska-Białogłowska, *Wprowadzanie klauzuli przeciwdziałającej obejściu prawa podatkowego do polskiego systemu prawnego*, Łódź 2020, s. 117. Por. też T. Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częścią finansową*, Warszawa 2010, s. 146.

[13] D. Łukawska-Białogłowska, op.cit., s. 117. Por. też T. Dębowska-Romanowska, op.cit., s. 147.

[14] Dz.U. 1997 nr 78 poz. 483, ze zm.

Fiscală Timiș,[15] the CJEU held that Directive 2006/112, and in particular Articles 73 and 78 thereof, "must be interpreted as meaning that, when the price of a good has been established by the parties without any reference to value added tax and the supplier of that good is the taxable person for the value added tax owing on the taxed transaction, in a case where the supplier is not able to recover from the purchaser the value added tax claimed by the tax authorities, the price agreed must be regarded as already including the value added tax.";

- fourthly, **Article 29a(1), read in conjunction with Article 7(1)(6) of the VAT Act, is not a sufficient basis for the municipality to add this tax to the transformation fee. This is because value added tax is included in the charge for the supply of goods or services.**[16] **For the municipality, the transformation fee is a statutory payment for the disposal of land to the existing perpetual usufructuary, and the fact that a provision on the possibility of adding value added tax to the transformation fee was not included in the Transformation Act has the effect that the fee should be treated as a gross receivable, already including value added tax**;
- fifthly and finally, it is true that the Supreme Court, in its judgment of 29 May 2007 (ref. V CSK 44/07)[17] held that annual fees for perpetual usufruct, strictly defined as a percentage of the value of real property, should be treated as net benefits, not including value added tax, but this does not constitute a basis for assuming that this tax should be charged to the existing perpetual usufructuary by adding it to specific annual fees or a one-off fee. Indeed, it should be pointed out that **the case law of the Supreme Court**[18] **recognised that the fact of charging VAT in respect of a certain activity or service does not justify its automatically being added to the amount payable to the taxable person, as agreed in the agreement, without the parties thereto amending the provisions of the agreement accordingly, possibly by way of bringing an action provided for in Article 357[1] of the Civil Code of 23 April 1964**.[19] In turn, in its decision of 10 February 2006. (ref. III CZP 1/06)[20], the Supreme Court took the legal view that **since the fees for perpetual usufruct are agreed in an agreement concluded between the owner of the land and the perpetual usufructuary, then, without amending the agreement, they can only be changed in the situation provided for in Article 77(1) of the Act of 21 August**

[15] LEX nr 1383201.
[16] Por. uchwałę składu siedmiu sędziów SN z 27 lipca 2017 r., sygn. akt III CZP 97/16 (OSNC 2017, nr 12, poz. 131).
[17] LEX nr 447467.
[18] Zob. np. przywołaną już uchwałę składu siedmiu sędziów SN z 27 lipca 2017 r., sygn. akt III CZP 97/16, oraz uchwałę SN z 7 lipca 2016 r., sygn. akt III CZP 34/16 („Monitor Prawniczy" 2016, nr 15, s. 787).
[19] Dz.U. 1964 nr 16 poz. 93, ze zm.; t.j. Dz.U. 2020 poz. 1740, ze zm.
[20] LEX nr 180664.

1997 on Real Property Management;[21] in turn, pursuant to this provision, the amount of the annual fee can only be updated if the value of the real property leased in perpetual usufruct increases, and without amending this provision, the real property owner can therefore only increase the amount of the fee for perpetual usufruct if he/she proves that the introduction of VAT affected the value of the real property leased in perpetual usufruct (as there is no legal basis in the currently applicable law to otherwise pass on to the perpetual usufructuary the effects of introducing VAT on leasing land in perpetual usufruct).

4. Conclusions

In the light of national legislation (Article 29a(1) of the VAT Act, read in conjunction with Articles 84 and Article 217 of the Constitution) on the one hand, and the provisions of EU law (Articles 73 and 78 of Directive 2006/112, read in conjunction with their interpretation by the Court in its judgment in Joined Cases C-249/12 and C-250/12) on the other hand, it should be concluded that **under the currently applicable law, it is impossible for the municipality to increase the transformation fee by the amount of VAT due**, and as such *de facto* to shift its tax liability to the existing perpetual usufructuary. As a consequence, municipalities are obliged to pay VAT on a general basis, which means that the part of the transformation fee that constitutes payment for the supply of goods within the meaning of Directive 2006/112 is treated as VAT included therein, not constituting the municipality's income. Thus, in the light of Luxembourg case law, municipalities are deprived of a part of income due to them on account of the transformation of title to real property under the Transformation Act.

The article presents the author's <u>personal</u> view.

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[21] Dz.U. 1997 nr 115 poz. 741, ze zm.; t.j. Dz.U. 2020 poz. 1990, ze zm.

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