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Regulacja przedmiotu opodatkowania w podatku od nieruchomości a zasada samodzielności finansowej gmin

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Streszczenie:

Podatek od nieruchomości, będący dochodem własnym gmin, stanowi najbardziej wydajne źródło dochodowe spośród wszystkich innych podatków przyznanych tej kategorii wspólnot lokalnych[2]. Jednocześnie w doktrynie jest utrwalone stanowisko, że im większa wysokość dochodów własnych, tym większa samodzielność finansowa samorządu terytorialnego[3]. Tym samym ustawodawca, respektując zasady konstytucyjne dotyczące samorządności lokalnej, jest odpowiedzialny za takie ukształtowanie przepisów dotyczących poszczególnych dochodów własnych samorządu terytorialnego, aby nie doprowadzały do takiej interpretacji, która zagrażałaby wydajności danego źródła dochodowego, i, w sposób ewentualny, stanowiłaby ryzyko zmniejszenia samodzielności samorządu. Sposób uregulowania przedmiotu opodatkowania w podatku od nieruchomości, tak jak w przypadku każdej daniny publicznoprawnej, wymaga zachowania podwyższonych standardów procedury legislacyjnej. Dzięki nim może zostać zabezpieczony zarówno interes publicznoprawny (samorządowy), jak i interes prawno-ekonomiczny podatnika. W artykule przedstawiono nie tylko przykłady zaniechań ustawodawcy w respektowaniu zasad prawidłowej legislacji odnośnie do przedmiotu opodatkowania w podatku od nieruchomości. Przede wszystkim autorka wskazała na powiązanie braku zachowywania zasad prawidłowej legislacji ze stworzeniem ryzyka ograniczenia samodzielności finansowej gmin. Z uwagi na uzyskane konkluzje niezbędne było również wskazanie wniosków *de lege ferenda*.

Słowa kluczowe: podatek od nieruchomości, samodzielność finansowa gminy, zasady prawidłowej legislacji, przedmiot opodatkowania w podatku od nieruchomości, wydajność podatku lokalnego. Regulation of the subject of property tax and the principle of financial autonomy of municipalities

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[2] Według danych PWC średni udział tego podatku w dochodach gmin w latach 2011-2015, z tytułu podatków lokalnych, wynosił aż 83%. Natomiast udział podatku od nieruchomości w całości dochodów gmin z tytułu podatków wynosił w tym okresie średnio 33%, [w:] https://www.pwc.pl/pl/pdf/25-lat-podatku-od-nieruchomosci-w-polsce-raport-pwc.pdf [dostęp: 3.05.2018] W ciągu 5 lat (2016-2020) wpływy z podatku od nieruchomości wzrosły o prawie 3,5 mld zł, [w:] https://www.ey.com/pl_pl/tax/podatek-od-nieruchomosci-w-budzecie-samorzadow [dostęp: 28.7.2022].

[3] R. Kowalczyk, *Ustrojowa regulacja daninowych dochodów własnych gmin*, „Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2017, nr 485, s. 252.

Regulation of the subject of taxation in real estate tax and the principle of financial autonomy of municipalities

Abstract:

The real property tax, which is the own income of municipalities, is the most efficient source of income amongst all other taxes of local communities under this category. At the same time, it is a well-established approach in legal scholars' writings that the higher the local self-government's own income, the greater its financial independence. Thus, respecting the constitutional principles of the local self-government, the legislator is responsible for structuring the legal regulations on the particular own revenues of the local self-government in such a way so as not to lead to such an interpretation that would jeopardize the efficiency of the given revenue source or, potentially, pose a risk of reducing the self-government's independence. Regulating the subject of taxation of the real property tax, as in the case of any public law levy, requires adherence to higher standards of the legislative procedure. Thanks to it, both the public interest (interest of the local self-government) and the legal and economic interest of the taxpayer may be secured. The article presents not only examples of the legislator's omissions in respecting the principles of proper legislation with regard to the subject of property taxation. Above all, the author pointed out the connection between the failure to respect the principles of proper legislation and the risk of limiting the financial independence of municipalities. In view of the conclusions reached, it was also necessary to indicate *de lege ferenda* conclusions.

keywords: real property tax, financial independence of a municipality, principles of proper legislation, subject of taxation with property tax, efficiency of local taxation

I. Introductory remarks

It is true that real property tax which constitutes own income of municipalities is the most efficient source of income among all other taxes, be it local taxes or taxes imposed by local governments, which are granted to that category of local communities[4]. At the same time, the doctrine presents a well-established position that the greater own income, the higher financial self-sufficiency of the local government[5]. Thus the legislator, by respecting the constitutional rules on the local self-government is even more

[4] S. Kańduła, J. Śmiechowicz, *Podatki i opłaty lokalne w kontekście międzygminnych nierówności dochodowych*, „Annales Universitatis Mariae Curie-Skłodowska", Lublin 2016, s. 737. Podobnie: J. Rogalska, *Znaczenie podatku od nieruchomości w dochodach podatkowych miasta Kielce*, „Acta Scientifica Academiae Ostroviensis. Sectio A, Nauki Humanistyczne, Społeczne i Techniczne" 2016, nr 7, s. 135; M. Poniatowicz, *Nieruchomość jako źródło dochodów własnych gminy z uwzględnieniem możliwości oddziaływania władz samorządowych na ich wielkość*, „Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2011, nr 173.

[5] R. Dziemianowicz, A. Kargol-Wasiluk, A. Bołtromiu, *Samodzielność finansowa gmin w Polsce w kontekście koncepcji Good Governance*, „Optimum Economic Studies" 2018, nr 4 (94), s. 209.

responsible for such shaping of provisions on individual sources of own income of a local government so that they do not lead to an interpretation that would be detrimental to self-reliance of the local government or the efficiency of a given source of own income. The natural tool to fulfil that goal is maintaining the principles of proper legislation which, when it comes to fiscal acts of law, stem in particular from Article 217 of the Polish Constitution[6]. The author believes that given the context of regulations on the subject of the real property tax, the legislator not only disregarded the principles of proper legislation but could have exposed the municipalities to the risk of limited financial self-reliance. This hypothesis particularly applies to those municipalities where the real property tax is the most efficient source of income in the structure of total income.

The purpose of this article is first to evaluate the regulation of the object of taxation with the real property tax in the context of the legislator maintaining the principle of the proper legislation and the possible impact of that relation on the financial self-reliance of municipalities. The second aim of this paper is to present the need to develop regulations that would address the legislator's responsibility for the possible breach of the financial self-reliance of municipalities as a result of development of imprecise standards that shape structural elements of that category of own income of local government units. To fulfil the aforementioned research goals, it was necessary to apply the research method based on the legal theory that would not only encompass the analysis of legal provisions but also the case law of administrative courts and of the Constitutional Tribunal.

It is the research assumption that applies to the structure of this paper, which consists of presentation of the principle of the financial self-reliance of municipalities in correlation with the principles of proper legislation, presentation of the implementation of that principle in the context of regulation of the object of taxation with the real property tax and final conclusions.

II. The principle of financial self-reliance of the municipalities

[6] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. z 1997 r. Nr 78, poz. 483, ze zm.

The issue of the financial self-reliance of a local government is widely presented not only in the contemporary literature on the subject[7], but was also a matter of interest of the doctrine during the interwar period[8]. For the purposes of this paper, it should be added that the financial self-reliance is defined, among others, as "(….) the right, expressed in the Act, to hold sufficient funds to perform the tasks; it is also the obligation of the state to equip local governments with the funds sufficient to perform the tasks, which should mostly comprise of own income. An important criterion for determining the financial self-reliance of units of local governments is the amount of financial means available to units of a local government, along with the definition of proportions of individual types of income in the structure of their total income, especially the proportion between own income and other types of income. The nature of the source which the financial means come from (own income or transfers from the state budget) is of major importance."[9]

Therefore preservation of the elementary principles of developing normative provisions on the sources of own income of a local government is so important for the financial self-reliance of the municipalities. At the same time this does not mean that the legislator does not have the right to modify structural elements of own income of a local government. The literature on the subject mentions that the self-reliance of a local government "is not a fixed and constant category"[10] and the legislator may limit the self-reliance at the statutory level when other values and goals protected by the Constitution so require. In other words, it does not abolish the right of the legislator to modify provisions on income sources of a local government. Such changes do not have to be arbitrary – the legislator must respect the fundamental political principles on providing income to the local government and must not interfere with the essence of the local government as defined in the Constitution.

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[7] Np. E. Kornberger-Sokołowska, *Decentralizacja finansów publicznych a samodzielność finansowa jednostek samorządu terytorialnego,* Warszawa, 2001; A. Wiktorowska, *Prawne determinanty samodzielności gminy. Zagadnienia administracyjnoprawne*, Warszawa 2002; M. Kosek-Wojnar, *Samodzielność jednostek samorządu terytorialnego w sferze wydatków*, „Folia Oeconomica Bochniensia" 2006, nr 4, P. Chadała, *Samodzielność finansowa jednostek samorządu terytorialnego*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio H, Oeconomia" 2022, nr 36; J. Heller, *Samodzielność finansowa samorządów terytorialnych w Polsce*, „Studia Regionalne i Lokalne" 2016, nr 2(24).

[8] J. Panejko, *Geneza i podstawy samorządu europejskiego* (reprint wydania z roku 1927), Warszawa 1990, s. 96.

[9] J. Zawora, *Samodzielność finansowa samorządów gminnych Podkarpacia*, „Zeszyty Naukowe SGGW - Ekonomika i Organizacja Gospodarki Żywnościowej" 2010, nr 81, s. 139.

[10] M. Jastrzębska*, Finanse jednostek samorządu terytorialnego*, Warszawa 2012, s. 54.

III. Real property tax as own income of municipalities

As mentioned, the condition of preserving the fundamental nature of own income of the local government is one of the criteria that can be applied to evaluate preservation of the financial self-reliance of units of the local government. This condition is formulated in legal sciences (as assumed by the constitution legislator), and in the economic sciences[11].

The criterion of the key nature of own income of a local government results from the need to calculate the income of a local government in Article 167(2) of the Polish Constitution: "The order of calculating individual categories of income of the local government units applied in this provision should be a specific point of reference for the legislator when creating legal grounds for the financial management for the local government units and determining proper proportions between categories of the sources of income"[12]. As a side note, it should be mentioned that some authors challenge the view that the order of sources of income specified by the constitution legislator was intentional, namely directly translatable to shaping the proportions of such income in the total income. However, the prevalence of the general subvention and subsidy would result in limited self-reliance of units of local government[13]. Such shaping of the proportion of income would lead to an economic dependence of a local government on the decision of the central authority and if the subsidy was to dominate in terms of quantity it would lead to limitation of self-reliance of the local government with regard to political decisions on the purpose of spending, which does not fall into constitutional assumptions for the local governance.

Preservation of the fundamental meaning of own income means that such income should be dominant in the structure of total assets comprising, besides own income, subventions and subsidies. Domination of that category of income results from political principles which stipulate that the

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[11] R. Kowalczyk, *Ustrojowa regulacja*…, s. 252.

[12] M. Ofiarska, Z. Ofiarski, *Kryteria oraz formy podziału dotacji i subwencji dla jednostek samorządu terytorialnego*, „Finanse Komunalne" 2014, nr 1-2. s. 53-68.

[13] *Finanse Samorządowe 580 pytań i odpowiedzi*, red. C. Kosikowski, J.M. Salachna, Warszawa, 2012, s. 80. Samodzielność finansowa JST jest zależna od konstrukcji dochodów JST. W jednostkach, w których odnotowuje się w dochodach ogółem większy udział dochodów własnych, stopień samodzielności jest zdecydowanie większy. „Wszelkie ingerencje z zewnątrz, w postaci zadań zleconych i pojawiających się za tym dotacji lub subwencji, obniżają samodzielność finansową, a co za tym idzie również stopień samorządności społeczności na szczeblu regionalnym i lokalnym", [w:] J. Heller, *op.cit.*, s. 18. Ustawodawca nie może ograniczać tej samodzielności finansowej w taki sposób aby gminy, powiaty czy województwa nie mogły uzyskiwać, bądź też były zmuszone do utraty znacznej części dochodów własnych. Konstytucyjne zagwarantowanie JST dochodów własnych było akcentowane nie tylko w obecnej Konstytucji ale również w Małej Konstytucji.

local government should be afforded self-reliance and be a participant in exercising public authority. In other words, own income that is efficient and dominates the income structure of budgets of local governments should afford financial independence from decisions made by the central authority which, in turn, would make units of local government self-reliant. With regard to own income, self-reliance of local communities encompasses, among others, the right to shape the amount, the right to collect, the right to enforce and the right to freely spend such income.

With the financial potential based on own income, the local government may become an actual partner in fulfilling public tasks and not merely executor of such tasks.

The criterion of the fundamental nature of own income in the structure of total income of a local government may be deemed fulfilled when several conditions that make up the essence of the 'own income' are met. It should be stressed that there is no normative definition of that term. There is also no uniform doctrine-based approach to the definition of the term of 'own income'[14], albeit the literature on the subject mentions criteria that distinguish the features of own income that, as a rule, are beyond doubt. The first criterion is the granting units of the local government with a legal title to a given source of income for indefinite duration, based on statutory premises[15]. The second criterion is linking the performance of own tasks with the fiscal efficiency of that source of income[16]. There is also a criterion that refers to the legal possibility of having an impact on the amount of own income[17]. The real property tax meets all of these features of own income of a municipality. That tax is entrusted to municipalities for indefinite duration based on statutory premises, and in addition, as an efficient source of income, it allows municipalities to fulfil their own tasks. What is more, the municipality council has the right to define the real property tax rate by way of resolution, within the limits defined by the legislator (Article 5(1) of the Act of 12 January 1991 on Local Taxes and Fees[18]).

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[14] P. Pest, *Pojęcie dochodów własnych jednostek samorządu terytorialnego*, „Wrocławsko-Lwowskie Zeszyty Prawnicze"' 2015, nr 6, s. 335.

[15] T. Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną*, Warszawa 2010, s. 245-246.

[16] *Ibidem.*

[17] R. Kowalczyk, *Finansowo-prawne instrumenty kształtowania niepodatkowych źródeł dochodów własnych gmin o charakterze publicznoprawnym*, Wrocław 2019, s. 58.

[18] Dz.U. z 2019 r. poz. 1170 (dalej: u.p.o.l.).

The legislator often impairs the efficiency of sources of own income of units of the local government by failing to observe the principles of the proper legislation when creating and amending the provisions which govern the sources of income. Failure to abide by the principles of proper legislation, and especially the duty of the sufficient transparency of provisions, may not only contribute to reduction of income from a given source but may also make such units, for which it is the major source of income, incur reverse liabilities.

When it comes to the real property tax, failure to follow the principles of the proper legislation seems to be the most severe circumstance that may contribute to limiting the self-reliance of municipalities. This observation is supported by the fact that the income from real property tax accounted for a considerable part of own income of municipalities in 2021 (23.3%)[19]. Besides receipts from the real property tax, receipts from local government taxes and local taxes are not the dominant component of municipality budgets. For example, the structure of budgets of units of the local government in 2018 consisted of the following taxes, in the per cent breakdown: agricultural tax 1.2%, real property tax 11.36%, forest tax 0.24%, tax on means of transport 0.64%, receipts from the fixed amount tax 0.03%, tax on inheritance and donations 0.11%, tax on civil law transactions 0.97%, other income: 85.45%[20].

Therefore, at least for the sake of respecting political principles, the legislator should act with particular care when creating provisions on the structure of the real property tax.

IV. Principles of proper legislation with regard to fiscal acts of law

The principles of the proper legislation could be defined as „*sui generis"* or the set of rules and principles that undergo evolutionary modification in terms of quantity and meaning. Each principle of the proper legislation is derived from the essence of the democratic rule of law. Another definition demonstrates that these are highly general directives addressed to entities which make law and which instruct such entities how they should resolve

[19] Informacja o wykonaniu budżetów jednostek samorządu terytorialnego w 2021 r., https://www.gov.pl/web/ finanse/sprawozdanie-roczne-za-2021 [dostęp: 29.07.2022].

[20] https://www.gov.pl/web/finanse/sprawozdanie-roczne-za-2018 [dostęp: 29.11.2020].

individual issues encountered while making law and how to shape the lawmaking process so that such issues can be properly resolved."[21]

In its judgment of 25 November 1997 the Constitutional Tribunal explained that the principle of proper legislation "is a kind of the collective expression of the series of rules and principles which are not *expressis verbis* presented in the written text of the constitution but which inherently result from the axiology and the essence of the democratic rule of law (...)."[22] In a special way, this principle refers to provisions of the tax law given the imperative interference with the freedoms of the taxpayer on whom obligations are imposed not only to pay the tax but also to self-determine the tax or make the report as stipulated by the law, by the time limit usually counted of the day on which the tax obligation arose. In addition, provisions of the tax law govern the legal tax relation between two entities that do not have an equal status.

First it should be mentioned that the standard prescribed by Article 217 of the Polish Constitution provides for the obligation of the legislator to act with particular precision when making tax legislation that allows to calculate the only possible amount of a given tax. Thus not only does it afford protection to the taxpayer but also to the public law relation which is the beneficiary of receipts from the given tax. It has been mentioned in the doctrine and procedural writs of tax authorities on multiple occasions that pursuant to Article 217 of the Polish Constitution "(…) all elements of the tax obligation should be precisely defined and enshrined in the act of law to protect the taxpayer against excessive interference of the state bodies in the sphere of personal freedom and to provide legal guaranties of protecting the entity in the process of making and applying the tax law (…)."[23] At the same time, the standard derived from Article 217 in conjunction with Article 167(2) of the Polish Constitution affords a guarantee to units of the local government that own income which provides for their self-reliance in terms of income would be determined with proper precision and attention to detail; this standard is not mentioned in the doctrine. Such an assumption allows the local government to adopt a stable budget for a given year and maintain stable financial management of a municipality.

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[21] A. Michalska, S. Wronkowska, *Zasady tworzenia prawa*, Poznań 1983, s. 55, podaję za: S. Bułajewski, *Zasady prawidłowej legislacji podczas tworzenia aktów prawa miejscowego w Polsce*, „Studia Prawnoustrojowe" 2015, nr 29, s. 31-42.

[22] K 26/97, OTKZU 1997, nr 5-6, poz. 64.

[23] Pismo z dnia 6 października 2021 r. Dyrektor Krajowej Informacji Skarbowej 0113-KDIPT- 2-1.4011.588.2021.3.RK Ustalenie skutków podatkowych z tytułu transakcji wymiany walut.

Practice shows that in order to ensure proper efficiency of the source of income it is essential for the legislator to follow the principles of proper legislation in defining the normative structure of sources of income of a local government. First it is necessary to mention the obligation of the legislator to properly formulate legal provisions that determine the structure of income granted to local governments. The term of "properly formulate" implies the need for a precise creation of standards that would not allow tax authorities to give discretionary interpretations that would increase or decrease receipts from a given source. It should be mentioned that the lack of precision may lead to contrary interpretations that would be neutral to the financial result of one municipality, while having a certain effect for the other municipality. As regards the latter, decisions made on the basis of imprecise standards of the tax law may be overruled by way of the administrative court proceedings or overruled in connection with a judgement of a Constitutional Tribunal, which may result in the need to return the overpaid tax. At the same time it should be stressed that preservation of precision of regulations by the legislator is one of the conditions why units of local governments may plan their budgets by trusting the legal standards.

Second, the proper legislation means respecting the prohibition of interference with the legal and financial legislation during the budget year. The legislator should not change the structural elements of local government income during the budget year, in particular to reduce their efficiency, because this way local governments would be unable to cover the costs of pre-planned tasks without incurring reverse liabilities. In addition, with regard to fiscal income, any change of their structure that reduces the tax base during the tax year or that is introduced retroactively would generate an overpayment that the local communities would be forced to return. Thus such an action on the part of the legislator could disrupt the financial balance of local communities unprepared for additional expenses caused by the interference by the legislator or even reduce the spending self-reliance of the local government since the local government would have to spend the funds to make refunds which would be necessary through no action of the local government. Compliance with the principle of proper legislation is, in essence, implementation by the central authority of the principle of trust in the state and the law it makes.

V. Failure to follow the principles of proper legislation with regard to the object of taxation with real property tax

V.1. Failure to act with precision in defining the object of taxation

It is difficult to give a positive evaluation of the attempts made by the legislator (or rather the lack thereof) to preserve the financial self-reliance of municipalities in the context of failure to observe the precision when defining the object of taxation of such an important own income of municipalities which the real property tax is. In this regard, several circumstances should be addressed. First, pursuant to Article(2)(1) in conjunction with Article(1a)(1)(1) and (2) of the Act on Local Taxes and Fees, in order to determine the object of taxation with the real property tax, it is necessary to refer to definitions explained in the Act of 7 July 1994 on the Building Law[24]. As regards that Act, the requirement of detail and precision is much lower compared to fiscal acts of law. It is no wonder that the definition of a building or structure is worded in greater detail in jurisprudence. Thus it could be assumed that the building and structure are terms not ultimately defined, which makes it more difficult for the taxpayers to properly settle and maintain the financial management of municipalities. This argument was re-assured by the resolution adopted by the seven judges of the Supreme Administrative Court on 29 September 2021, file No III FPS 1/21[25], which noted that provisions on the object of taxation with the real property tax "have not been amended since they were introduced to the fiscal act, namely since 1 January 2003. Meanwhile, 'provisions of the building law' evolved, which contributed to the difficulties in creating a legal standard (reinstatement of which requires making a reference to two or three acts of law where merely one falls into the system of the tax law) in a way that supports clear determination how to define a building and a structure and where the border between those two terms is." Not only does such a situation pose a threat to the taxpayer but it also makes it impossible for the local government to plan budgets while putting trust in the text of legal standards. Second, it should be noted that decisions made on the basis of imprecise standards that govern the object of real property tax may be overruled by way of the administrative court proceedings or overruled in connection with a judgement of a Constitutional Tribunal, which may result in the need to return the overpaid tax.

One of the examples is Article (1a)(1)(1) in conjunction with Article (1a)(1)(2) of the Act on Local Taxes and Fees. The legislator's lack of

[24] Tekst jedn.: Dz.U. z 2021 r. poz. 2351 (dalej: Prawo budowlane).

[25] ONSAiWSA 2021/6/89.

precision resulted in the interpretation giving rise to the incorrect categorisation of telecommunication containers as structures. Units of local government assumed that such containers were structures, thus the tax rate depended on the value of the object of taxation, bringing relatively high receipts from that tax, higher than if the telecommunication containers were treated as structures. Authorities of local governments, using the interpretation of administrative courts, referred to the non-statutory "premise of functionality" as the grounds for treating a built feature, which meets all the features necessary for treating it as a building, as a structure. This translated to the amount of the tax. In accordance with judgment of the Constitutional Tribunal of 13 December 2017, SK 48/15[26], the interpretation made by units of the local government with regard to telecommunication and transmission containers proved to be contrary to the Polish Constitution. It is inadmissible to modify the definition scope of objects of taxation based on a premise not specified in provisions of fiscal acts of law. The judgment of the Constitutional Tribunal is the basis for resuming the proceedings and overruling final decisions based on which tax authorities followed the broadening interpretation of structures that was in breach of the Polish Constitution. In addition, taxpayers have the right to file a corrected real property tax return that will result in overpayment of that tax.

"On the nationwide scale, this could have considerable consequences for the municipalities which may face demands for the return of millions of zlotys in overpaid real property tax, mostly from legal persons. Treatment of objects either as buildings or structures poses massive financial consequences because buildings are taxed on the basis of their floorspace regardless of the value of the building, while structures are taxed with a 2% tax on value. Thus if an object worth PLN 100,000 with the floorspace of 4 sq.m. is treated as a building, the real property tax will be PLN 88. If the same object is treated as a structure, the due tax will amount to PLN 2,000, twenty times more. It is worth noting that the judgment of the Constitutional Tribunal does not automatically mean that built features previously categorized as structures are not treated as buildings – each case will have to be analysed individually in the course of administrative proceedings."[27]

It should be additionally mentioned that if the proceedings on determination of the amount of the real property tax are resumed and if the

[26] Dz.U. z 2017 r., poz.2432.

[27] L. Staniszewska, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 13 grudnia 2017 r., sygn. SK 48/151, dotyczącego podatków i opłat lokalnych – zasad ustalania podatku od nieruchomości*, „Studia Prawa Publicznego" 2018, nr 2(22), s. 179.

proceedings end successfully for the taxpayer, the municipalities will be obliged to return overpaid tax with interest for the entire period from the moment the overpayment originated until it is returned.

The example of the lack of detail when determining the object of taxation with real property tax is not isolated. The issue of taxation of warehouse facilities (silos) and the tunnels underneath them and technical equipment on silo roofs and in the tunnels is just as representative an example. It is also related to the possible double treatment of a built feature, i.e. as a building or as a structure.

In the opinion of taxpayers, the silos meet the premises specified in Article 1a(1)(1) of the Act on Local Taxes and Fees as they are permanently attached to the ground, separated from surrounding space with envelopes, have foundations and roofs and thus should be treated as buildings. At the same time, tax authorities argued that the silos with tunnels and upper envelopes were subject to taxation with the real property tax as structures and not buildings. This conclusion was based on Article 3(3) of the Act on the Building Law which stipulates that built features such as tanks and tunnels were categorized by the legislator as structures. In accordance with an annex to the Act on the Building Law, the legislator defined industrial tanks including silos, elevators, fuel and gas bunkers as category XIX built features. The authority agreed with the taxpayer's view that a built feature having hallmarks typical of a building cannot be treated as a structure. As a result, if a specific built feature bears the statutory hallmarks of a building, then it cannot be treated as a structure. However, it is not ruled out that specific features having the hallmarks of a building are treated by the legislator as a structure in a special provision which, given the principle of equal taxation, would have to be justified by their unique specific nature, which is also the case when it comes to treatment of the silos[28]. As regards taxation of silos, the seven member Supreme Administrative Court issued a resolution of 23 September 2021, III FPS 1/21[29], where it found that a built feature which is a structure could be, for the purposes of taxation with the real property tax, treated as a building, but it must meet the criteria of being treated as a building which are listed in provisions of the tax law (i.e. it is permanently attached to the ground, has foundations and a roof and is separated with envelopes), and the floorspace is to be its distinguishing feature. As argued in the verbal explanatory memorandum, the specific

[28] Por. Wyrok TK z 13 grudnia 2017 r., SK 48/15, OTK ZU A/2018, poz. 2.

[29] ONSAiWSA 2021/6/89.

nature of structures must be taken into account. If the specification shows that the space or cubic capacity is the basic technical and operating parameter instead of the floorspace, then it may result in treatment of a build feature, for the purposes of taxation with the real property tax, as a structure even if the built feature has hallmarks of a building as listed in the Act. The said resolution by the seven judges of the Supreme Administrative Court may seem a bit surprising compared to the judgment of the Constitutional Tribunal of 13 December 2017, SK 48/15, which clearly rules out the use of the non-statutory premise of "functionality" as regards treatment of a given built feature as a structure. However, while the premise of functionality does not exist on the ground of the legislation, the specification relating to the cubic capacity does[30]. The problem with taxation of the silos was a long-term issue that ended favourably for the finances of municipalities. It should be noted that the long-term problems with treatment of the silos as the object of taxation with the real property tax point to the instability of considerable income in budgets of municipalities until 2021, and thus the inconsistent fulfilment of the principle of the financial self-reliance of municipalities, which is a value inherently enshrined in the financial system of the local government.

V.2. Failure to follow the *lex retro non agit* principle

The risk of limitation of the principle of the financial self-reliance of municipalities increases along with the introduction of retroactive ad hoc legislative changes. Following occurrence of such a conditioned risk of limiting the principle of the financial self-reliance of municipalities, there is the circumstance of the legislator disregarding the principles of budgetary planning at the local government level. As part of the financial self-reliance of the local government, the budgetary self-reliance is also separated, which is defined as the right to organize the budget freely. "The budgetary self-reliance of units of local government is expressed as the powers of local government authorities to define the principles and mode of the budgetary procedure, namely the processes of planning, approving and exercising the budget of the local government units in the form of a resolution of the decision-making body of the local government unit on the budget procedure."[31] It could be noted that through the budgetary self-reliance two

[30] Zob. Załącznik do ustawy Prawo budowlane.

[31] M. Jastrzębska, *Finanse jednostek samorządu terytorialnego*, Warszawa, 2012, s. 55-56.

planes of self-reliance in terms of income and expense are combined, thus the local government is able to exercise the powers to make its own decisions on the accumulation and use of the funds.

Units of local government approve budgets before the start of the budget year to perform public tasks in the most effective and economical manner. At the same time, in accordance with the constitutional principle of trust in the rule of law, they may expect that decisions of the central authority will not disrupt the adopted budgets of local government units. It should be noted that there are examples of steps taken by the legislator that stand in contrast to the standards mentioned above. In this scope, it is necessary to mention the amendment of the rules of taxation of wind power stations with the real property tax as stipulated in the Act Amending the Act on Renewable Energy Sources and Certain Other Acts of 7 June 2018[32]. In Article 2(1) of the said Act, the legislator reinstated the formal definition of a built feature in the construction law and for the purposes of taxation of wind power stations with the real property tax by municipalities, which resulted in a reduction in the tax liability and the tax. In accordance with Article 17(2) of the Act, the amendment became effective with the retroactive effect, which is the flagrant ignorance of the budgetary planning for local governments which in 2017 had to define their 2018 income no later than by 15 November, based on the governing provisions of the law. As mentioned in the opinion of the Board of the Association of Rural Municipalities of the Republic of Poland on the Act on Renewable Energy Sources and Certain Other Acts (parliamentary print No 2412), the income to be lost is defined as a provision or deposit and based on such income specific expenses, usually investment ones, were planned. The shortage in income created by the legislator related to the adjustment of the tax base and thus the income of local government units in a year cannot be balanced out with other income. The amendment may also result in claims raised by taxpayers in relation to the liabilities already paid for the entire year, with interest. The Board of the Association of Rural Municipalities of the Republic of Poland postulated for the change of the effective date or compensation for the income lost. The amendment also impacted determination of the Individual Debt Indicator[33] and outdated judgments of administrative courts given on the basis of legislation that had been retroactively amended. The legislator completely disregarded the existence of municipalities such as Kluczbork-Osada where the income from

[32] Dz.U. poz. 1276.

[33] P. Szczepanowski w piśmie skierowanym do Komisji Gospodarki Narodowej i Innowacyjności.

real property tax on wind power stations accounts for 62% of income from all taxes collected by the municipality[34], or municipalities such as Gołańcz where the income from taxation of wind power stations accounts for one of the largest revenues of the municipality[35]. It is also worth adding that the legislator did not estimate in any way the financial consequences of the adopted Act in relation to finances of local governments.

Local government units filed a constitutional appeal requesting review of the constitutional nature of Article 17(2) of the Act of 7 June 2018 Amending the Act on Renewable Energy Sources and Certain Other Acts to the extent it provides for the retroactive implementation, as of 1 January 2018, of Article 2(1) and (6) and Article 3(1) that give the new wording to Article 3(3) and the Annex to the Act on the Building Law, and Article 2(1) of the Act on Investments in Wind Power Stations. The Constitutional Tribunal made the only right decision by concluding, in its judgment of 22 July 2020, K 4/19,[36] that the appealed provision had breached Article 2 of the Polish Constitution.

VI. Summary

First it should be stressed that despite the fact that local regulations on the object of taxation with the real property tax were implemented in the Act on Local Taxes and Fees 19 years ago and the fact that 65 legal acts amending that Act of law have come into effect since that date, the normative regulation of the object of taxation with the real property tax considerably differs from constitutional standards protecting the financial self-reliance of municipalities. Essential practical issues have arisen in the light of the need to refer to definitions enshrined in the Act on the Building Law to determine the object of taxation with the real property tax. The Act on the Building Law is not a fiscal act of law, thus it is not subject to an elevated regime of precision as defined in Article 217 of the Constitution, and it was amended on numerous occasions, without correlation with changes of the object of taxation with the real property tax. Therefore the standard defining the object of taxation with that tax became increasingly less legible.

At the same time one must not omit the fact that the examples of failure to follow the principles of proper legislation with regard to the object of

[34] Pismo wójta gminy Kuczbork-Osada przedłożone senatorowi Janowi Marii Jackowskiemu.

[35] Zmiany wprowadzone ustawą skutkują zachwianiem planowanych wpływów budżetowych, a tym samym realizacji budżetu na 2018 r. oraz zagraża realizacji planowanych przez gminę Gołańcz inwestycji, [w:] Pismo Burmistrza Miasta i Gminy Gołańcz skierowane do Marszałka Senatu.

[36] OTK ZU A/2020, poz. 33.

taxation with the real property tax as presented in this article are a testament to years of omissions on the part of the legislator with regard to legislative changes that would be directed at clear definition of that structural element of the real property tax. These examples also highlight the current flagrant breaches of the principles of proper legislation, as it was the case with Article 17(2) of the Act of 7 June 2018 Amending the Act on Renewable Energy Sources and Certain Other Acts to the extent it provides for the retroactive implementation, as of 1 January 2018, of Article 2(1) and (6) and Article 3(1) that give the new wording to Article 3(3) and the Annex to the Act on the Building Law, and Article 2(1) of the Act on Investments in Wind Power Stations.

Such far-reaching cases of negligence on the part of the legislator over a period of 19 years with regard to regulation of the object of taxation with the most efficient source of own income of the municipalities could have obviously exposed municipalities to the risk of limited financial self-reliance. In this scope it is necessary to remember about Polish municipalities the income structure of which demonstrates that they need a stable regulation of provisions on the real property tax in order to fulfil their own tasks in a continuous and effective manner (such as the aforementioned municipality of Kluczbork-Osada where the income from real property tax on wind power stations accounts for 62% of income from all taxes collected by the municipality[37], or municipalities such as Gołańcz where the income from taxation of wind power stations accounts for one of the largest revenues of the municipality).

By adopting provisions on the sources of own income of local governments, the legislator must not disregard the principles of proper legislation, which are ancillary to other constitutional principles. By fulfilling them, other principles, in particular the principle of the financial self-reliance of municipalities may be achieved (please note that this is not the only condition for that).

In examining the issue of regulation of the object of taxation with the real property tax it should be noted that in this case the legislator forgets that since it has the sole right to decide on the structure of income of a local government, the legislator is responsible for the potential failure to meet the criteria of proper equipping local governments with income. This is a special responsibility as it encompasses protection of the systemic financial self-reliance of municipalities. This is the preventive and guarantee responsibility

[37] Pismo wójta gminy Kuczbork-Osada przedłożone senatorowi Janowi Marii Jackowskiemu.

and not repressive responsibility. This kind of responsibility requires elimination of defective standards and replacing them with standards derived in line with the principles of proper legislation, with respect for the political and systemic rules.

As a result, besides the postulate for amendments that would word the object of taxation with the real property tax in greater detail, it seems that it is necessary to introduce standards that would realize the legislator's responsibility for imprecise provisions in the act of law that creates sources of income for the local government which result in decrease of such income or which lead to disputes that prevent effective collection of such income. It is worth mentioning that refunds on the account of income lost as a result of the legislator's implementation of exemptions from real property tax under Article 7(4) of the Act on Local Taxes and Fees proved to be insufficient in that respect. It should be noted that the legislator introduced 31 exemptions by object for this tax, while refunds on the account of the income lost relate to only two of them. In addition, they refer only to exemptions and do not involve compensation of the municipalities for the income lost on account of the defective regulation of the object of taxation with the real property tax.

The author believes that this issue requires a wider examination of the matter of the legislator's responsibility for introduction of defective provisions on all structural elements of income of the municipalities. The need to introduce such solutions that would compensate not only shortages in own income arising out of the exemptions introduced by the legislator is dictated, on the one hand, by the need to protect local budgets against such legislative omissions on the part of the legislator as a result of which the provisions on structural elements of own income give rise to a number of doubts (or controversies) during their application, which weakens the principle of the financial self-reliance of municipalities, and on the other hand, by the evaluation resulting from deliberations that the institution of the application for determination of non-compliance with the Constitution of the Republic of Poland, referred to the Constitutional Tribunal by the decision-making bodies of local government units, seems to be an insufficient tool to protect the local government against the legislator's breach of the constitutional principle of the financial self-reliance of municipalities. For systemic reasons, the Constitutional Tribunal cannot perform the function of unilateral protection of finances of a local government. What is more, the Constitutional Tribunal is merely the court of law and not facts which determine on the defective nature of normative structures introduced by the

legislator in the field of local finance. The application of legal and financial provisions generates varied financial consequences for the individual local government units due to the presence of the objective differences among local communities. Consequently, in order to examine the constitutional nature of a given legal and financial standard, the Constitutional Tribunal should analyse the individual financial situation of a local government unit, a task which is beyond the systemic jurisdiction of the court[38].

The proposed regulation would introduce a temporary compensation for the period during which the legislator removes the defective provisions from legal transactions. Such a function could be performed by a compensatory subvention. Given the fact that the Constitution provides for a need to compensate the shortage in own income by increasing such income or by introducing new sources of own income, a compensatory subvention would have to be treated as an extraordinary and temporary instrument. A compensatory subvention cannot be introduced for indefinite duration as a type of income that is part of the system of local finances. As mentioned before, by introducing a compensatory subvention, the legislator would win time to introduce provisions that would increase the amount of the existing own income or provisions that would introduce new sources of income to that category of income of the local government.

It has to be stressed that introduction of this solution is justified by the existence of a special responsibility of the legislator in the field of shaping the income that covers protection of the systemic essence of the local government, as the local government is a political and territorial community, just like the state is a community.

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