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Approbatory gloss to the judgment of the Voivodship Administrative Court (WSA) in Białystok of 28 October 2022, I SA/Bk 347/22

Taxation of the building of a Limited Liability Company carrying out solely economic activity

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Summary:

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Abstract:

In the commented judgment, the court found that if the subject of the Company's activity, according to the information contained in the National Court Register (KRS), includes solely the conduct of economic activity, then the entire immovable property, regardless of whether it is used for economic activity, is linked with economic activity and should be taxed at the highest rates. By the same token, the WSA in Białystok did not take into account the argumentation of the applicant who, in order to avoid the highest rates of immovable property tax on the acquired building, invoked the judgment of the Constitutional Tribunal of February 24, 2021, SK 39/19.

¹ Starszy asystent sędziego w Wojewódzkim Sądzie Administracyjnym w Białymstoku z wieloletnim stażem pracy w urzędzie skarbowym, urzędnik służby cywilnej.

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1. Facts

A limited liability company in K.² requested an individual interpretation from the Mayor of B. regarding the immovable property tax. While describing the future event, it indicated that it is engaged in an activity subject to value-added tax and that on [...] December 2021 it acquired a land property located in B. at ul. D. along with the building located on it. Both the land and the building are not used (even indirectly) by the applicant in its economic activity. The company also did not enter it in the fixed asset account. All expenses made in connection with the purchase of the immovable property in question, i.e. the purchase price, notary's fee, appraiser's fee and tax on civil law transactions, have been classified in the books on account 331 "Goods." In addition, the Company did not recognize the indicated expenses as deductible.

In view of the description such presented, the question was formulated as to whether the building acquired by the Company, which is not related to its economic activity, i.e. not used for its economic activity and not entered in the fixed asset account, falls within the category of "other buildings" indicated in Article 5(1)(2)(e) of the Act of 12 January 1991 on Local Taxes and Charges?³

According to the applicant, the building it purchased, which is not used for economic activity and is not entered in the fixed asset account, should be taxed at the rates for "other buildings" indicated in Article 5(1)(2)(e) of the Act on Local Taxes and Charges (ALTC).

In an individual interpretation issued in July 2022, the Mayor of B. found the Company's position to be incorrect. He argued that if the object of the entrepreneur's activity includes only the conduct of economic activity, then the entire immovable property, regardless of whether it is or is not used for conducting economic activity, is related to it. In conclusion, the authority stated that the commercial and service building purchased by the entrepreneur should be reported for immovable property taxation at the economic activity-related rates provided for in Article 5(1)(2)(b) of the ALTC, and not as a so-called "other" building, as referred to in Article 5(1)(2)(e) of the ALTC.

The Company filed a complaint against the above interpretation with the Voivodship Administrative Court in Białystok. The applicant requested that the contested interpretation of the tax law be revoked in its entirety. The Company alleged, among other things, a violation of substantive law, i.e., Article 5(1)(2)(b) in conjunction with Article 1a(1)(3) of the ALTC, by its unjustified application in the case, resulting in the conclusion that the immovable property,

² Dalej też: skarżąca, Spółka.

³ Dz.U. z 2019 r. poz. 1170, ze zm.; dalej: u.p.o.l.

which is the subject of the application, is related to the conduct of economic activity and should be taxed at an increased rate of immovable property tax, and Article 5(1)(2)(e) in conjunction with Article 1a(1)(3) of the ALTC by the failure to apply it, resulting from the authority's incorrect interpretation of Article 1a(1)(3) of the ALTC, made in isolation from the rules established by the interpretative judgment of the Constitutional Court SK 39/19, resulting in an erroneous assumption that the immovable property constituting the subject of the application is connected with the Company's economic activity.

2. Judgment of the Voivodship Administrative Court in Bialystok

The WSA in Bialystok dismissed the Company's complaint and formulated the following statement:

Statement:

"The judgment of the Constitutional Court issued in case SK 39/19 is irrelevant to the manner of taxation of the immovable property of the applicant Company, because, firstly, the object of the entrepreneur's activity in the present case includes only the conduct of economic activity, and secondly, from the facts presented in the application, it does not appear that there is an extraordinary situation when the immovable property, for objective reasons beyond the control of the taxpayer, cannot be used to conduct economic activity."

3. Evaluation of the position expressed in the judgment of the WSA in Bialystok

The essence of the dispute in the commented judgment is whether the building acquired by the Company, which is entered in the books on the "Goods" account, is not currently used for conducting economic activity and is not entered in the fixed assets account, should be taxed at economic activity-related rates, i.e. under Article 5(1)(2)(b) of the ALTC, or whether it falls into the category of "other buildings" indicated in the wording of Article 5(1)(2)(e) of the ALTC.

The issue of the definition of the term "land, buildings and structures related to the conduct of economic activity" contained in Article 1a(1)(3) of the ALTC has been the subject of numerous statements in the literature and case law⁴. Representatives of the doctrine pointed out that, in accordance with the wording of Article 1a(1)(3) of the ALTC, all buildings, structures and land owned by an entrepreneur or another entity engaged in economic activity, with the exceptions provided for in Article 1a(2a) of the ALTC, are related to the conduct of economic activity. The mere fact of ownership by an entrepreneur (another entity conducting economic activity) results in the building, structure, land being connected with the conduct of economic activity.

⁴ L. Etel, S. Presnarowicz, G. Dudar, *Podatki i opłaty lokalne. Podatek rolny. Podatek Leśny. Komentarz*, Warszawa 2008, s. 48 i n.

At the same time, it was pointed out that this definition needs to be clarified, first of all by indicating that the immovable properties serve or can serve even indirectly the economic activity. Also in the case law, the view has been repeatedly expressed that the mere fact that an entrepreneur owns a building, structure or land must result in the recognition of these categories as related to the conduct of economic activity.⁵

A new perspective on the interpretation of Article 1a(1)(3) of the ALTC was brought by the Constitutional Court's judgment of 12 December 2017 (SK 13/15)⁶. In that judgment, the Court stated that Article 1a(1)(3) in conjunction with Article 5(1)(1)(a) of the ALTC, understood to mean that a sufficient condition for qualifying land subject to immovable property tax to the category of land associated with the conduct of economic activity is the conduct of economic activity by the natural person who is its co-owner, is inconsistent with Article 2 in conjunction with Article 64(1) and (2) and Article 84 in conjunction with Article 32(1) of the Constitution. Although the judgment of the Constitutional Court dealt with the problem of immovable property taxation of a natural person as a co-owner of land associated with the conduct of economic activity, the literature has expressed the view that it is also highly relevant to the taxation of immovable property owned by other entities.⁷

In turn, in a judgment of the Constitutional Court of 24 February 2021 (SK 39/19), which was issued on the basis of a constitutional complaint by a natural person, it was stated that Article 1a(1)(3) of the ALTC, understood in such a way that the association of land, building or structure with the conduct of economic activity is determined solely by the ownership of the land, building or structure by an entrepreneur or another entity conducting economic activity, is incompatible with Article 64, Article 1, in conjunction with Article 31(3) and Article 84 of the Constitution. In the aforementioned judgment, the Court expressed the view that entrepreneurs cannot be charged a higher tax rate merely because they own immovable property that is not used for their economic activity. Taxing land or buildings – which are unused and cannot potentially be used for conducting economic activity – at a higher immovable property tax rate solely because they are owned by an entrepreneur or other business entity, the Court finds incompatible with Article 64(1) of the Constitution.

It should be noted that although the judgment of the Constitutional Court of 24 February 2021 did not introduce any changes in the immovable property taxation of entrepreneurs carrying out solely economic activity, it caused many disputes between taxpayers and tax authorities. In fact, the Constitutional Court there addressed the issue of taxation of the entrepreneur's immovable property, and the complaint concerned immovable property acquired as personal

⁵ Zob. wyroki NSA: z 1 lipca 2014 r., II FSK 1349/14, LEX nr 1490431; z 23 czerwca 2015 r., II FSK 1398/13, LEX nr 1774160.

⁶ Dz.U. poz. 2372.

⁷ L. Etel, R. Dowgier, G. Liszewski, B. Pahl, *Podatki i opłaty lokalne. Komentarz*, Warszawa 2020, teza 30 komentarza do art. 1a u.p.o.l.

property by a natural person carrying out economic activity. In addition, the Court said that entrepreneurs cannot be charged a higher tax rate simply because they own immovable property that is not used for their economic activity, but did not clarify what is meant by ownership. From the wording of the grounds for the Constitutional Court's judgment, it is not possible to derive directly what is the difference between ownership of immovable property by an entrepreneur and its use. The above judgment of the Court, although it does not apply, as the court correctly inferred in the commented judgment, to entrepreneurs carrying out solely economic activity, has become a pretext for them to try to avoid the highest immovable property tax rates on the acquired building.

The problem of the link with the conduct of economic activity of immovable property owned by an entrepreneur or another business entity, or lack thereof, concerns not only natural persons, but also legal persons and other organizational units⁸. The issue of the meaning of the concept of "link" of immovable property with the conduct of economic activity, which, as the Constitutional Court pointed out, cannot be based on the mere fact of ownership of immovable property by an entrepreneur or another entity conducting economic activity, was clarified, as aptly pointed out by the court in the commented judgment, in the judgment of the Supreme Administrative Court (NSA) of 15 December 2021 (III FSK 4061/21)⁹.

The rationale of the cited judgment indicates that the circumstance of ownership of immovable property by an entrepreneur, who is, as its owner (perpetual usufructuary, self-owner), a taxpayer, does not prejudice the possibility of applying the highest tax rates if this entity can be identified doubly, and therefore also as an entity in whose possession there is immovable property not connected in any way with its economic activity. The Supreme Administrative Court compared the situation of a doubly-identified entity with a non-entrepreneur, holding that in the event that the taxpayer does not itself occupy the immovable property for economic activity purposes, only those lands, buildings, structures or parts thereof that have been given into the possession of an entrepreneur or another entity engaged in economic activity (e.g., on the basis of a lease or rental agreement) and are occupied by it for economic activity in the sense adopted in the judgment, i.e., when there is an actual and effective performance of organized profit-making activity by an entrepreneur (another entity engaged in economic activity) on its own behalf and on a continuous basis, as well as when such entrepreneur undertakes on the immovable property the preparatory activities necessary for the commencement of economic activity (renovation, modernization, collection of equipment, start-up, incurring of costs accounted for in the course of economic activity, etc.).

⁸ Zob. wyroki NSA z 11 października 2022 r.: III FSK 1184/21, LEX nr 3447781; III FSK 1418/21, LEX nr 3447850; III FSK 2720/21, LEX nr 3447863.

⁹ LEX nr 3285503.

The Supreme Administrative Court, in the aforementioned judgment, determined, among other things, that immovable property owned by a taxpayer (held either in self-ownership or perpetual usufruct), which is held by an entrepreneur (another entity engaged in economic activity), and at the same time the subject matter of the entrepreneur's activity includes only the conduct of economic activity, regardless of whether the immovable property is used for economic activity, may be considered to be related to economic activity, within the meaning of Article 1a(1)(3) of the ALTC.

The cassation court in the cited judgment also clarified that the phrase "are unused and cannot potentially be used for conducting economic activity" used in the Constitutional Court's judgment of 24 February 2021 should be interpreted to mean that the increased tax rate will not be able to apply in the event of an objective and unforeseeable obstacle beyond the entrepreneur's control that makes it completely impossible to conduct or continue economic activity. This does not apply if, while such an obstacle persists, the entrepreneur in whose possession the immovable property (part of it) is, independently undertakes activities aimed at preparing it for future (planned) economic activity, enhances functional properties for the purposes of the economic activity carried out, functionally linking the immovable property to the economic activity, or settles in the course of economic activity other costs related to it.

The interpretation of the concept of "link with economic activity" outlined above is undoubtedly an important interpretative guideline when the authority determines the appropriate tax rate for immovable property, including the acquired building, which the WSA reasonably took into account in the commented judgment. This is because the Constitutional Court's judgment has bridged the gap between immovable property linked with the conduct of economic activity and that occupied for it. This gave rise to the idea that tax at the highest rates should be paid only on immovable property used for economic activity, not just owned¹⁰. The above position, however, did not take into account the difference between immovable property linked with economic activity, as referred to in Article 1a(1)(3) of the ALTC, and that occupied for economic activity, regulated in Article 2(2) and Article 5(1)(2)(b) of the ALTC.

Meanwhile, possession should be understood, according to civil law, as the possession of the immovable property, and this means the use of the immovable property (including potentially) by the holder¹¹. Therefore, it cannot be argued, as the Constitutional Court did, that possession is not enough and that it should be additionally examined whether the immovable property is or can be used for conducting economic activity. This error would have been avoided by the Constitutional Court if it had determined what it means for an entrepreneur to own immovable

¹⁰ Ł. Zalewski, *Będą sądowe spory o podatek od spółek. Gminy nie zamierzają odpuścić*, „Gazeta Prawna” z 6 kwietnia 2021 r.

¹¹ B. Pahl, *Posiadanie w konstrukcji prawnej podatków lokalnych. Zarys problemu*, [w:] red. P. Borszowski, *Regulacje prawa finansów publicznych i prawa podatkowego. Podsumowanie stanu obecnego i dynamika zmian. Księga jubileuszowa dedykowana Profesor Wiesławie Miermieć*, Warszawa 2020, s. 510-521.

property and use it for conducting economic activity¹². As a result, there have been claims that if an entrepreneur has a dilapidated building in which it does not conduct economic activity, it should not pay tax on it at the highest rates. It is in the possession of the entrepreneur, but is not used for economic activity and will not be due to, for example, its poor technical condition.

With the above considerations in mind, it should be noted that the court in the grounds for the commented judgment rightly noted that in the case of entities whose only form of activity is the conduct of economic activity (this is indicated, for example, by the object of the enterprise listed in section 3 of the Register of Entrepreneurs of the National Court Register), as a rule, the mere possession of immovable property is sufficient for the application of the highest tax rate, regardless of whether the immovable property is actually used for economic activity during the period in question¹³. The situation is different for entities engaged in other activities besides economic activity¹⁴. Such an entity may own immovable property for economic activity (business components) and immovable property for other activities. Its immovable property assets for the purposes of immovable property taxation should be divided into those that are or may be used to conduct economic activity, and therefore related to the conduct of economic activity within the meaning of Article 1a(1)(3) of the ALTC, and the rest, taxed on a general basis. The Constitutional Court's judgment applies to entities engaged in more than just economic activity, as only in their case is there a need to determine what part of the immovable property is related to the conduct of economic activity. With regard to entrepreneurs (including legal entities and other unincorporated entities) carrying out solely economic activity, this is not necessary, since immovable property as an asset of their enterprise can only be used for conducting economic activity. In the latter case, the mere possession of the immovable property means that it is connected with the conduct of economic activity within the meaning of Article 1a(1)(3) of the ALTC, and consequently the tax rates provided for in Article 5(1)(1)(a) and Article 5(1)(2)(b) of the ALTC will apply.

In this regard, it is irrelevant, as the court correctly stated in the commented judgment, that the building is not entered in the account of fixed assets, but was only included in the books on the "Goods" account. This would be relevant for entrepreneurs who are engaged in other activities in addition to economic activity (sports, charity, culture)¹⁵. In their case, the fact that the building is listed in the fixed asset account would make it possible to establish that it is related to the economic activity.

¹² L. Etel, *Co wynika z wyroku Trybunału Konstytucyjnego z dnia 24 lutego 2021 r. w sprawie SK 39/19*, „Przegląd Podatków Lokalnych i Finansów Samorządowych” 2021, nr 7, s. 8.

¹³ Zob. wyrok. NSA z 8 lutego 2022 r., III FSK 4045/21, LEX nr 3339694.

¹⁴ L. Etel, *Co wynika z wyroku...*, s.11.

¹⁵ Zob. szerzej, R. Dowgier, *Opodatkowanie nieruchomości przedsiębiorców – uwagi na tle wyroku Trybunału Konstytucyjnego z dnia 24 lutego 2021 r. (SK 39/19)*, [w:] *Księga jubileuszowa dedykowana profesorowi Stanisławowi Bożykowi z okazji 70 rocznicy urodzin i 45-lecia pracy naukowej*, red. R. Skarzyńskiego, E. Kuźelewskiej, J. Matwiejuka, A. Jackiewicz, A. Olechno, L. Jamroza, Białystok 2022.

Pursuant to Article 16a(1) of the Act of 15 February 1992 on Corporate Income Tax (ACIT),¹⁶ depreciation is applied to, save Article 16c, owned or jointly owned by the taxpayer, acquired or produced on its own, complete and fit for use on the date of acceptance for use of structures, buildings and premises being separate property; machinery, equipment and means of transportation, as well as other objects with an expected period of use longer than one year, used by the taxpayer for the purposes related to its economic activity or given for use on the basis of a lease, rental or agreement specified in Article 17a(1), called fixed assets. Fixed assets are also listed in paragraph 2 of the same Article. The fact that, for example, a building is entered in the account does not make it a fixed asset. The building is a fixed asset, as the above-mentioned provision recognizes it as such. On the other hand, the entry of a building (as a fixed asset) in the fixed asset account makes it possible to include depreciation deductions made on its value as a deductible expense (Article 16h(1) of the ACIT). On the other hand, the provisions of the Act on Corporate Income Tax do not imply an absolute obligation to enter an asset in the fixed asset and intangible asset account (cf. Article 16d(2) of the ACIT). The taxpayer makes an entry in the fixed asset account of an item constituting a fixed asset in accordance with the provisions of the ACIT, or it may consider the item as a trading asset for resale¹⁷. In such a situation, the asset in question should not be treated as a fixed asset, but as a trading good for resale¹⁸. As a result, the value of a property that represents a commercial good in a taxpayer conducting economic activity that has not been sold by the end of the tax year will be excluded from deductible expenses (in the year of non-sale of the immovable property in question) and included in the year-end inventory.

In the commented judgment, the Company, in addition to failing to include the building in its fixed asset account, declared that it would not currently use it for conducting its economic activity. However, it cannot be assumed, as the court correctly inferred in the judgment under review, that the limited liability company, having acquired the building in question, will not use it in the future to conduct economic activity. The essence of an entrepreneur is specifically conducting economic activity¹⁹. The sole purpose of an entrepreneur is to conduct economic activity using an organized set of intangible and tangible components designed to carry out this activity (an enterprise within the meaning of Article 551 of the Civil Code). All components of the company are intended for operation, meaning that they are actually or potentially used in this activity. An entrepreneur does not need things that are not and cannot potentially be used for conducting economic activity, as the sole purpose. Although they are unfit for current

¹⁶ Dz.U z 2021 r. poz. 1800, dalej: u.p.d.p.

¹⁷ Zob. wyrok NSA z 15 maja 2008 r., II FSK 446/07, LEX nr 475548.

¹⁸ J. Oziębło, *Orzecznictwo sądów administracyjnych w świetle wyroku Trybunału Konstytucyjnego z dnia 24 lutego 2021 r. (sygn. akt SK 39/19)*, „Przegląd Podatków Lokalnych i Finansów Samorządowych” 2021, nr 7, s. 13.

¹⁹ C. Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warszawa 2011, s. 42 i n. Rozważania są aktualne na gruncie ustawy z dnia 6 marca 2018 r. – Prawo przedsiębiorców (Dz.U. z 2021 r. poz. 162, ze zm.).

economic activity, they are still assets of the entrepreneur and are taxable. This can include unused buildings that need renovation or means of transportation.

The above reasoning is also supported by the construction of unitary immovable property taxes other than property taxes. The essence of these benefits is the ownership of the assets, not whether individual elements of the assets generate income or are actually used by their owner at all times²⁰. In addition, the tax on means of transportation regulated by the ALTC is charged based on the mere ownership of means of transportation. The tax obligation is imposed on the owners (holders) not only of operational transportation vehicles used for conducting economic activity²¹.

Besides, as the court reasonably pointed out in the judgment under review, it does not appear from the facts presented in the application that there is an extraordinary situation when the property, for objective reasons beyond the taxpayer's control, cannot be used for conducting economic activity.

4. Summary

In conclusion, it should be stated that the building acquired by the Company, which carries out solely economic activity, and for which there is no extraordinary situation, should be taxed at the economic activity-related rates referred to in Article 5(1)(2)(b) of the ALTC. The very fact of owning a building means that it is related to the conduct of economic activity. The fact that the immovable property is not entered in the fixed asset account or not used for economic activity is irrelevant. However, the reasoning of the commented judgment, which, although not final, should be supported in its entirety, especially since the Company, apart from the aforementioned economic activity, did not own immovable property unrelated in any way to its economic activity. Thus, the Constitutional Court's judgment of 24 February 2021 (SK 39/19) does not apply to the factual situation in question.

In conclusion, it should be said that the WSA in Bialystok rightly disregarded the argument of the applicant, who, in order to avoid the highest property tax rates on the acquired building, referred to the above-mentioned judgment of the Constitutional Court.

²⁰ L. Etel (red.), *Prawo podatkowe, Zarys wykładu*, Warszawa 2013, s. 38 i n.

²¹ L. Etel, *Co wynika z wyroku...*, s.10.

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7. Wyrok NSA z 8 lutego 2022 r., III FSK 4045/21, LEX nr 3339694.
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