

April 2021

Justification for the Constitutional Tribunal's ruling on the tax on real estate not used in business activity

A written justification for the ruling of the Polish Constitutional Tribunal of 24 February 2021 (case file SK 39/19) on the tax on real estate not used in business activity was published in the Polish Journal of Laws.

The justification states that any interpretation of Article 1a(1)(3) of the Act on Local Taxes and Charges which treats the real property as connected with business activity just because of the fact that its owner conducts business operations shall be deemed unconstitutional.

The ruling pertains directly to individuals conducting business activity who at the same time own real property, which is not, in fact, used for the purposes of such business activity. However, it may also impact the scope of taxation of real estate owned by entrepreneurs being legal persons.

The reasoning of the ruling

The ruling centred on the legal definition provided by Article 1a(1)(3) of the Act on Local Taxes and Charges, according to which, land, buildings and structures connected with running a business shall mean land, buildings and structures owned by an entrepreneur or other entity conducting business activity.

In the justification for the ruling, the Tribunal found that the current wording of the provision suggests that for the purposes of real estate taxation, the lawmaker does not make any distinction between taxpayers owning and using real

estate in their business activity and taxpayers owning real estate who, in fact, do not use it for the purpose of running a business. This means that both taxpayer groups are required to pay the real estate tax at a higher rate, which is intended for real property used in business activity. The lack of such a differentiation is of particular detriment to business owners being natural persons, who play a dual role of an individual (having control over their separate property) and a business operator.

Consequently, according to the Tribunal, the intent behind the quoted provision goes beyond fiscal imperatives and results in imposing disproportionate fiscal burden, as it draws no distinction between the tax situation of taxpayers who own real estate, but do not use or cannot use it to conduct business activity, and taxpayers who use the real estate owned for the purpose of running a business.

Importantly, application of the criterion of "ownership of land by an entrepreneur" is not narrowed to achieving the fiscal goal, and thus leads to a constitutionally unjustified violation of the right to property. Thus, application of the disputed provision may not, in any way, be justified by protection of the public interest. This, in turn, leads to a conclusion that the prerequisites for passing the proportionality test have not been satisfied.

Consequently, applying a higher real estate tax rate only because of the fact that the entrepreneur or other entity being the real estate's owner is engaged in business activity was

assessed by the Tribunal as bringing disproportionate interference with such entities' property right.

Consequences of the ruling

Stating that land, buildings and structures owned, but not used by an entrepreneur in their business activity are not, in fact, part of the entrepreneur's business means that the real estate tax rate on such land is approximately two times lower, and the respective rate for buildings is approximately three times lower. In turn, for constructions the real estate tax is not due at all, since it is levied only on constructions used in business activity.

Importantly, the ruling may be applied to real estate not used at a given time by the taxpayer in their business activity, with the reason for not using it not being taken into consideration at all. In our opinion, the preferential rate should also be applied to real estate and structures temporarily being excluded from business use, e.g. land for future investments, parking space not sold before the building is handed over, premises temporarily excluded from business use, e.g. due to business reorientation, or unused industrial facilities, the liquidation of which is economically unprofitable for the entrepreneur.

Possible actions

Despite the fact that the constitutional complaint at origin pertained to an individual, the operative part of the Tribunal's judgment does not restrict the declaration of the unconstitutionality of the provision to natural persons.

In consequence, it may also be applicable to entrepreneurs being legal persons.

Thus, it is likely that the ruling will impact the established jurisprudence of administrative courts, under which the higher real estate tax rates must be applied by all entrepreneurs, even to the real estate which is not, in fact, used in their business activities.

This finds its confirmation in the fact, that the Tribunal's judgment has been already invoked by the Supreme Administrative Court in its rulings of 4 March 2021 (case file III FSK 895-899/21), in which it stated that the very fact of owning real estate by an entrepreneur is not enough to apply the higher real estate tax rate.

Consequently, it seems that entrepreneurs owning real estate which they do not use in their business operations may take steps to diminish the related tax burden.

KPMG offers support in reviewing this type of property and initiating activities aimed at safe recovery of overpaid tax and reduction of the tax burden in the future.

If you would like to learn more about the of issues discussed, please do not hesitate to contact us.

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