

The Assumption of the Profit-Making Nature of a Business Activity for the Purpose of Determining Property Tax Liability

Judgment of the Voivodship Administrative Court in Rzeszów
of 24 October 2024, I SA/Rz 359/24¹

1. A business activity can be defined as profit-making if it is carried out for the purpose of earning income (earnings), understood as the excess of revenues over costs incurred.
2. It is considered that if an entity assumes that in connection with the activity and as a result of it, it will achieve a surplus of revenue over the costs incurred, and thus obtain income, it means that the profit-making purpose of such activity has been defined.

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Commentary

1. Actual State

The Provincial Administrative Court in Rzeszów, in its judgment of 24 October 2024 in case I SA/Rz 359/24, determined that on 7 February 2024, the Mayor of the City of T. received an application from a municipal legal entity, operating in the form of a joint-stock company, whose sole shareholder is the City (hereafter: the Company), for an individual interpretation regarding real estate tax in terms of the taxability to real estate tax of the structures constituting the intake and discharge canal, by which the annual water transfer from a river to a lake and the discharge of water from a lake to a river, respectively, takes place.

¹ LEX No. 3780137.

The Company is a legal successor of a state-owned enterprise, which was established by the State Treasury in 1994 to carry out public tasks in the process of decommissioning mining plants associated with extraction works and to rehabilitate post-mining areas devastated by other state-owned industrial mining companies.

The object of the Company's activities was the reclamation and restoration to the environment of a post-mining pit area, which was degraded as a result of mining activities. The area was rehabilitated by creating a water reservoir together with the intake and discharge channels indicated above.

The Company completed the project in 2016. Pursuant to the decision of the Podkarpackie Voivod on 5 August 2013, the reservoir along with the reclaimed adjacent areas, used mainly as beaches, recreational areas, and parking spaces, became the property of the Municipality. The area includes public facilities and equipment. It is also a place where the Municipality implements its own tasks, including; the promotion of physical culture and tourism, sports, recreation, and environmental protection; maintenance of municipal public facilities and equipment; and maintenance of spatial order, municipal greenery, and municipal roads.

As a result, since 2017, the Company has been carrying out its statutory tasks financed from public funds only with regard to activities performed after the completion of the decommissioning work in the mining excavations, and these activities are financed from the state budget. They are understood to include: securing the areas located in the vicinity of the mining excavations against changes in water conditions; removing unnecessary installations and buildings, as well as dismantling machinery and equipment related to the performance of the aforementioned activity; reclamation of post-mining areas related to the performance of the aforementioned activity, and performance of safety works and taking preventive measures related to the performance of the aforementioned activity.

On the basis of the description presented of the actual state, the Company formulated the question: in the actual state so described, are the structures belonging to the Company, which are the intake (supply) canal and the discharge canal, by which the annual transfer of water from the river to the reservoir and from the reservoir to the river is carried out, related to the conduct of business activities and, thus, are they subject to real estate tax under the Act of 12 January 1991 on taxes and local fees?²

According to the Company, the answer to the above question should be negative.

In presenting its position, the Company argued that the activity it performs is continuous and takes place in its own name, but the activity is under no circumstances performed for profit.

The Company stressed that its intention is not to make a profit from its water-transfer activities, as the profit associated with its operations in the reservoir and adjacent areas is obtained by the City, while the Company's necessity to act in this regard stems from the fact that it owns the aforementioned canals and the associated

² Act of 12 January 1991 on Local Taxes and Fees, consolidated text: *Journal of Laws* of 2025, item 707 (hereafter: UPOL [Ustawa o podatkach i opłatach lokalnych]).

water permit, which is undoubtedly related to its previous reclamation and liquidation activities in the pit.

In the Company's opinion, the fact of owning the canals in question and the associated annual water exchange does not fulfill one of the constitutive prerequisites indicated in Article 3 of the Entrepreneurs' Law,³ and, what follows, this is not an activity carried out with the intention of making a profit and is not of a profit-making nature, as the Company does not use and does not have the possibility of using the reservoir and the areas adjacent to it, on which public facilities and utilities are located.

The above, in the Company's view, determines that the canals in question are not business-related structures, and thus are not subject to property tax under Article 2(1)(3) in conjunction with Article 1a(1)(3) of the UPOL.

The Mayor of T., in an individual interpretation dated 26 April 2024, found the position presented by the Company to be incorrect.

In its justification, the Authority stressed that regardless of whether the buildings or land indicated were actually occupied for business activities at a certain time, or whether, due to the conduct of proceedings aimed at liquidating the company, actual business activities were no longer conducted on them, the real estate which is owned by the joint-stock company, is owned by an entrepreneur within the meaning of Article 1a(1)(3) of the UPOL and should, therefore, be qualified as related to the conduct of business activities.

Referring to the jurisprudence of the Constitutional Tribunal and the Supreme Administrative Court (Judgment of the Constitutional Tribunal of 24 February 2021, SK 39/19, OTK-A 2021, No. 14, and Judgment of the Supreme Administrative Court of 16 February 2022, III FSK 285/21), the Mayor of the City of T. noted that they primarily refer to natural persons, as well as other entities that can act in a dual role in legal transactions: both as entrepreneurs and non-business entities. In the Authority's view, however, this does not apply to commercial companies, in particular joint-stock companies, as the object of their activities cannot be other than economic.

The Company filed a complaint against the above individual interpretation with the Provincial Administrative Court in Rzeszów, requesting that the interpretation be revoked and the costs of the proceedings be awarded to the Company.

The contested interpretation was alleged to be in violation of the following articles:

- Article 2(1)(3) and Article 1a(1)(3) of UPOL, due to misinterpreting these provisions by ignoring the content of Article 1a(1)(4) of UPOL and Article 3 of PP when interpreting them, which led the Authority to arbitrarily assume that the structures constituting the intake and discharge canal through which water is exchanged between the river and the reservoir, belonging to the Applicant, are subject to property tax by the mere fact of their being owned by the Applicant;
- Article 1a(1)(4) of UPOL, in conjunction with Article 3 of PP, due to failing to take them into account when considering the merits of the case, as a result of which the

³ The Act of 6 March 2018 – Entrepreneurs' Law, consolidated text: *Journal of Laws* of 2025, item 1480 (hereafter: PP [Prawo przedsiębiorców]).

Authority arbitrarily assumed that any activity of the Applicant, as a municipal joint-stock company, is a business activity resulting in property taxation of structures owned by the company;

- Article 190(1) of the Constitution of the Republic of Poland, in conjunction with Article 1a(1)(3) of UPOL, due to failing to take into account the judgment of the Constitutional Court of 24 February 2021, SK 39/19, and arbitrarily assuming that mere ownership of a structure by an entrepreneur conducting business in the form of a joint-stock company is a sufficient condition for property taxation, and consequently failing to consider the merits of the case.

2. Taxation of Real Estate Used for Business Activities

In the case at hand, key importance must be attributed to the corresponding provisions of two laws, namely Article 2(1)(3) of UPOL and Article 3 of PP. Pursuant to the first of the above-mentioned regulations, real estate tax is imposed on structures or their parts connected with the conduct of business activities. It should be noted here that, following Article 1a(1)(4) of UPOL, the concept of business activity specified in Article 3 of PP is used for the purposes of this act. According to this provision, business activity is understood as an organized activity for profit, carried out on a business's own behalf and in a continuous manner.

In this state of affairs, in order to determine the relevant tax liability, it is necessary to make two initial determinations. First, it is necessary to answer the question as to whether the Company's activities exhibit the characteristics of a business activity referred to in Article 3 of PP. If the answer is in the affirmative, then second, the existence of a connection between such activity and specific real estate will also need to be resolved.

With regard to the first of the issues outlined above, it should be noted that in the proceedings discussed here, the Company admitted that the essence of its activity shows the characteristics of organization and continuity, and that it is carried out on its own behalf. At the same time, however, the entity requesting the interpretation (the Company) firmly emphasized that the activity performed does not meet the premise of profitability. In particular, it was pointed out here that the Company's intention is by no means to make a profit from the aforementioned water transfer, since "the profit associated with the activity in the [...] area and adjacent areas is obtained by the City [...], and the necessity for the Applicant, which is a municipal company of the City [...], stems from the fact that the City has transferred the said canals and the related water permit to it in order to provide this reservoir with the above-described replacement of the top layer of water, which is necessary for the City [...] to use the functions of the above-mentioned reservoir for the performance of its own tasks of this local government unit."

The argumentation used by the Company should be considered convincing. In the doctrine of public economic law, it is pointed out that any economic activity is purposeful in nature and the establishment of an intention to earn money, equated with the intention to make a profit is a sufficient premise for the relevant qualification.⁴ In other words, the existence of the premise of profitability is determined primarily by the purpose to which the activity is subordinated. Thus, in order to give an activity an economic attribute, it is important that it is aimed at making a profit, although this does not necessarily mean actually obtaining a profit.⁵ The literature emphasizes the subjective dimension of such an objective (falling within the sphere of the entity's intention), which, however, will be subject to objectification based on a number of ventures undertaken by such an entity.⁶ Among the activities constituting a kind of externalization of the profit-making intention of the activity, the entry into the register (record) of entrepreneurs is mentioned in the first place.⁷ Consequently, it is assumed that profit, understood as the expected result of activity, constitutes the essence of economic activity with a positive economic result not being a necessary result here.⁸

A similar optics was adopted by the Regional Administrative Court in Rzeszów in the commented case, emphasizing that the premise of profitability is sometimes considered in two aspects: subjective and objective aspects. In doing so, the subjective aspect is related to the purpose of the entity conducting the activity in question, while the objective aspect involves determining whether the entity in question actually conducts an activity that can generate income.

In this state of affairs, the observation of the Provincial Administrative Court in Rzeszów should be considered accurate, according to which the failure of the Authority was the lack of any reference to the description provided by the Applicant of the essence of the Company's activity and the omission of the fact that the profit associated with the Company's activity on the reservoir and adjacent areas is obtained by the City. As pointed out by the Regional Administrative Court in Rzeszów, the interpreting Authority limited itself to stating only that the real estate owned by the Company is owned by an entrepreneur, and this circumstance alone should determine that it should be qualified as related to the conduct of business activities.

The Authority's point of view outlined above leads to the second fundamental legal issue that requires relevant observations. Namely, the issue refers to the necessity of proving the connection between the real estate and the object of the business as a prerequisite for property taxation.

⁴ K. Strzyczkowski, *Prawo gospodarcze publiczne*, Warszawa 2007, p. 194.

⁵ See: H. Gronkiewicz-Waltz, K. Jaroszyński, "Przedsiębiorca" [in:] *Prawo gospodarcze. Zagadnienia administracyjnoprawne*, eds. H. Gronkiewicz-Waltz, M. Wierzbowski, 4th ed., Warszawa 2015, p. 235.

⁶ See: A. Powałowski, "Działalność gospodarcza i jej cechy" [in:] A. Dobaczewska, A. Powałowski, H. Wolska, *Nowe prawo przedsiębiorców*, Warszawa 2018, p. 35.

⁷ M. Szydło, *Swoboda działalności gospodarczej*, Warszawa 2005, p. 36 ff.; A. Powałowski, "Działalność gospodarcza według ustawy – Prawo przedsiębiorców" [in:] *Prawo przedsiębiorcy*, eds. R. Blicharz, A. Powałowski, Warszawa 2019, pp. 39–40.

⁸ H. Gronkiewicz-Waltz, K. Jaroszyński, "Przedsiębiorca...", p. 235.

It should be pointed out that until 2021, the literature presented a view assuming that any structure which is owned by an entrepreneur, even if not useful to him due to the type of business conducted, is subject to property tax.⁹ This view corresponded to the wording of Article 1a(1)(3) of UPOL, which presented an understanding of land, buildings, and structures related to the conduct of business that was based solely on the fact of remaining in the possession of the entrepreneur or other entity conducting business.

A fundamental change in the interpretation of this phrase occurred as of the date of the Constitutional Tribunal's judgment of 24 February 2021,¹⁰ in which Article 1a(1)(3) of UPOL, understood in the manner described above, was found to be inconsistent with Article 64(1) in conjunction with Article 31(3) and Article 84 of the Polish Constitution. In light of the aforementioned judgment, the Regional Administrative Court in Gliwice aptly emphasized that currently there can be no doubt that the connection between real estate and conducting business activities cannot be based on the mere fact of ownership of real estate by an entrepreneur. In this state of affairs, in order to determine taxation, it is necessary to demonstrate the actual connection between the real estate and the business activity performed.

The argument of the Authority regarding the limited application of the TK 39/19 judgment of the Constitutional Tribunal only to individuals and also to other entities, which in legal transactions can act in a dual role (both as entrepreneurs and non-business entities) should also be considered incorrect. First, it is impossible to agree with the Authority's view that the object of activity of a joint-stock company (as opposed to the above entities) cannot be other than economic. A joint-stock company can be established for any legally permissible purpose. This purpose need not, consequently, be economic in nature. Second, as rightly pointed out by the Regional Administrative Court in Gliwice, it is clear from the thesis of the TK 39/19 ruling that it is addressed to all taxpayers who are entrepreneurs or other entities engaged in business activities. Therefore, the position presented in the aforementioned ruling applies to natural persons as well as legal entities and other organizational units that have the status of property taxpayers under Article 3(1) of the UPOL.

3. Conclusions

The glossed judgment of the Regional Administrative Court in Rzeszów should be given approval. Acknowledging the legitimacy of the allegations presented by the Applicant (the Company), the court aptly emphasized the importance of the prerequisites of business activity contained in Article 3 of the Entrepreneurs' Law for determining tax liability in the present case. In this context, the observations regarding the Authority's

⁹ See: R. Dowgier, "Komentarz do art. 2" [in:] R. Dowgier, L. Etel, G. Liszewski, B. Pahl, *Podatki i opłaty lokalne. Komentarz*, LEX/el 2021.

¹⁰ Judgment of the Constitutional Court of 24 February 2021, SK 39/19, OTK-A 2021, No. 14.

shortcomings consisting in the absence of any reference to the existence of the premise of profitability in the present case and the Company's description of the essence of its business activity, should be considered legitimate.

It is also necessary to note the position of the Regional Administrative Court in Rzeszów indicating that the Authority erred in considering that the mere possession of certain structures (canals) by the Company is already sufficient to consider that these structures should be subject to property tax. In this regard, the court reasonably relied on the judgment of the Constitutional Tribunal SK 39/19 while assuming that the view is no longer valid that the possession of an asset by an entrepreneur is equivalent to the fact that the asset is always connected with the conduct of business.

Literature

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Summary

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The Assumption of the Profit-Making Nature of a Business Activity for the Purpose of Determining Property Tax Liability

The gloss deals with the judgment of the Provincial Administrative Court in Rzeszów, issued following a complaint filed by a municipal legal entity against a decision on an individual interpretation, concerning the imposition of real estate tax relating to a structure used for business activity. The subject of the gloss is an analysis of two fundamental issues accompanying the present case, that is, the interpretation of the premise of profitability of business activity, as referred to in Article 3 of the Entrepreneurs' Law, and the determination of the relationship in which certain real estate should remain in relation to the business activity undertaken.

Keywords: entrepreneur, business activity, premise of profitability, property tax.

Streszczenie

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Założenie o dochodowym charakterze działalności gospodarczej dla celów ustalenia zobowiązania podatkowego z tytułu podatku od nieruchomości

Glosa dotyczy wyroku Wojewódzkiego Sądu Administracyjnego w Rzeszowie, wydanego w wyniku skargi wniesionej przez gminę na decyzję w sprawie indywidualnej interpretacji dotyczącej opodatkowania podatkiem od nieruchomości obiektu wykorzystywanego do prowadzenia działalności gospodarczej. Przedmiotem glosy jest analiza dwóch fundamentalnych kwestii towarzyszących niniejszej sprawie, tj. interpretacji przesłanki rentowności działalności gospodarczej, o której mowa w art. 3 prawa przedsiębiorczości, oraz określenia relacji, w jakiej dana nieruchomość powinna pozostawać w stosunku do prowadzonej działalności gospodarczej.

Słowa kluczowe: przedsiębiorca, działalność gospodarcza, przesłanka rentowności, podatek od nieruchomości.