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Opodatkowanie VAT sprzedaży niezabudowanych gruntów rolnych

DOI 10.5604/01.3001.0015.9855

Streszczenie:

Opodatkowanie VAT sprzedaży niezabudowanych gruntów rolnych budzi problemy natury interpretacyjnej. Przyczyną takiego stanu rzeczy jest brak ścisłych kryteriów normatywnych definicji działalności gospodarczej. Powoduje to, że dla uznania, czy dana czynność podlega opodatkowaniu, kluczowe znaczenie odgrywa orzecznictwo sądowe. Biorąc pod uwagę zachodzące zmiany w gospodarce, nie ma ono charakteru stałego i ciągle ewoluuje. Celem niniejszego artykułu jest próba wskazania, w jakich okolicznościach osoba fizyczna dokonująca dostawy nieruchomości rolnych jest traktowana jak profesjonalista, a kiedy działa w ramach zarządu majątkiem prywatnym. Artykuł składa się z trzech części. Pierwsza zawiera uwagi wprowadzające. W drugiej wskazano na zakres przedmiotowy i podmiotowy opodatkowania VAT - rozważania koncentrują się na osobie podatnika, pojęciu dostawy gruntów rolnych i kryteriach prowadzenia profesjonalnej działalności handlowej. Trzecia część to wnioski. W artykule postawiono następującą hipotezę badawczą: Katalog przesłanek, które świadczą o opodatkowaniu VAT sprzedaży niezabudowanych gruntów rolnych, nie ma charakteru zamkniętego. Prowadzone badania wykorzystują następujące metody badawcze: dogmatycznoprawną, historyczną i komparatystyczną.

Słowa kluczowe: VAT, dostawa niezabudowanych gruntów rolnych, działalność gospodarcza, podatnik czynny

Sale of undeveloped agricultural land as a base for VAT taxation

Abstract:

Sale of undeveloped agricultural land raises problems of its VAT taxation interpretation. In view of absence of rigid normative criteria for defining economic operations, judicial decisions, which evolve over time, play a key role in this respect. The objective of this article is to indicate under what circumstances a natural person supplying agricultural real property is regarded a professional and when they act as a private property manager. The structure of the article has been divided into three sections. The first includes general remarks, while the second indicates the objective and subjective scope of VAT taxation on sale of undeveloped agricultural land. The third offers the conclusions. The article presents the following research hypothesis: a natural person registered as an active VAT payer for agricultural business should not always be obliged to pay tax on the sale of agricultural land. The following research methods were used in the article: legal-dogmatic, historical and comparative.

Keywords: VAT, supply of undeveloped agricultural land, economic activity, active taxpayer

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1. Introductory remarks

The changes in agrarian policy, initiated in the 1980s, became an impulse for transformation in the field of real estate management. On the one hand - the increase in awareness of the quality of manufactured goods contributed to the intensification of activity by agricultural producers (e.g. by increasing investment outlays), on the other - the so-called boom on the housing and infrastructure market maintaining at a high level has increased the attractiveness and demand for undeveloped agricultural land suitable for development. In response to new market needs, there have been changes in the structure of land ownership previously used as arable land. More and more often, entities not involved in the production process began to become owners of arable land, but purchasing real estate for residential, recreational and speculative purposes².

As the aforementioned processes have an impact on the understanding of the provisions of law, search for an answer to the question in which circumstances the sale of agricultural land takes place under the ordinary management of private property, and when the activities undertaken bear the hallmarks of professional trade, which results in the imposition of VAT, has become a problematic issue. These issues, not being properly standardized, led to numerous disputes between the taxpayer and the tax authority, often ending up in court. Due to this, the issue of taxation of the sale of undeveloped agricultural land under the Act on Value Added Tax (VAT) began to occupy an increasingly important place in the study of tax law. The purpose of this article is to indicate under what circumstances the seller of agricultural land is treated as a person running a business.

The article presents the following research hypothesis: The catalog of premises, which proves that VAT is taxed on the sale of undeveloped agricultural land, is not of a closed nature. The following question contributed to the verification of the above hypothesis: Does the definition of economic activity indicated in the VAT Act allow to clearly indicate the criteria of professional trade?

The article consists of three parts. The first includes an introduction. The second part indicates the objective and subjective scope of VAT taxation - considerations focus on the person of the taxpayer, the concept of supply of agricultural land and the criteria for conducting professional commercial activity. The third part is conclusions. The considerations are based primarily on the jurisprudence of the courts. The article uses such research methods as dogmatic-legal, historical and comparative.

² W. Dziun, *Zmiany skali wykorzystania zasobów gruntów rolnych w Polsce w procesie przemian systemowych i integracji z Unią Europejską*, „Zagadnienia Ekonomiki Rolnej” 2012, pp. 18-19.

2. The objective and subjective scope of the VAT taxation of the sale of undeveloped agricultural land

A declaration that the seller of agricultural plots is subject to VAT requires the joint fulfillment of the objective and subjective condition. The objective premise was expressed in Art. 5 par. 1 point 1 of the VAT Act, which states that tax is imposed on the paid supply of goods and the paid provision of services within the territory of the country³. Pursuant to Art. 7 par. 1, the delivery of goods means the transfer of the right to dispose of the goods as the owner. Since this right covers the possibility of actual use of things, obtaining benefits from them, as well as disposing of the goods, it is beyond dispute that the sales contract is payable and falls under the concept of delivery. On the other hand, the glossary of the VAT Act in Art. 2 point 6 specifies the concept of goods, stating that they are things and their parts, as well as all forms of energy. Since agricultural land belongs to the category of real estate and real estate is real property, it constitutes goods within the meaning of VAT.

The concept of agricultural land is normative and has been defined in several legal acts⁴. Art. 46¹ of the Civil Code, according to which agricultural land is land that can be used for agricultural production in the field of plant and animal production, including horticultural, fruit and fish production, is of basic importance. As can be seen, a functional criterion, which refers to the agricultural purpose of the real estate, is of key importance for determining the agricultural nature of the land property⁵. It is not necessary to actually use it in the form of cultivating plant crops or breeding animals⁶. An agronomic attribute that proves the possibility of obtaining agricultural produce is enough⁷. The legislator in Civil Code does not introduce the area standard, which means that even a small area can be considered as agricultural land, as long as it can potentially be used for broadly understood agricultural activity. To sum up, in the light of the above-mentioned provisions, it should be concluded that the sale of agricultural land meets the provisions of Art. 5 par.1 point 1 of the VAT Act and constitutes a paid delivery of goods. It should be noted, however, that not every activity that constitutes a

³ Act on tax on goods and services of March 11, 2004 (consolidated text: of March 19, 2021, Journal of Laws of 2021, item 685, as amended; hereinafter: the VAT Act).

⁴ The most important role is played by the Act of April 23, 1964 - Civil Code (consolidated text: Journal of Laws of 2020, item 1740, as amended; hereinafter: the Civil Code), although this concept is also used by the Act of April 11, 2003 on the shaping of the agricultural system (consolidated text: of February 24, 2022, Journal of Laws, item 461), the Act of August 21, 1997 on the management of agricultural real estate of the State Treasury (consolidated text: of March 3, 2022, Journal of Laws, item 514) or the Act of April 14, 2016 on suspending the sale of the Agricultural Property Stock of the State Treasury and amending certain acts (consolidated text: of March 2, 2022, Journal of Laws, item 507).

⁵ Judgment of the Supreme Administrative Court of November 23, 2006, I OSK 132/06.

⁶ Definition from the Civil Code applies to all other laws relating to agricultural land, unless otherwise provided for. M. Balwicka-Szczyrba, *Komentarz do art. 46¹ K.c.*, [in:] *Kodeks cywilny. Komentarz, Warszawa 2022*, <https://sip-1lex-1pl-1gv5b9u2g1c9f.han.wsb.gda.pl/#/commentary/587886120/683560TtocHit=1&cm=URELATIONS>, [date of access: 27.04.2022].

⁷ A. Lichorowicz, *Głosa do wyroku SN z 2.06.2000 r. II CKN 1067/98*, „Orzecznictwo Sądów Polskich” 2001, no. 2, item 27, p. 88.

supply of goods within the meaning of Art. 7 par. 1 of the VAT Act entails the obligation to pay the tax⁸. For this to be the case, it is also necessary to transform the tax obligation into a tax liability in the form of its individualisation, i.e. to determine whether a natural person who sells agricultural land acts as a VAT taxpayer.

The subjective premise requires determining whether the seller of the real estate is a taxpayer within the meaning of the provisions of the Value Added Tax Act. Pursuant to Art. 15 par. 1 of the VAT Act, the taxpayer is a legal person, an organizational unit without legal personality and a natural person who independently conducts business activity, referred to in par. 2 regardless of the purpose or result of such activity. Pursuant to the principle of universality of taxation, the legislator defined the subject group in a universal manner and treated the receipt of the attribute of an entrepreneur very broadly. This is because, under the Act on Value Added Tax, granting the seller of land the status of a taxpayer does not require meeting additional formal requirements⁹, e.g. registering a business activity¹⁰. The mere fact that the seller acts in this capacity is sufficient, and the acquisition of the above-mentioned quality by him is not a permanent feature.

In order to conclude that the act of supplying agricultural land meets the characteristics of an economic activity, it should be examined whether the activity of a natural person is continuous and professional, i.e. whether it takes the form of professional trade. For the Polish legislator, following the example of Art. 9 par. 1 of Directive 2006/112 /EC¹¹, neither the purpose nor the economic result of economic activity which may result in a loss in a given tax year is significant¹². This is due to the fact that in EU law a taxpayer is an entity that is primarily entitled to rights, e.g. the right to deduct input tax, and only then obligations, such as e.g. the obligation to pay tax¹³. Due to the autonomy of tax law, the institutions expressed in the Value Added Tax Act cannot be defined through the prism of similar-sounding terms expressed in other acts of internal law, e.g. in the context of the concept of economic activity under the Entrepreneurs' Law Act¹⁴. In the case of the European VAT system, the idea of EU law

⁸ H. Dzwonkowski, *Opinia prawna w sprawie naliczania podatku od towarów i usług w związku ze sprzedażą użytków rolnych na publiczne inwestycje drogowe w zależności od tego, czy rolnik rozlicza podatek VAT na zasadach ogólnych bądź ryczałtowych*, „Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu” 2015, no. 4 (48), pp. 232-233.

⁹ It is different when applying for the status of an active VAT taxpayer.

¹⁰ Article 9 of Council Directive 2006/112/EC.

¹¹ Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax, OJ EU. L 2006, No.347, item 1.

¹² Judgment of the Provincial Administrative Court of December 15, 2020, I SA/Gd 962/20.

¹³ A. Bartosiewicz, *Prowadzenie działalności gospodarczej - status podatnika VAT*, ABC, https://sip-1lex-1pl-1gv5b9uxo0b27.han.wsb.gda.pl/#/publication/469873433/bartosiewicz-adam-prowadzenie-dzialalnosci-gospodarczej-status-podatnika-vat?unitId=aka_WKP_AL_25403&cm=URELATIONS [date of access: 3.06.2022].

¹⁴ Pursuant to Art. 3 of the Act of March 6, 2018 (Journal of Laws of 2018, item 650) - Entrepreneurs' Law, economic activity is an organized gainful activity, performed on one's own behalf and on a continuous basis.

is the need to unify the concepts that are subject to harmonization and remain independent of the national understanding of the Member States¹⁵.

Legal construction of art. 15 par. 2 of the Value Added Tax Act defines economic activity as all activities of producers, traders or service providers, including entities acquiring natural resources and farmers, as well as activities of freelancers. Economic activity includes, in particular, activities consisting in the use of goods or intangible assets on a continuous basis for commercial purposes¹⁶. The normative concept of economic activity is subjective in nature, as it relates not so much to the nature of the activity as to the entities that undertake it. Additionally, it is very comprehensive and contains only exemplary activities. For this reason, as indicated by the court on several occasions, the interpretation of Art. 15 par. 2 of the VAT Act does not make it possible to unequivocally state in what situation the farmer's activities bear the features of private property management, and since when they are included in the professional turnover¹⁷. The analysis of the legal definition shows that an economic activity is classified as professional trade when it is characterized by constant, independent¹⁸, not occasional and, consequently, of an organized nature¹⁹. It should be noted that, in accordance with the intention of the legislator, an occasional activity should not lead to VAT taxation, although in fact the performance by a taxpayer of even one transaction as part of its activity will also result in taxation²⁰.

Hence, in each particular situation it should be verified whether the seller of agricultural land engages resources similar to those used by traders. If so, then it works

¹⁵ T. Michalik, *Komentarz do art. 7 ustawy o podatku od towarów i usług*, [in:] *VAT. Komentarz*, <https://sip-1legalis-1pl-10000092g1f41.han.wsb.gda.pl/document-view.seam?documentId=mjxw62zogi3damzshheyteni&to-cid=mjxw62zogi3damzshheyteni&rowIndex=-1>, [date of access: 3.05.2022].

¹⁶ In the wording of the definition of economic activity in force until March 31, 2013, a farmer who divided his own farm and then sold the plot of land was treated in the judiciary as a person running a business. It was believed that the mere fact of a geodetic separation and one-off performance of activities in circumstances indicating the intention to perform them repeatedly resulted in the obligation to pay VAT. Decision of the Head of the Tax Office in Pruszków of March 22, 2007 (on issuing a tax interpretation), decision of the Director of the Tax Chamber in Warsaw of January 11, 2008 on refusal to change the decision of the first instance authority. Judgment of the Provincial Administrative Court of April 6, 2006, file ref. I SA/O1 112/06. Over time, under the influence of EU regulations, a different line of jurisprudence began to develop, according to which the fact of selling a separate plot (frequency of activities) does not lead to the recognition of a farmer as an entrepreneur. This position was derived from Art. 2 of Directive 2006/112/EC, where the term "taxpayer acting as such" appears, which means that a given entity, having the status of a taxpayer, may act as an entity that does not meet such criteria in certain transactions. Judgment of the Provincial Administrative Court of June 24, 2008, III SA/Wa 551/08, judgment of the Supreme Administrative Court (7w) of October 29, 2007, I FPS 3/07, ONSA. Finally, in 2013, in connection with the amendment to the VAT Act, in Art. 15 par. 2, the wording according to which economic activity includes activities performed once in circumstances indicating the intention to perform repeatedly was deleted.

¹⁷ Supreme Administrative Court judgment of November 5, 2020 I FSK 681/18, Supreme Administrative Court judgment of January 21, 2022, I FSK 1421/18, Supreme Administrative Court judgment of October 29, 2007, I FPS 3/07 and Supreme Administrative Court judgment of October 27, 2009, I FSK 1043/08.

¹⁸ Case C-230/94. Judgment of the Court (Fourth Chamber) of September 26, 1996. Renate Enkler v Finan- Zamt Homburg. ECR 1996, p. 4517.

¹⁹ Judgment of the Provincial Administrative Court of November 29, 2019, I SA/Wr/741/19.

²⁰ W. Modzelewski, *Komentarz do ustawy o podatku od towarów i usług. Komentarz*, Warszawa 2022, <https://sip-1legalis-1pl-1000009xo045d.han.wsb.gda.pl/document-view.seam?documentId=mjxw62zogi3damzgm3dsoboobqxalrvha2tomzvgi2q#tabs-metrical-info>, [date of access: 13.05.2022].

in a typical trader manner²¹. It is important to consider the actions at different stages of the seller's activity together, not separately²². Helpful in determining the legal and tax subjectivity of VAT is the judgment of the European Court of Justice in the joined cases of Jarosław Słaby against the Minister of Finance, Emilian Kuć and Halina Jeziorska-Kuć against the Director of the Tax Chamber in Warsaw (C-190/10 and C-181/10)²³. In the opinion of the Tribunal, a natural person who conducted agricultural activity on land acquired with VAT exemption, which then, regardless of its will, was transformed as a result of a change in the spatial development plan into land intended for development, is not a taxpayer of tax on goods and services within the meaning of Art. 9 par. 1 and Art. 12 par. 1 of Directive 2006/112/EC, when selling land, if the sale takes place as part of private property management. On the other hand, a situation should be treated differently when this person takes active actions in the field of real estate and engages certain funds, assets similar to those used by producers, traders and service providers. Then, in the opinion of the Court, such a person conducts business activity, and therefore is obliged to pay VAT.

Although the aforementioned judgment did provide some guidance, it did not dispel any doubts related to the determination of the circumstances in which the sale of plots of land is taxable²⁴. The Court has not indicated a *numerus clausus* of actions that make the seller of the land conduct commercial activity on this account. Instead, it formulated criteria that are characteristic of both activities undertaken as part of economic activity and private property management²⁵. These include the number and scope of transactions (large transactions can also be made as personal transactions), the division of land in order to obtain a higher total price, the length of the period in which these transactions took place, the amount of revenues generated on this account.

In the light of cases C-190/10 and C-181/10, the circumstances that existed at the time of the purchase of the real estate by the seller are irrelevant for determining whether the activity of a trader takes place²⁶. Each assessment, when the seller of an

²¹ Supreme Administrative Court judgment of October 29, 2007, I FPS 3/07, Supreme Administrative Court judgment of October 22, 2013, I FSK 1323/12, Supreme Administrative Court judgment of March 14, 2014, I FSK 319/13, Supreme Administrative Court judgment of April 16 2014, I FSK 781/13, Supreme Administrative Court judgment of May 27, 2014, I FSK774/13, Supreme Administrative Court judgment of July 8, 2015, I FSK 729/14.

²² *Ibidem*.

²³ Judgment of the European Court of Justice of September 15, 2011, Jarosław Słaby against the Minister of Finance (C-180/10) and Emilian Kuć and Halina Jeziorska-Kuć against the Director of the Tax Chamber in Warsaw (C-181/10). ECR 2011, p. 8461.

²⁴ M. Duda-Hyz, *Kształtowanie się linii orzeczniczych w zakresie opodatkowania VAT sprzedaży przez rolników działek pod zabudowę*, „Roczniki Nauk Prawnych” 2020, v. 30, no. 3, pp. 13-19.

²⁵ G. Kaptur, *Podatnik VAT w obrocie nieruchomościami cz. IV - orzecznictwo sądów administracyjnych po wyroku TSUE w połączonych sprawach C-180/10 i C-181/10*, „Nieruchomości@” 2022, no. 2, p. 32.

²⁶ SAC judgment of October 5, 2017, I FSK 188/16. A different approach was taken by tax authorities and courts before the ruling in cases C-190/10 and C-181/10. At that time, it was assumed that the purchase of real estate in accordance with the buyer's intention, e.g. by way of a contract of sale, may prove that it was granted the status of a VAT payer. If, on the other hand,

agricultural plot acts as an entrepreneur, resulted in the emergence of a rich body of judicature. It allows for the formulation of criteria in the jurisprudence of the Supreme Administrative Court which, when used jointly, are treated as active activities of the seller in the field of real estate transactions²⁷. These include activities related to utilities, separation of internal roads and marketing activities.

In the normative sense, the term "land utilities" is equated with the land utilities network. Within the meaning of Article 2 par. 1 point 1 of the Geodetic and Cartographic Law²⁸ this term is understood as all types of above-ground, ground and underground cables and devices: water, sewage, gas, heat, telecommunications, electricity and others, with the exception of detailed drainage devices, as well as underground structures which, in the meaning of the provisions on public statistics, are not buildings. As a result, the utilities network in colloquial language is defined as a developed plot, which is understood as the area to which all utilities have been connected, e.g. water and sewage networks, gas, electricity, telecommunications and others. The case law of the Supreme Administrative Court does not require that transmission networks have already been established on the plot in question. To recognize commercial activity as a premise, it is enough to obtain a promise for the supply of water and electricity to the plots of land, and thus to undertake activities aimed at its development²⁹. The doctrine emphasizes that this premise is not sufficient, because the promise to the buyer, often occurring in trade, or making arrangements by the seller with transmission companies, does not yet constitute utilities within the meaning of cases C-190/10 and C-181/10³⁰.

Activities that require investment outlays exceeding the activities of private property management will be of key importance here. For example, the division of real estate and the separation of internal roads necessary for communication are treated as activities of a small range, which as such should not exhaust the hallmarks of professional activity³¹. If, on the other hand, it is accompanied by efforts that require greater commitment, then, in the light of the jurisprudence, the indicated construction works prove to be of a professional nature.

The Act on Value Added Tax does not contain a legal definition of marketing activities. The CJEU in its ruling issued in cases C-190/10 and C-181/10 also did not indicate the scope of this concept. According to the Dictionary of the Polish language, marketing is understood as activities aimed at understanding the needs of consumers,

it took place regardless of his will, e.g. by inheritance or donation, then such an action did not determine the conduct of business activity..

²⁷ SAC judgment of August 28, 2020, I FSK 2036/17.

²⁸ The Geodetic and Cartographic Law of May 17, 1989 (consolidated text: of October 1, 2021, Journal of Laws of 2021, item 1990).

²⁹ SAC judgment of January 17, 2013, I FSK 262/12.

³⁰ G. Kaptur, *Podatnik VAT w obrocie nieruchomościami cz. V- uzbrojenie terenu w orzecznictwie sądów administracyjnych po wyroku TSUE w połączonych sprawach C-180/10 i C-181/10*, „Nieruchomości@” 2022, no. 4, p. 32.

³¹ Judgment of the Provincial Administrative Court of July 22, 2020, I SA/Bd 91/20.

determining the production volume and methods of distribution, sale and advertising of goods³². In the context of the supply of real estate, it seems that marketing activities should be understood as advertising activities, while referring to the content of the above-mentioned ruling, they must be of a nature similar to that used by producers, traders and service providers³³, that is professionals. Thus, not every form of advertisement is a marketing measure. Judicature indicates that this can be considered a large advertising banner³⁴. However, it does not include a simple press advertisement³⁵, placing an advertisement in the local press or displaying it³⁶. The so-called word of mouth marketing, although the tax authority argued that in small towns it is quite common and is the best form of reaching a potential buyer, also does not indicate professional nature³⁷. Noteworthy is the approach of the judicial authorities to the issue of the advertisement posted on the website. While in the judgment of 2011, the Supreme Administrative Court stated that such an activity does not fall within the ordinary management of property³⁸, but almost a decade later, it considered it to be a standard action of people intending to sell a property, provided that the advertisement took a simple graphic form, i.e. there was no promotion, positioning or bolding³⁹. In view of the technical progress, the manifestation of which is universal access to the Internet and the acquisition of IT knowledge at the level of primary school, the adoption of a more liberal position in administrative judiciary deserves approval.

The fact that the seller has already concluded a lease agreement is the fact that he is running a business on agricultural land. It should be remembered that sometimes, in rural relations, it has its specificity, which consists in the fact that the parties agree, for example, to use the land and collect benefits from it in exchange for taking over the obligation to pay agricultural tax or maintaining the land in a proper condition (so that it does not lie fallow). As a result, such a contract is not payable and takes the form of rent-free use. Hence, it is important that the tax authority examines the provisions contained in it each time⁴⁰, and was not limited only to asking the applicant whether a civil law contract was concluded. The court rightly noted that not every lease of real estate means that it is used for business activity⁴¹.

³² Słownik języka polskiego PWN, <https://sjp.pwn.pl/sjp/marketing;2567058.html> [date of access: 6.06.2022].

³³ Judgment of the CJEU of 15 September 2011, Journal of Laws of 2011, No. EU C 201 No. 589, pt. 39 and 40.

³⁴ SAC judgment of October 9, 2014, I FSK2145/13.

³⁵ SAC judgment of November 29, 2011, FSK 1059/100.

³⁶ SAC judgment of May 9, 2014, I FSK812/1, SAC judgment of August 28, 2020, I FSK 1476/17.

³⁷ Judgment of the Provincial Administrative Court of July 22, 2020, I SA/ Bd 91/20.

³⁸ *Ibidem*.

³⁹ SAC judgment of March 24, 2021, I FSK 1243/19, judgment of the Provincial Administrative Court of July 22, 2020, *op.cit*.

⁴⁰ Letter of April 16, 2021, Director of the National Tax Information 0112-KDIL1-4012.121.2021.4.ST.

⁴¹ SAC judgment of October 21, 2020, I FSK 297/18, judgment of the Provincial Administrative Court of April 9, 2021, III SA/Wa 677/20.

On the basis of the above considerations, the situation of the legal qualification of multiple deliveries of undeveloped agricultural land by an entity conducting agricultural business activity deserves attention. There is no problem when the seller is not acting as an entrepreneur and the land has always been his private property. Then there is no need to show the separation between personal property and business related assets. When the person making the delivery, due to the previously undertaken activity, submitted, pursuant to Art. 96 par. 1 of the VAT Act, a VAT-R registration declaration, there is a presumption that he is an active taxpayer of the tax on goods and services⁴². Obtaining such an attribute requires meeting certain formal requirements and it is not possible to replace them with other technical activities, e.g. submitting a tax declaration. Pursuant to Art. 96 par. 4 of the VAT Act, the head of the Tax Office, after prior verification of the data provided in the application, registers the VAT payer. The regulations do not expressly indicate exactly when the seller acquires such an attribute. The doctrine assumes that this takes place when the application is submitted to the head of the tax office⁴³.

Occurrence in trade as an active VAT payer is of great legal importance. The current interpretation of Art. 15 par. 2 in connection with Art. 96 par. 1 of the Act on tax on goods and services indicates that the land owned by the entity conducting agricultural activity is closely related to the farm, unless it was acquired before starting business activity. In another situation, it always seems to be his property. Following this lead, the seller is treated as having no private property, and its sale takes place as part of business activity. On the other hand, being treated as an entrepreneur, it is very difficult for him to prove that he is selling undeveloped agricultural land not as part of his commercial activity, but within the limits of private property, especially when part of the plot is intended for recreational purposes or, for example, classified as a meadow which is lying fallow and there are no livestock in the yard.

There is also the problem of what if the active taxpayer acquires the right to the subjective exemption⁴⁴. Such a person is not obliged to perform activities in the scope of updating the registration application, i.e. in the light of the regulations, he remains registered as conducting business activity⁴⁵. The conditions for exempting the delivery

⁴² In special cases mentioned in art. 96 par. 3 of the VAT Act, the right to submit a registration application, without the obligation to do so, is granted to taxpayers who are subject or objectively exempt from taxation. T. Michalik, *VAT. Komentarz*. Warszawa 2021, <https://sip-1legalis-1pl-1000009xo0dc4.han.wsb.gda.pl/document-view.seam?documentId=mjxw62zogi3damzsheytenjoobqxlrvha2tonjsgm3q#tabs- -metrical-info> [date of access: 17.06.2022]

⁴³ E. Ekińska, *Błędy formalne związane z rejestracją podatnika a prawo do uznania danej transakcji za wewnątrzwspólnotową dostawę towarów*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2012, no. 5, pp. 80-81.

⁴⁴ The legislator in art. 113 par. 13 of the VAT Act, excluded the sale of agricultural land intended for development from the subjective exemption.

⁴⁵ The aforementioned situation resembles a fairly common approach of tax authorities and courts, which pursuant to Art. 1 par. 1 point 3 of the Act on Local Taxes and Fees (Act of 12 January 1991 on local taxes and fees, consolidated text: Journal of Laws of 2019, item 1170, as amended; hereinafter referred to as: UOPOL) recognized that the mere fact that an entrepreneur owns

of undeveloped land other than construction land are set out in Art. 43 par. 1 point 9 of the VAT Act. Pursuant to Art. 135 par. 1 let. k of Directive 2006/112 /EC, Member States exempt from tax on "deliveries of undeveloped land, other than the supply of construction sites, referred to in Art. 12 par. 1 let. b)". On the other hand, under Article 12 par. 3, for the purposes of par.1 let. b), "building land" shall mean any land that has no infrastructure or utilities and is considered as building land by the Member States. Such a legal construction indicates that EU countries individually define the scope of the concept of "building areas"⁴⁶. The Polish legislator in Art. 2 par. 33 of the VAT Act, by construction areas means land intended for development in accordance with the local spatial development plan (MPZP)⁴⁷, and in the absence of such a plan - in accordance with the decision on building conditions and land development (DWZ), referred to in the provisions on planning and spatial development. This means that the objective exemption applies to the delivery, the subject of which is undeveloped land, i.e. agricultural land not intended for development in accordance with local law (MPZP) and for which no individual administrative law act (DWZ) was issued⁴⁸.

3. Conclusions

The issue of VAT taxation of the supply of agricultural land has still not been sufficiently clarified in the literature. The fact that the catalog of premises which proves that the sale of undeveloped agricultural land is not subject to VAT is closed is due to the following reasons:

1. The wording by the legislator in Art. 15 par. 2 of the Act on tax on goods and services, of the definition of economic activity. Its legal structure is very extensive and covers all activities of manufacturers, traders and service providers. Additionally, it typifies only exemplary types of activity. Such an approach, although

land has always resulted in the property being recognized as related to running a business (Judgment of the Supreme Administrative Court of April 8, 1997, SA/ Po 3225/95, judgment of the Supreme Administrative Court of July 13, 1994, III SA 108/84, "Monitor Podatkowy" 1995/4/114, judgment of the Supreme Administrative Court of December 3, 1992, SA/Kr 1020/92, "Serwis Podatkowy" 1999/10. Judgment of the Provincial Administrative Court of April 22, 2009, I SA/0185/09). Currently, it is assumed on the basis of UOPOL that a natural person who is also an entrepreneur may appear in trade in a double capacity. Once as an entrepreneur and once as a private person who owns real estate intended for the implementation of non-economic, personal life goals (Judgment of the Supreme Administrative Court of July 18, 2018, II FSK 1817/16). Regardless of the similarities indicated, it should be emphasized that the comments made concern two separate tax benefits: turnover tax (VAT) and property tax (real estate tax). A natural person running a business, being an active taxpayer, may fully benefit from the principle of tax neutrality in the form of reducing the amount of tax due by the amount of input tax. Therefore, since such an entitlement is correlated with the fact of being an entrepreneur, it may be justified to adopt the thesis that an active taxpayer who supplies land does not do it as part of the management of personal property..

⁴⁶ SAC judgment of January 17, 2011, I FPS 8/10. T. Bąkowski, *Podatek od towarów i usług - podstawa klasyfikacji terenów niezabudowanych - zwolnienie od podatku. Glosa do wyroku NSA z dnia 17 stycznia 2011 r., I FPS 8/10*, OSP 2012, no. 2, p. 13.

⁴⁷ With such a structure of legal provisions, questions arise as to whether there is any doubt that the VAT Act, which shapes the structural elements of state tax, provides for the conditions for the exemption in the sources of local law, and whether local law acts that only regulate the right to conduct a specific activity, in this agricultural activity is a reliable source of information. These acts do not provide any guarantee that the indicated form of activity is actually carried out.

⁴⁸ Individual interpretation of the Director of the National Tax Information of August 13, 2021, no. 0113-KDIPT-1-1.4012.426.2021.1.MGO.

it raises problems of interpretation, is understandable. There is no universal model for the definition of legal economic activity that could be applied by the legislator to all factual situations.

2. The lack of a strictly defined definition of economic activity allows the authorities applying the law a wide margin of interpretation. Since the legislator does not give a clear answer when the seller's activity is included in the management of private property, and when in professional trade, ultimately the jurisprudence bodies bear the burden of creating the law in terms of indicating the features of professional commercial activity. The position of the judicature is evolving. From the ruling of the CJEU in cases C-190/10 and C-181/10, it can be noted that tax authorities and courts include among the premises of conducting business activity that the seller undertakes activities related to utilities, separation of internal roads, and marketing activities. However, these criteria are not exhaustive and should always be examined together in the context of an individual case. An interesting example is the prior conclusion of a lease agreement by the person delivering the agricultural parcel. This action appears to prejudge that the seller acts like a trader. Such reasoning refers to the issue of obtaining benefits from the undertaken activity, although only a detailed analysis of the case allows to state whether in rural relations there is really.
3. Adoption by judicial decisions of a specific catalog of premises may not be automatically applied in every similar factual state. Doubts are raised when agricultural land is sold by an entity that is an active VAT taxpayer. This fact now appears to be exaggerating and constitutes a sufficient criterion to consider that the supplier is marketed as a trader. I believe that such a legal qualification cannot act a priori and each time - following the example of other factual situations, it should be preceded by an examination of the circumstances of the case. This is not an easy task, because in agrarian relations it is difficult to clearly separate personal property from property related to conducting commercial activity. Nevertheless, the unknowing recognition that an active taxpayer who conducts agricultural activity always acts as a professional in the market may be harmful and lead to violation of the principle of non-discrimination in tax matters.

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