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THE LIMITS OF THE FREEDOM OF A COMMUNE COUNCIL IN DETERMINING AND DIFFERENTIATING OF PROPERTY TAX RATES

The power of communes to impose taxes, which is guaranteed in the Constitution of the Republic of Poland and the European Charter of Local Self-Government, includes the competences of a commune council to determine and differentiate the rates of property tax. Using the legal dogmatic method and, additionally, the empirical-analytical method, the study presents and evaluates the legal solutions justifying the claim that the competences of a commune council can only be exercised within the limits determined in the Tax Act. The statutory limits were set through determination of maximum annual tax rates and the subjective criteria pursuant to which the tax rates may be differentiated. Therefore, it may be assumed that the competences of a commune council are limited. The manner of exercising them is subject to supervision by regional accounting chambers as well as control carried out by administrative courts. Exercising of these competences by a commune council may constitute an important instrument of the local tax policy.

Keywords: tax rates, commune council, property tax, power to impose taxes, local tax policy.

JEL Classification Codes: H70, H72.

Introduction

The general power to determine the amount of taxes and local charges, guaranteed to local government units (lgu) in the Constitution of the Republic of Poland of 2nd

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April 1997 and the European Charter of Local Self-Government (ECLSG) drafted in Strasbourg on 15th October 1985, is shaped through legal acts. This is the result of the reference to the Act in Art. 168 of the Constitution of the Republic of Poland and Art. 9(3) of ECLSG. Neither ultimate limits of shaping the amount of taxes and local charges were formulated in the Constitution of the Republic of Poland and ECLSG nor were any tax law instruments mentioned with the use of which it is possible to shape the local public levies. Each of the above mentioned legal acts uses the phrase „within the scope specified in the Act”. Pursuant to the dictionary definition, the term „scope” is understood as framework, width, range (Bańko, 2005, p. 953), limits (Bańko, 2007, p. 305; Dubisz, 2003, p. 481). This means that the legislator is authorised to determine the limits within which Igu may use the tax law instruments resulting in reduction of taxes and local fees (Zawora, 2014, p. 24). The most frequently used instruments include tax rates and tax exemptions. The doctrine indicates that Art. 168 of the Constitution of the Republic of Poland may be treated in a broader manner, i.e. not only as a standard for introduction of statutory constructive solutions of a specific local levy (the lawmaking sphere), but also referring to solutions enabling tax authorities to make decisions on the amount of local levies in specific cases in the form of tax obligation relieves (the law application sphere) (Etel, 2010, p. 382).

The aim of the study is the analysis and evaluation of the applicable tax legislation which determines the powers of communes to shape the amounts of property tax rates (the Act of 12th January 1991, further LTFA) supported with the analysis of the achievements of the doctrine and judicial decisions concerning the manner of application of the regulations determining the limits of commune's competences within the area of the power to impose taxes. The problem of shaping the amount of rates is examined in two areas, i.e. determining of their amount and differentiating of tax rates. In the first area, a commune is obliged to exercise its competences (it must determine the tax rates), whereas, in the second one, it is empowered to use its competences (it may differentiate the amount of tax rates) (judgement of the Voivodeship Administrative Court in Gliwice of 2nd June 2011). If a commune council, acting within the limits of law, does not use its competences to differentiate tax rates within the same type of the taxation subject (e.g. other buildings), the determined rate shall apply for all objects subject to property tax within this category (judgement of the Voivodeship Administrative Court in Gliwice of 18th June 2008). Summing up, there are two possible situations where communes determine tax rates, but do not differentiate them or such when communes determine and differentiate tax rates for individual types of real property.

The choice of the examined problem is justified with the fact that the property tax is a source of commune's own budget incomes, which is, at the same time, one of the most effective sources as regards the value of cash inflows. Each year, the total amount

of ca. PLN 20 billion is paid into the budget of all communes². A thesis has been formulated, according to which a commune, using its powers to determine property tax rates, operates within the limits determined by the legislator, which shall not be crossed. Its activity within this scope is subject to supervision by regional accounting chambers as well as court control carried out by administrative courts.

The economic consequences of the commune's arrangements referring to tax rates and their diversification directly burden the commune's budget and shall not constitute a basis for filing claims against the State Treasury concerning compensation of lost incomes from this source. The power to determine property tax rates and differentiate them is the outcome of commune's independence guaranteed by the law in the area of shaping its own incomes and an instrument of the local fiscal policy focused on achieving long-term objectives, e.g. management of specific areas, promotion of entrepreneurship. It has been correctly assessed that the commune's independence is when it has legal instruments for shaping and implementing of its own fiscal, social and economic policy (Nieżgoda, 2010, p. 361). A commune is, nevertheless, not completely independent in its actions because it may make respective arrangements „within the extent provided by the law” and, thus, its power is limited (Kotulski, 2004, p. 125) pursuant to the intent of the constitutional legislator specified in detail by the legislator in the legal construction of a specific local tax or local fee.

The study uses the legal dogmatic method as the dominant one as well as, additionally, the empirical-analytical method (in particular for presentation of selected judgements of administrative courts concerning the manner of exercising its powers by a commune as regards property tax rates).

Powers of a commune council to determine the rates of property tax

Pursuant to Art. 5(1) of LTFA, a commune council determines property tax rates through a resolution, yet they shall not exceed the annual maximum rates determined in the Tax Act for individual categories of real property and types of real property within them. A commune council is obliged to exercise this competence, which is prejudged by the phrase used in the content of the above mentioned provision: „a commune council shall determine”. If the legislator's intent had been to formulate only the rights of a commune council, the phrase „may determine” or „is empowered to determine” would have been used. Should a commune council fail to perform its duty determined under Art. 5(1) of LTFA, i.e. fail to adopt a tax resolution determining the property tax rates for a given year, Art. 20(1) of LTFA shall be applied, pursuant to which the tax rates from the previous tax year shall be applied. Pursuant to the above mentioned provision, the tax rates

² Financial ranking. Property tax is a significant source of communal incomes, Serwis Samorządowy PAP, samarząd.pap.pl

applicable in the year preceding the tax year shall only apply if no resolution is adopted for a given year until 31st December of the year preceding the tax year. If, on the other hand, a commune council delays determination of the rates and intends to do it in the tax year (after 1st January), it shall not have the right to do so. Then, the tax rates from the resolution applicable in the year preceding the tax year shall apply (judgement of the Voivodeship Administrative Court in Krakow of 20th December 2012). Based on the analysis of Art. 20a(1) of LTFA, it may be concluded that, in the subsequent tax year, there may be new rates determined by a commune council in a resolution adopted pursuant to Art. 5(1) of LTFA or the rates applicable in the year preceding the tax year if such a resolution is not adopted. There are no normative grounds for two tax rates being applicable during a tax year for a particular type of real property (judgement of the Supreme Administrative Court of 19th November 2010).

The legislator, for taxation needs, distinguishes three categories of real property (land, buildings and their parts, structures). Within these categories, the real property is divided in accordance with its intended purpose, e.g. the category of „buildings and their parts” has been divided into: residential ones, those connected with conducting of business activity, connected with provision of healthcare services and others. The basic idea of real property taxation is relativisation of the amount of tax to the tax payer’s scope of use of the land and buildings. Systemic corrections of this idea are applied, which involve differentiation of the annual tax rates depending on the manner of use of the land or building (Brzeziński, 2011, p. 8). The order to determine tax rates through a resolution means that they should be determined in a general manner (with reference to the category of tax subjects), i.e. without indication of specific real property, e.g. a specific building or plot of land (resolution of the RAC in Olsztyn of 14th March 2016).

The power of a commune council to determine property tax rates is of an exclusive nature and shall not be transferred to any executive authorities of a commune (a village administrator, a town or city mayor). The exclusive power of a commune council to determine property tax rates is prejudged by Art. 18(2)(2) of the Act of 8th March 1990 on commune self-government (further CSA), pursuant to which the exclusive competences of the commune council shall include the adoption of resolutions on taxes and fees within the limits set out in separate acts. This means that the above mentioned provision is of a central competence nature. The legislator, in this case, used the technique of fragmenting the content of the legal norm, which consists in the fact that, apart from the central provision, there are also other provisions affecting the content of the norm, co-designating it together with the central provision (judgement of the Voivodeship Administrative Court in Białystok of 6th September 2007). The provision of Art. 18(2)(8) of CSA does not constitute an independent basis for „tax” competences of a commune council (Borszowski, 2004, p. 67) and should be applied with the respective provision of the Tax Act. In the case under discussion, the provision should be applied together

with Art. 5(1) of LTFA setting the boundaries of the competences of a commune council to determine property tax rates.

The manner of drafting the provision of Art. 5(1) of LTFA indicates that, already on the level of the Act, there has been differentiation of tax rates concerning individual types of real property. The lowest tax rates refer e.g. to residential buildings and their parts as well as land (including those occupied for conducting of paid statutory public benefit activity by public benefit organizations) unless they are connected with conducting of any business activity. The highest rates, being multiple lowest rates, refer to buildings and their parts as well as land connected with conducting of business activity. The differentiation is the effect of applying the social and economic criteria by the legislator (judgement of the Voivodeship Administrative Court in Szczecin of 23rd January 2013).

Pursuant to Art. 5(1) of LTFA, a commune council shall determine the annual property tax rates, which means that the rates shall not be changed (increased) during the tax year and neither shall new categories of taxation subjects be distinguished during the tax year (resolution of the RAC in Szczecin of 27th April 2016). The property tax is of an annual nature and, thus, a resolution of a commune council on the amount of these tax rates shall not become effective during the tax year (resolution of the RAC in Olsztyn of 26th January 2016). The principle to be observed is the one developed in the judicial decisions of the Constitutional Tribunal pursuant to which no changes in tax law resulting in an increase in the taxation burden shall be introduced during the tax year (Etel, 2004, p. 36). Tax obligations should be known to tax payers well in advance before the beginning of the tax year. Tax payers shall have some time to adjust their decisions to the tax which they will have to pay in the upcoming tax year.

A commune council, adopting a tax resolution, pursuant to Art. 5(1) of LTFA, shall not determine tax rates at a higher level than the maximum tax rates adopted in the Tax Act for a particular year. A possible determination of tax rates at a level higher than that set out in the Act would be a significant violation of Art. 5(1) of LTFA (resolution of the RAC in Bydgoszcz of 22nd December 2010). A commune council is empowered to determine, in its resolution, the rates for a particular type of real property at the same level as in the Act (*de facto* it will repeat the maximum statutory rates in its resolution) or determine them on a lower level than the statutory one, whereas the minimum tax rates have not been determined in the Act. Nevertheless, determination of tax rates for any category of real property included in the Act in the amount of PLN 0 does not enable the performance of the tax obligation. In the case of determining the PLN 0 tax rate, neither can tax payers perform their tax obligation nor can the commune council exercise its duty to determine the rate. Therefore, the „zero” amount shall not be considered a tax rate (judgement of the Supreme Administrative Court of 22nd July 1993). A commune council may, nevertheless, referring to Art. 7(3) of LTFA, introduce objective exemptions from taxation other than those provided for in the Act. In economic terms, this will have the same outcome as in the case of the prohibited PLN 0 rate (Paczocha, 2000, p. 10).

Property tax rates are determined in the Act in the form of specific amount rates, and only in the case of structures, a percentage rate has been applied. A commune council, determining property tax rates through a resolution, should comply with the rule and include, in its resolution, specific amount rates and percentage rates respectively for individual taxation subjects. A commune council, guided by the principle of clarity and transparency of the adopted law, should determine tax rates in compliance with this rule. Tax payers should know what the right tax rates are for them rather than calculate these themselves (resolution of the RAC in Bydgoszcz of 12th December 2007). For these reasons, a tax resolution should not contain any provisions requiring that tax payers determine the tax rate themselves, e.g. the rate for residential buildings applicable in the area of the commune is 15% lower than the maximum rate determined in the Act. Neither is a commune council entitled to change the type of the rate adopted in the resolution, i.e. from the specific amount to the percentage rate or from the percentage to the specific amount rate.

Powers of a commune council to differentiate the rates of property tax

Introduction of the competence of a commune council to differentiate property tax rates is a manifestation of the legislator's care for the independence of communes. The way in which commune councils exercise this competence is of crucial importance in this case. Differentiation of tax rates with the use of objective criteria gives communes the possibility to adjust tax rates to local conditions. This should be important in situations which are related to the aspect of business activity, especially in those communes which consider the development of local entrepreneurship as one of their strategic objectives (Borszowski, 2006, p. 171).

The powers of a commune council to differentiate the rates of property tax are regulated in Art. 5(2-4) of LTFA. In this manner, real property has been divided into three categories and the criteria for differentiating the tax rates have been included in three separate catalogues. In each case, the open nature of these catalogues has been maintained, as the list of the criteria has been preceded by the words „in particular”. This means that a commune council may, while differentiating the tax rates, take into account both the criteria directly mentioned by the legislator and other criteria, which have not been mentioned in the Tax Act, but introduced by a resolution of the commune council (resolution of the RAC in Katowice of 22nd November 2012). Nevertheless, this does not mean that a commune council is completely independent to act in this respect. The criteria defined directly in the Act are of a subjective nature, i.e. they refer to the features of the tax subject and, therefore, other criteria adopted by a commune council by way of a resolution should also maintain such nature (judgement of the Voivodeship Administrative Court in Warsaw of 19th September 2006). Such a conclusion justifies

the construction of Art. 5(1) of LTFA, where the maximum tax rates are differentiated according to the characteristics or purpose of the real property subject to taxation rather than the characteristics of the tax payer who owns some specific real property.

While determining the tax rates for land, a commune council may differentiate their amount for individual types of taxation subjects, taking into account, in particular, the location, type of conducted activity, type of development, intended use and manner of land use. Nevertheless, none of these differentiated tax rates may exceed the maximum rate adopted in the Act for a particular type real property (Etel, 2009, p. 76). Art. 5(1)(1) of LTFA distinguishes four types of land subject to taxation. This is the land:

- connected with conducting of business activity,
- under standing surface waters or flowing surface waters of lakes and artificial reservoirs,
- other, including that occupied for conducting of paid statutory public benefit activity by public benefit organizations,
- undeveloped land included in the revitalisation area and located in areas for which the local spatial development plan provides for use as residential, service or mixed-use development, including only those types of development, if the period of 4 years has elapsed since the effective date of the plan with respect to such land and construction has not been completed within that period pursuant to the provisions of the construction law.

When differentiating the tax rates applied to the taxation of residential buildings or their parts, a commune council should, in particular, take into account the following criteria: location, manner of use, type of development, technical condition and age of the buildings. The above mentioned criteria of tax rate differentiation indicate that the legislator's intention is that the tax rate should depend on the value of a building (location, type of development, technical condition, age of buildings) or on the object of business activity (manner of use), which should be understood as the need to adopt a factor that will lead to the tax being relative to the taxation subject (judgement of the Voivodeship Administrative Court in Bydgoszcz of 16th March 2011). Differentiation of tax rates in a resolution of a commune council depending on the taxpayer's source of income rather than on the location, manner of use, type of development, technical condition and age of buildings violates Art. 5(3) of LTFA as it refers to subjective criteria and not objective criteria (resolution of the RAC in Szczecin of 23rd November 2011).

The criterion of the type of conducted business activity was the only one indicated by the legislator in Art. 5(4) of LTFA allowing for the possibility of differentiating, by the commune council, of the tax rates applied for taxation of buildings or their parts:

- connected with conducting of business activity and residential buildings or their parts occupied for conducting of business activity,
- occupied for conducting of business activity in the field of marketing of certified seeds,

- connected with provision of healthcare services and occupied by the entities providing these services,
- other, including those occupied for conducting of paid statutory public benefit activity by public benefit organizations.

The above mentioned criterion of the „type of conducted activity” should also be taken into account in the event of a commune council differentiating the tax rates applied to the taxation of structures.

It may be concluded that granting a commune with the right to differentiate tax rates assumes that these rates will not be equal for all tax payers. From the point of view of the principle of equal taxation, it is important that entities in the same situation are treated equally and that differentiation does not refer to subjective criteria. Thus, differentiation on the basis of an objective criterion is permitted. If the differentiation is based on the Tax Act, it should be considered legal (judgement of the Voivodeship Administrative Court in Rzeszów of 18th May 2017). The number of taxpayers who meet certain objective criteria constituting the basis for taxation with property tax does not affect the admissibility of tax rate differentiation if the content of a specific provision of the resolution of a commune council unequivocally indicates the objective criterion of the differentiation made (judgement of the Supreme Administrative Court of 2nd February 2017). No subjective criteria may be used as a basis for a commune council to differentiate the rates of property tax (judgement of the Voivodeship Administrative Court in Opole of 13th April 2011). In particular, it is not permissible to differentiate between the tax rates for individuals and legal entities, as this leads to discrimination against the tax payer or a group of tax payers and is beyond the limits of the statutory authority of a commune council (judgement of a Voivodeship Administrative Court in Łódź of 7th October 2010).

Selected practical aspects of determining and differentiating property tax rates by commune councils

When examining the effects of communes' activities on determination and differentiation of property tax rates, one should refer to resolutions of commune councils documenting the manner of exercising these powers by the commune self-government as well as to the resolutions of regional accounting chambers issued in the supervisory mode, which indicate the types and severity of violations of law committed by commune councils. The content of 200 resolutions of commune councils adopted in the years 2015-2017 was examined, which constitutes a sample of about 4% of all resolutions adopted in that period. The most important findings are presented below, enabling the assessment of the quality of the local tax law making process within the limits set by the legislator, in relation to one public levy and only within the scope of one of its structural elements, the so-called tax rates.

The analysis of the provisions of selected resolutions of commune councils shows that the differentiation in the amount of property tax rates referred mainly to the category of „other buildings”. Within this category, which has not been divided into specific types of real property by the legislator, commune councils distinguish e.g. utility buildings, free-standing garages, holiday and recreation homes, determining tax rates for each type of real property at different levels, but not higher than the maximum statutory rate adopted for the category of „other buildings” (resolution of the Town Council in Ujście of 28th September 2015). Moreover, recreational grounds have been distinguished within the category of „other land” and taxed at a higher rate as compared to other land for which a significantly reduced rate has been applied, as compared to the maximum statutory rate (e.g. resolution of the Lubasz Commune Council of 27th October 2016). In the category of „structures”, for which the maximum statutory rate is 2%, a sub-category of „structures used for winter sports, i.e. ski lifts, gondola and chair railways, snow-making installations” has been distinguished with a tax rate of 1% of their value (e.g. resolution of the Stronie Śląskie Town Council of 27th October 2016) or a sub-category of „structures used for collective water supply” with a tax rate of -0.5% of their value (e.g. resolution of the Miękinia Commune Council of 30th September 2016). Within the category of „buildings or their parts connected with conducting of business activity”, a sub-category of „buildings used for the storage of agricultural equipment” has been identified with a 50% reduction in the tax rate compared to the maximum statutory rate for the whole category of „buildings or their parts connected with conducting of business activity” (e.g. resolution of the Miłosław Commune Council of 3rd November 2017).

Not very often have the commune councils used the criterion of the type of conducted business activity in the case of tax rate differentiation. One of the few such cases concerns the distinction of several business activities (provision of veterinary services, production of textiles, manufacturing of metal products, storage activities) and adoption of an appropriate tax rate (e.g. resolution of the Kudowa - Zdrój Town Council of 25th November 2015).

When exercising their powers to differentiate property tax rates, in some cases, commune councils clearly indicated that they considered this competence as an instrument to introduce specific preferences in the taxation of certain real property, e.g. by applying the lowest possible specific amount rate of PLN 0.01. per 1 m² of the land occupied for the purpose of conducting business activities in the field of sports shooting ranges. The determination of such a tax rate was justified by the need to develop sports shooting in the commune and to provide assistance in creating conditions for practising of sports shooting (e.g. resolution of the Mragowo Commune Council of 6th April 2016).

Differentiation of tax rates in the examined period took place on the basis of the criteria directly mentioned in the Act, including mainly the criterion of the type of conducted business activity, the manner of using the buildings, the intended use and the manner of using the land. Commune councils, despite their powers, did not create any new criteria

of tax rate differentiation. The most frequent deficiencies found by the regional accounting chambers concerned exceeding of the statutory powers by commune council. Such deficiencies involved primarily differentiation of tax rates based on subjective criteria (e.g. tax rates were set for fuel stations, banks; resolution of the Adjudicative Board of the Regional Accounting Chamber in Poznań of 3rd November 2016) or subjective and objective ones, while commune councils may only apply subjective criteria within this scope. In the course of their supervision, the regional accounting chambers also questioned the creation, by commune councils, of new categories of taxable real property, such as „standing surface waters” and „flowing surface waters of lakes and artificial reservoirs”, whereas the provisions of the Tax Act indicate that “the land under standing surface waters or flowing surface waters of lakes and artificial reservoirs” is subject to taxation (resolution of the Adjudicative Board of the Regional Accounting Chamber in Poznań of 30th November 2016). The omission of the term „land under water” in the resolution of the commune council led to exceeding of the commune council's powers.

Conclusion

As regards property tax rates, the powers of a commune council are located in two areas, i.e. the one covering determination of tax rates for a particular calendar year and the one concerning differentiation of these rates using the criteria set out in the Act or other criteria adopted in a resolution of the commune council. The powers of a commune council contained in the first area are connected with the obligation to fulfil them and the performance of this obligation is secured by the provisions of Art. 20(1) of LTFA, according to which, in the event of failure to determine tax rates, the rates applicable in the year preceding the tax year are used. In this way, the risk of a regulatory gap and the inability to levy property tax in a particular commune have been prevented. The phrase „rates applicable in the year preceding the tax year” used in Article 20a(1) of LTFA should not be limited to the tax rates specified in the tax resolution of the immediately preceding year. If the omission of a commune council in determining tax rates has lasted longer than one year, the rates from the most recent resolution adopted by the commune council, even adopted a few years ago, should be applied. Nevertheless, these shall not be higher tax rates than the currently applicable statutory maximum rates. The principle expressed in Article 20a(1) of LTFA applies only to tax rates. If any tax exemptions were also specified in the tax resolution, they cease to be in force when the resolution expires (Popławski, 2007, p. 31).

Pursuant to Art. 20 of LTFA, the upper limits of the statutory maximum amount rates applicable in a particular tax year are changed annually for the following tax year to the extent corresponding to the consumer price index for goods and services in the first

half of the year³ in which the rates are changed, compared to the same period of the previous year. The Minister of Finance shall announce, through an announcement in the Official Journal of the Republic of Poland - „Monitor Polski”, the upper limits of these rates for each tax year, taking into account the above mentioned principle. The adoption of this rule means that the statutory maximum tax rates may increase (in the case of inflation) or decrease (in the case of deflation). In conclusion, the statutory statement „a commune council shall determine property tax rates by way of a resolution” is fully realistic and refers both to cases in which an appropriate resolution is adopted for each subsequent tax year and when the necessity arises to apply the extraordinary procedure regulated in Article 20a(1) of LTFA.

Within the second area, the powers of a commune council are not connected with the obligation to use them, as a commune council may only differentiate the level of tax rates for individual types of taxation subjects. In this respect, it may apply the criteria specified directly in the Act or the criteria established independently by way of a tax resolution. Nevertheless, when formulating its own criteria for differentiation of tax rates, it cannot act completely independently because it can only differentiate rates according to objective criteria as it has been done in the Act.

The powers of a commune council to differentiate the level of property tax rates are not self-contained and can only be exercised together with the competences to determine the level of tax rates. This means that a commune council may only use its competences to differentiate tax rates provided that it first determines the level of tax rates. Actually, it is not possible to differentiate what has not been defined before. On the other hand, the powers of a commune council to determine the amount of property tax rates are self-contained because a commune council, when determining these rates, is not obliged to differentiate them. In practice, most frequently, commune councils use the competence to determine and differentiate property rates at the same time.

The study shows that the competences of a commune council to determine and differentiate property tax rates fit within the limits of its power to impose taxes. They are of a limited nature, as are other competences within the power to impose taxes, e.g. relating to the introduction of tax exemptions. The justification for the application of these restrictions is primarily the provisions of the Constitution of the Republic of Poland and the ECLSG, which explicitly refer to the phrase „within the scope specified by the Act”. The power of a commune to determine and differentiate the level of property tax rates is limited, whereas the forms and methods of such limitations are set out in the Tax Act. They are not unchangeable and may be modified by the legislator in accordance with the set objectives of the fiscal policy implemented in the state.

³ The price index is determined based on an announcement by the President of the Central Statistical Office published in the Official Journal of the Republic of Poland - „Monitor Polski” within 20 days after the end of the first half of the year

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