

Evolution of the Taxation of Wind Power Plants in the Polish Tax Law

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Abstract

The general purpose of the article is to present in a comparative perspective how the principles of the taxation of wind power plants have evolved. In the Polish tax law, over the past several years, the legislature has undertaken considerable efforts to modify those principles. The lack of the stability of tax legislation may prove to be one of the main reasons for discouraging economic operators from pursuing such investments. Most evidently, the lawmakers do not have a clear vision of a coherent and permanent legal framework in this aspect. The purpose of this article is to present how the principles of the taxation of wind power plants in Poland have evolved. Perhaps the wider experience of other European countries in this regard will help to develop a model of the taxation of wind power plants not only in Poland but also in other East and Central European Union Countries.

Keywords

wind power plants; property tax; Polish tax law

1 Introduction

There is a growing interest in renewable energy sources (solar energy, wind energy) both in Poland and in other EU member states. Aside from expenditures on implementation of such investments, energy companies – already at the planning stages – take into

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account possible tax burdens involving assets used for this purpose. In the Polish legal system, property tax is of key importance. Unfortunately, in recent years, the Polish tax legislation regarding facilities and structures used for wind power generation (wind power plants) has resembled a weather vane. Undoubtedly, this whole situation does not make operators willing to invest in assets to generate power from renewable sources.

The lack of the stability of tax legislation may prove to be one of the main reasons for discouraging economic operators from pursuing such investments. The constant changes in the regulations regarding the taxation of wind power plants seem absolutely incomprehensible. Most evidently, the lawmakers do not have any vision of a coherent and permanent legal framework in that respect; at the same time, they are also very susceptible to local governments of communes and municipalities lobbying for increasing their tax revenues as well as to taxpayers who, for obvious reasons, want optimal circumstances to operate this controlled economic activity.

Apart from the foregoing, one also has to note how amendments are introduced to the laws and regulations which provide for imposing a property tax on wind power plants – they are an academic example of how not to make tax laws. In Poland, over the past several years, it has become a disgraceful standard to amend the legislation on local taxes when adopting other laws. Although it is understandable that the legislature amends a certain provision of the tax law by specifying it directly in an amending act, it is difficult to approve of establishing public law rights and obligations indirectly, i.e. by changing definitions in other laws and regulations, to which the lawmakers refer (e.g. a change in the definition of a “work” (in Polish: *obiekt budowlany*) in the Polish Construction Law Act of 07.06.1994), although sometimes there is even no such reference; nonetheless, a specific provision affects the tax obligations (and rights). A perfect example of this is the Polish Act of 20.05.2016 on Investments in Wind Power Plants (hereinafter: WPI Act) (*Journal of Laws*, 2016, item 961, as amended) which introduced the definition of a “wind power plant” (in Polish: *elektrownia wiatrowa*), thus modifying the Polish Construction Law and containing a transitional provision on imposing a property tax on wind power plants after 1 January 2017. Hardly any time had passed from the introduction of the new regulations on taxation of wind power plants until new bills to amend them appeared on the horizon. Currently, i.e. as of May 2018, the Sejm is discussing the bill of 19.02.2018 on amending the Act on Renewable Energy Sources and certain other acts (document no. 2412) which – does not amend the Tax Law, but rather the Wind Power Investment Act and the Construction Law.

The purpose of this article is to present how the principles of the taxation of wind power plants in Poland have evolved. Perhaps this experience and analyses will help to develop a new model of taxation of wind power plants and avoid the errors made by the Polish legislator by other EU countries.

2 Wind Power Plant Taxation in Poland till September 2005

The Act of 12.01.1991 on taxes and local fees (hereinafter: UPOL Act) (*Journal of Laws*, 2017, item 1751, as amended), since its entry into force, does not contain any legal regulations that would directly treat taxation of wind farms. Certainly, such constructions are not classical buildings, and thus should be considered in terms of potential buildings related to running a business. The application of the provisions regulating the real estate tax was hindered by the lack of a legal definition of the term “building”. It was only from 01.01.2003, as a result of the amendment to the Polish law by the Act of 30.10.2002 changing the act on taxes and local fees, when the Polish legislator introduced the explanations of the terms used in the UPOL Act. Among them was the definition of “building”. It applies invariably till today – being regulated in Art. 1a par. 1 point 2 of this Act. This stipulates that the building is a building structure within the meaning of construction law, which is not a building or a small architecture structure, as well as a construction device within the meaning of the construction law, which provides the facility to be used in accordance with its purpose.

In this context, it should be assumed that a building subject to real estate tax is a building object or a construction device within the meaning of the construction law. Therefore, the taxation of wind farms should be assessed on the basis of these provisions (Etel et al., 2005: 185). In the analysed period, the concept of a building object included: a building with installations and technical devices; a building constituting a technical and functional unit together with installations and devices, as well as a small architecture facility.³

The provisions of the construction law, in particular those to which the legislator referred in the UPOL Act, were not mentioning the wind farms until the end of September 2005. Nevertheless, bearing in mind that the building was a technical and utilitarian structure with installations and equipment, it was assumed that both the strictly constructional elements of the power plant (foundation, mast) and not having such character (rotor, gondola, control computer, etc.) were subject to real estate tax. The construction was to be considered as a building with installations and devices enabling it to be used as intended. Therefore, it was not entitled to “limit” a building object only to building parts. Thus, the owner of the construction object was obliged to pay the value tax of all elements constituting the wind farm.

³ This definition was valid in Poland until 28.06.2015.

3 Taxation of Wind Power Plants from 1 October 2005 to 31 December 2016

The taxation rules for wind power plants presented above underwent fundamental changes upon the entry into force of the Act of 28.07.2005 on the change of the Construction Law and amendments to some other acts (*Journal of Laws*, No. 163, item 1364). This act gave a new meaning to the concept of “building” as defined in Art. 3 point 3 of the Construction Law Act, stating that they are, among others, construction parts of technical equipment (of boilers, industrial furnaces, wind farms and other devices). The amendment resulted, among others, from the fact that until its introduction in the jurisprudence of administrative courts there were judgments, according to which the construction for the purposes of taxation was the entire wind farm consisting of building and non-construction parts, which constituted one technical and utilitarian entity.⁴ In fact, only the amendment to the construction law, entering directly into Art. 3 point 3 of the Construction Law, the expression construction parts of wind farms, determined the change of the ruling line [Dowgier, 2016: 8; the judgement of NSA of 5 January 2010 (II FSK 1101/08)]. Thus, in view of the meaning of this provision, it was considered that the construction in the case of wind farms are only parts of the construction of technical equipment [judgement of NSA of 16.12.2009 (II FSK 1184/08)]. As a result, the tax base in property tax did not include the value of other elements constituting the wind farm.

4 Taxation of Wind Power Plants from 1 January 2017

The WPI Act in Art. 2 point 1 introduced the legal definition of the term “wind power plant” into the Polish legal order. It is a building within the meaning of the construction law, consisting at least of a foundation, tower and technical elements, with a capacity greater than the power of micro-installations within the meaning of Art. 2 point 19 of the Act of 20.02.2015 on renewable energy sources (*Journal of Laws*, items 478 and 2365; *Journal of Laws*, 2016, item 925). It should be emphasised, that the indicated act did not directly make any change to the provisions of the UPOL Act. Nevertheless, bearing in mind that for a building within the meaning of the Construction Law, an “entire” wind farm started to be considered for tax reasons as all its construction elements without the possibility to limit it only to the classical “building” part. This topic provokes passionate discussions in science and practice – it is the subject of relatively numerous, heterogeneous analyses (Etel, 2017: 13–19; Malinowski and Małecka,

⁴ See the judgment of WSA in Szczecin from 04.01.2009 r. (I SA/Sz 882/04) and judgment of NSA from 18.01.2007 (II FSK 51/06).

2017: 6) and interpretations.⁵ It is connected above all with a several-fold increase in property tax on this category of construction works.

Starting from 1 January 2017, in order to determine the correct way of wind power plant taxation, it was necessary to compare, up to three different acts, like the UPOL Act, construction law and WPI Act. The definition of a wind farm adopted on the ground of the last legal act is considered to be a systemic one (Dowgier, 2016: 8). Although, this does not mean that the definitions contained in the above mentioned acts do not matter to the real estate tax because they regulate issues other than taxation (Pahl, 2017b: 33–40).

Bearing that in mind, it should be assumed that if in the provisions of the UPOL Act there is a reference to the provisions of the construction law, it is necessary to apply the standards contained therein for the purposes of taxation. Going further, if the legislator in the provisions of the WPI Act when defining a wind power plant indicates that it is a building within the meaning of the provisions of the construction law there is no doubt that it is a building referred to in Art. 3 point 3 of the Construction Law and the in the same time the construction referred to in Art. 2 par. 1 point 3 in relation to Art. 1a par. 1 point 2 of the UPOL Act. It is irrelevant that this regulation does not explicitly mention wind power plants. It should be noted that according to Art. 3 point 3 of the Construction Law, the term “building” should be understood as any construction object that is not a building or a small architecture object, as linear objects, airports, bridges, etc. and foundations for machines and devices, as technically separate parts of items that make up the whole unit.

Changing of the meaning of Art. 3 point 3 of the Construction Law, implemented by the WPI Act is an important proof of a change in the taxation rules, since the legislator by using this act has removed from the law the expression related to the construction parts of wind power plants. This argument was also noticed by the judges of the Administrative Court in Bydgoszcz in the judgment of 21.02.2017 (I SA/Bd 866/16). According to the Court: “Against the interpretation that only the construction parts of wind farms are a building, speaks the fact that in Art. 3 point 3 of the construction law the term ‘wind power plants’ was removed from the fragment that stipulated before that: ‘as well as construction parts of technical equipment (boilers, industrial furnaces, wind farms, nuclear power plants and other devices)’. One cannot also agree that the deletion of the phrase ‘wind power plants’ has not changed anything, because the catalogue of technical equipment parts is still open, due to the use in Art. 3 point 3 of the expression ‘other devices’. By deleting from Art. 3 point 3 of the construction law the expression ‘wind power plants’ the legislator wanted to change the existing wind farm division into the construction and non-construction part so that the entire wind farm would be a building.”

⁵ A different view than the one resulting from the law was expressed in the interpretation issued on 03.11.2016 (mark: FP.310.1.1.2016.2) by the commune administrator of the city of Zgorzelec, repeated in the interpretation of the Commune of the city of Puck of 02.12.2016 (F.B.310.2.2016MW).

The presented way of interpretation is compatible with the judgment of the Constitutional Tribunal (TK P 33/09), in which it was indicated that only the buildings listed *expressis verbis* in Art. 3 point 3 of the Construction Law, or in other provisions of this Act or in the Annex to it, can be considered, together with its installations and other related devices, a construction object according to Art. 3 point 1 of this Act. It should be noted that Art. 2 of WPI Act, that is defining the wind power plants, indicates that it is a building within the meaning of the provisions of construction law, consisting at least of the foundation, tower and technical elements. Therefore, a building within the meaning of this provision is a complete facility, as the legislator lists the components of a wind power plant without limiting them only to building parts. At the same time, the above mentioned new definition of a building in construction law removed the technical equipment (e.g. a wind power plant) from the general definition of the building. It is difficult to conclude that these changes do not affect the understanding of the building both for the needs of the construction process and tax law. The status of a wind farm as a construction is therefore co-decided by the provisions of the UPOL Act, Construction Law and WPI Act.

When interpreting the UPOL Act in the context of taxation of wind power plants, it is necessary to pay attention to Art. 9 point 3 of the WPI Act, which amended the annex to the Construction Law, where the 29th category of construction objects includes freestanding chimneys and masts as well as wind power plants. It should be emphasised that the annex to the Construction Law is an immanent part of this Act. It is not a separate legal act, but an inseparable element defining the categories of construction objects. The legislator does not indicate in this provision or in any other act that a construction (building) is only the construction part of a wind power plant. It is difficult, therefore, to accept the view that, starting from 1 January 2017, following the adoption of the WPI Act in the area of taxation of this type of objects “nothing has changed”.⁶

The most important argument in favour of the adopted concept of taxing “entire” wind power plants is Art. 17 of the WPI Act. This provision stipulates that from the date of entry into force of the Act of 31.12.2016, the real estate tax relating to a wind power plant is determined and collected in accordance with the regulations in force before the Act enters into force. The legislator, through the content of this provision, expresses the will to change the existing taxation rules for wind farms. The said provision should be read in such a way that from 16.06.2016 (the date of entry into force of the WPI Act) a wind farm is a building within the meaning of the construction law, but until the end of 2016 it is subject to taxation on the “old” rules. However, from 1 January 2017, it is subject to taxation as a complete object. There is therefore no reason to decompose the wind power plant into building and non-construction parts (technical). Professor L. Etel notes that the legislator “was aware” of what he was doing, because the tax consequences were considered at the stage of creating regulations and were

⁶ See more in Pahl, 2017: 101.

accepted by the parliament through the adoption of the act. For these reasons, it is not reasonable to claim that the change in wind power plant taxation rules after 01.01.2017 was not a conscious act made by the legislator (Etel, 2017: 14).

The presented position regarding changes in the taxation of wind power plants from 01.01.2017 is justified by a historical interpretation, which the legislator refers to in the justification for the project of the WPI Act. As it seems, this provision was introduced primarily for tax reasons – in order to release some non-construction wind farms from real estate tax. This amendment resulted, among others, from the fact that until its introduction in the jurisprudence of administrative courts there were judgments, according to which the building for the purposes of taxation was the entire wind farm consisting of construction parts and non-construction parts, which constituted the entire technical-utility [judgement of the Administrative Court, WSA in Szczecin of 04.01.2009 (I SA/Sz 882/04); judgement of the Supreme Administrative Court, NSA of 18.01.2007 (II FSK 51/06)]. In fact, only the amendment to the construction law, entering directly into Art. 3 point 3 of the Construction Law, the construction parts of wind power plants, determined the change of the ruling line [Dowgier, 2016: 9; judgement of the Supreme Administrative Court, NSA of 05.01.2010 (II FSK 1101/08)].

5 Taxation of Wind Power Plants in the Draft Act on Amending the Act on Renewable Energy Sources

It has been less than a year since the entry into force of the new wind power plant taxation rules and there have already been published some proposals trying to change this new regulation. The last of these proposals does not provide a change to the tax laws but only a change to two legal acts, the WPI Act and the Construction Law. In the first of the above-mentioned acts, the legislator considers only the construction parts of a wind farm for “construction” within the meaning of the construction law. The draft provision stipulates that the Act of 20.05.2016 on Investments in Wind Power Plants (WPI Act) introduces the following changes – Art. 2 point 1 shall read as follows: “A ‘wind power plant’ is a renewable energy source installation consisting of a construction part constituting a building within the meaning of construction law and technical devices, including technical elements in which electricity is generated from wind energy, with a capacity greater than the power of micro-installations within the meaning of Art. 2 point 19 of the Act of 20.02.2015 on renewable energy sources (*Journal of Laws*, 2017, item 1148, 1213 and 1593; *Journal of Laws*, 2018, item 9).

Similarly, in the Construction Law, the project modifies the definition of a building indicating that in case of technical objects, like wind power plants, only the building parts are treated for construction. In addition, the draft changes the meaning of the annex to the construction law defining the categories of construction objects by stating that category 29 includes freestanding chimneys and masts, as well as construction parts of wind power plants.

The indicated changes, having a systemic character, lead to the decomposition of a wind power plant for construction and non-construction parts. This action is aimed at evidently changing the rules of taxing by real estate tax on this category of objects. At the same time, the project envisages changes to the construction law and WPI Act, planning that the changes will come into force with retrospective effect, i.e. from 1 January 2018. However, this will not violate the principle of a democratic legal state expressed in Art. 2 of the Constitution of the Republic of Poland and the resulting principle of prohibiting retroactivity of the law (*lex retro non agit*). It is justified by the fact that these changes in the assumption of the legislator are to reduce tax burdens, and therefore they are legal solutions beneficial for taxpayers. The project justification claims that: “The entry into force retroactively of changes concerning Art. 2 points 1 and 6 and Art. 3 point 1 of the project will automatically change the subject of taxation of property tax based on the Act on local taxes and fees. This fact will have an impact on the amount of property tax for wind farms, because this tax will be levied only on their building parts.”

However, there is some misunderstanding in the legislator explanations of the anticipated effects of introducing new regulations. In the legislator’s opinion: “The entry into force of the proposed regulation will not directly cause the necessity to incur expenditures from the state budget or the budget of local self-government units.” The “untruth” of this statement is justified by the fact that from 2017 taxpayers pay property tax calculated on the value of the whole wind farm. Also in 2018, the tax is being paid on the same basis. It is the income of the commune’s budget in which the wind farm is located. This means that the entry into force retroactively of the regulations in question will result in the need to return significant amounts of property tax. In some municipalities, overpayments on this account may reach several million zlotys.

6 Conclusion

Legal solutions concerning the taxation of wind power plants in Poland presented in this article indicate that in the Polish tax legal system, there are too frequent changes in the principles of taxation of buildings, structures, and landscape and street furniture. It is beyond any doubt that the lack of stability in the tax law discourages economic operators from investing in renewable energy sources; the last amendments even resulted in the property tax being increased several times. An advantage of the Polish solutions is imposing a single tax on components of wind power plants. For example, in other EU countries, like in France, wind power plants are subject to a special tax with only a subsidiary property tax (Etel, 2003: 30–31), and the movable and fixed parts of a wind power plant are not subject to property tax (Vernier, 2005: 33 et seq.). Meanwhile in Poland, over the last 15 years, both structural and non-structural elements of wind power plants have been taxed.

The present article may present an impulse for further reflection and comparative analyses regarding the model of wind power plant taxation. The errors and changes made by the Polish legislator in the analysed field may also be an interesting case study for the other East and Central European Union Countries. The present article may also be an interesting material that could help to solve or avoid several issues related to the taxation process in most of the EU countries.

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