



POLAND– April 2021

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Poland: Rate of property tax, real estate not used in business activity (tribunal decision)

The Polish Constitutional Tribunal issued a decision concerning the rate of real estate tax for property that is not used in a business activity but that is owned by an entrepreneur or entity conducting a business activity. The tribunal concluded that the provision that treats such real property as connected with business activity just because of the fact that its owner conducts business operations is unconstitutional.

Overview

The judgment concerns individuals conducting a business activity and who own real property that is not used for the purposes of the business activity.

At issue is a definition provided under a provision (Article 1a(1)(3)) of the law on local taxes. According to this provision, land, buildings, and structures connected with the operation of a business are defined as land, buildings, and structures owned by an entrepreneur or other entity conducting a business activity.

The tribunal found that the current statutory language suggests that for purposes of real estate taxation, there is no distinction between taxpayers owning and using real estate in their business activity and taxpayers simply owning real estate but not using it for the purpose of running a business. This means that both sets of taxpayers must pay the real estate tax at a higher rate—a rate that is intended for real property used in business activity. The difference in treatment would affect business owners who are natural persons and who play a dual role as individuals (having control over their separate property) and a business operator.

According to the tribunal, the provision imposes a disproportionate fiscal burden on one set of these taxpayers because it makes 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 for the purpose of running a business—a constitutionally unjustified violation of the right to property. Thus, application of the rule cannot be justified by a claim that the treatment is warranted to protect the public interest, and this treatment does not satisfy the proportionality test.

Consequently, the tribunal found that applying a higher real estate tax rate only because the entrepreneur or other entity as owner of the real estate is engaged in business activity was disproportionate interference with such property right.

KPMG observation

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Despite the fact that the constitutional complaint pertained to an individual, the tribunal's judgment does not restrict the finding of unconstitutionality to natural persons. Therefore, it appears it might also be applicable to legal entities. The tribunal's judgment has been already invoked by the Supreme Administrative Court in a March 2021 judgment (case file III FSK 895-899/21), in which it stated that the very fact of owning real estate by an entrepreneur was not enough to apply the higher real estate tax rate.

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

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