

Tax on Extraction of Certain Minerals and the Mining Fee as a Category of Budget Revenue in Poland

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Abstract

The subject of this article is to present the general principles concerning the operation of tax on certain minerals extraction (also called mining tax) and mining fee in Poland. The purpose of the study is to determine the extent to which the indicated public impositions related to the extraction of certain minerals supply the state budget or the municipality budget, respectively, and to assess the current legal situation in Poland in this respect. The basic research method is the analysis of legal sources, taking into account the views of the doctrine, and the analysis of statistical data on budget revenues.

Keywords

tax law; public budget; tax on mineral extraction

1 Introduction

Poland is a country with one of the highest raw material potentials in Europe.² The raw material base is diversified and includes a lot of different energy (coal, lignite, natural gas and even crude oil), metal (copper, zinc, lead and iron ores), chemical (sulphur, rock salt) and rock (including granite, sandstone, marble) resources distributed practically all over the country. It plays a significant role in the development of the mining industry, but also influences the development of other branches of industry, which use raw materials

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² Ministerstwo Środowiska, 2017: 16.

and, as a result, the functioning of the entire Polish economy.³ Apart from energy raw materials, metal raw materials are also very important for the country's economy, including the richest deposits of copper, which makes Poland one of the largest producers of this metal in the world.

The Polish law imposes on the activities of mining companies, in addition to corporate income tax and property tax, a number of other burdens, such as: remuneration for providing geological information, licence fees, remuneration for mining usufruct⁴ and mining fee.

2 Act of 2 March 2012 on the Tax on Extraction of Certain Minerals

The Tax on Extraction of Certain Minerals is a relatively new imposition in the Polish law. The legal basis is specified by the Act of 2 March 2012 on the Tax on Extraction of Certain Minerals.⁵ It has been collected since 18 April 2012, the date of entry into force of the Act. The tax constitutes revenues to the State budget [Art. 3(1) ATECM].

The Tax on Extraction of Certain Minerals covers the extraction in the territory of the Republic of Poland or the territory of an exclusive economic zone of: copper, silver, natural gas and crude oil [Art. 1(1) ATECM]. According to the Act of 25 July 2014 on Special Hydrocarbon Tax, crude oil and natural gas extraction will be subject to taxation as of 1 January 2020. However, certain entities have already been obliged to comply with measurement, recording and tax return obligations since 1 January 2016. The following are not subject to taxation: copper ore or processed copper ore output not being a concentrate, converted into the weight of copper ore output not exceeding 1 tonne per month; natural gas extracted in the amount not exceeding the equivalent of 11 MWh per month; crude oil extracted in the amount not exceeding 1 tonne per month – if used for research purposes. Also, extracted methane occurring in coal deposits and extracted methane occurring as an associated mineral are not subject to taxation [Art. 3(3) ATECM].

A taxpayer is a natural person, a legal person; an organisational unit without legal personality, including a partnership whose shareholders have been granted a licence pursuant to the Act of 9 June 2011 – Geological and Mining Law⁶ – an act which is the basic legal act regulating the conduct of extraction activities, that extracts copper, silver, natural gas or crude oil within the business activities conducted. If extraction of natural gas or crude oil takes place under a cooperation agreement referred to in the provisions of the Geological and Mining Law, the taxpayer is each party to

³ Strzelec-Łobodzińska, 2010: 102.

⁴ See the Act of 9 June 2011 – Geological and Mining Law (consolidated text, *Journal of Laws*, 2017, No. 2126, as amended).

⁵ Consolidated text, *Journal of Laws*, 2018, No. 228 (hereinafter: ATECM).

⁶ Consolidated text, *Journal of Laws*, 2017, No. 2126.

the agreement, and if the party to the cooperation agreement is a partnership, that partnership is a taxpayer.

The tax procedure for the Tax on Extraction of Certain Minerals is based on the principle of tax self-calculation. On this account, the taxpayer of the tax in question is obliged to submit monthly tax returns to the head of the tax office by the 25th day of the month in which the tax obligation arose and to calculate and pay the tax to the account of the competent tax office. It is worth noting that the taxpayer is obliged to pay the tax on the extraction of certain minerals regardless of the financial result achieved, i.e. also in the event of a possible loss. The tax does not in any way reward replacement expenditures or exploration expenditures.

Currently, KGHM Polska Miedź S.A. with its registered office in Lubin (hereinafter: KGHM) is the only taxpayer of the Tax on Extraction of Certain Minerals in Poland. It is the world leader in copper mining, with a history dating back to the early 1940s.⁷ In 2014, KGHM was the world's largest silver producer and the eighth largest copper producer.⁸ KGHM is engaged in the extraction and processing of the largest deposits of copper ore in Europe, located in south-western Poland. It also exploits deposits of copper, gold, nickel and platinum located in North and South America (mine production of metals in mines in the USA, Canada, Chile) (Annual KGHM Report 2016, 2017: 14).

The introduction of the Tax on Extraction of Certain Minerals was associated with a great deal of emotions. In 2011, when the then Polish Prime Minister announced in his expose the introduction of mineral taxation, the price of KGHM shares on the Warsaw Stock Exchange fell by 13%, as a result of their sale by investors who considered the introduction of the new tax to be a drop in the company's financial potential (Rapkiewicz and Fijalkowski, 2014: 11; Duda, 2013: 126). However, the State Treasury has undoubtedly benefited from the introduction of this tax. At the moment, it is indicated that the solutions adopted in relation to the tax have proven to be very budget effective, at the same time with low collection costs. What is more, in the opinion of the Government, these solutions allowed KGHM to make at the same time appropriate profits from the extraction of copper and silver (Rapkiewicz and Fijalkowski, 2014: 5). It is indicated that the Tax on Extraction of Certain Minerals had no impact on the reduction of employment in the mining sector. Moreover, due to the lack of negative impact on the labour market, no adverse impact of the Tax on Extraction of Certain Minerals was observed on local government authorities revenues from shares in the personal income tax (Annual KGHM Report 2016, 2017: 14).

It should be stressed, however, that the mineral tax, due to its structure, does not take into account the conditions of production and the quality of the ores exploited. On the other hand, these factors affect the taxpayer's result. Mining costs are varied, and

⁷ See <http://kghm.com/pl/>.

⁸ In 2014, KGHM produced 1,256 tons of silver. Available at: <http://kghm.com/en/kghm-worlds-largest-silver-producer> [Accessed 13 Sept. 2019].

while some mines are able to bear this huge tax burden, the prospects for mines exploiting more difficult deposits are much worse (Annual KGHM Report 2016, 2017: 14).

From 18 April 2012 until the end of 2017, KGHM paid approximately PLN 10 billion of the tax in question to the State Treasury.⁹

In 2017, the revenues from the Tax on Extraction of Certain Minerals amounted to over PLN 1,786 million, which in comparison to the total budget revenues (PLN 350,414,702 thousand) means 0.5% of state budget revenues and were higher than the forecast adopted in the Budget Law by PLN 786,224 thousand, i.e. by 78.6%.

3 The Mining Fee

The mining fee is a kind of imposition paid to a municipality by an entrepreneur extracting raw materials in its territory. This is a public legal imposition.¹⁰ The background for the considerations of its legal nature may be the idea of ecological tax reform created at the beginning of the 1990s.¹¹ The interest in the so-called “environmental taxation” has been reflected in the EU legislation, i.e. in the regulation (EU) No. 691/2011 of the European Parliament and of the Council of 6 July 2011 on European environmental economic accounts, the term “environmentally related tax” [Art. 2 (2)] was defined.

The mining fee was regulated by the Act of 9 June 2011, Geological and Mining Law. In this Act, the legislator indicated several types of fees related to the extraction of raw materials: one-off fees for licensed prospection and exploration of mineral deposits, as well as prospection or exploration of an underground complex in connection with the storage of carbon dioxide; fees for underground stocking or storage of substances, waste and carbon dioxide; additional fees for activities which grossly violate the conditions specified in the licence or in the geological works design; fees for activities conducted without the licence required or without the geological works design; mining fees for the extraction of mineral from the deposit. It should be noted that the term “mining” is used only for one of the abovementioned fees, i.e. the fee charged for the extraction of the mineral from the deposit (Ofiarski, 2017: 317), and should therefore be defined as a mining fee in *the strict sense*. Other charges are also collected in connection with the economic exploitation of the environment, and these are mining fees in *the broad sense* (Ofiarski, 2017: 317).

⁹ See <http://podatek-miedziowy.pl/> [Accessed 24 July 2018].

¹⁰ See in detail Lipiński and Mikosz, 2003: 389. More about fees and charges in the Polish law see Antonów, 2017a: 25–52; Antonów, 2017b.

¹¹ More on this matter in Sleszyński, 2004: 9.

The Constitutional Tribunal decided that the mining fee is equivalent in nature and therefore it is not a tax, but a classic fee.¹² The fee is a *remuneration for the economic use of the environment, which is now widely recognised as a common good*.¹³

The subject of the mining fee is primarily the activity consisting in the extraction of minerals from deposits. The mining fee shall be calculated on the basis of the amount of the extracted mineral expressed in units of mass or volume. In exceptional circumstances, the basis for the mining fee is the amount of a specific chemical element expressed in units of mass, as well as of a chemical compound contained in the mineral (this applies only to one mineral – gold ore).

The rate is of quota nature. The amount of the fee shall be differentiated according to the subject of activity covered by the licence. The provisions of the Geological and Mining Law are accompanied by an annex which specifies the rate set for particular types of minerals. These rates are subject to annual indexation, namely an annual change in accordance with the annual average consumer price index planned in the Budget Law for a given calendar year. Pursuant to Art. 136(2) of the Geological and Mining Law on the basis of the index referred to in the Annex to the Law, the minister competent for the environment shall announce, by way of an announcement, in the Official Journal of the Republic of Poland “Monitor Polski” the fee rates applicable for the following calendar year.¹⁴ For example, in the announcement of the Minister of the Environment of 5 September 2017 on the fee rates for 2018 in the scope of the provisions of the Geological and Mining Law,¹⁵ the rate for copper ore was set at PLN 3.52 per tonne, lignite – PLN 1.91 per tonne, coal – PLN 2.42 per tonne, methane-rich natural gas – PLN 6.43 per thousand m³ and 24.73 per thousand m³ over 2.5 million m³, crude oil – PLN 37.96 per tonne, 51.52 per tonne over 1,000 tonne.

It is also worth indicating that each year KGHM produces around 700 thousand tonnes of copper in various forms. As a result, the mining fee is PLN 2,464,000.

The settlement period for the mining fee is six months, calculated from 1 January to 30 June and from 1 July to 31 December, respectively (Art. 137(1) of the Geological and Mining Law). However, if the amount of the fee due for the settlement period does not exceed PLN 300, its payment obligation shall not arise. This does not exempt from the obligation to submit information on the amount of the extracted mineral (Art. 137(4) of the Geological and Mining Law).

If it is found that the entrepreneur has not paid the fee within the time limit or has paid in an amount other than that due, the licensing authority shall determine, by way of a decision, the amount of the fee due, applying the rate in force in the settlement period to which the fee relates (see Art. 138 of the Geological and Mining Law).

¹² Judgment of the Constitutional Tribunal of 2 February 1999, U 4/98, OTK ZU No. 1/1999, item 4. See also Judgment of the Constitutional Tribunal of 13 July 2011, K 10/09, *Journal of Laws*, No. 153, item 913. See also Gliniecka, 2007: 13, 32–39; Uberman, 2002: 46.

¹³ Judgment of the Constitutional Tribunal of 9 February 1999, U 4/98.

¹⁴ More in Pest, 2016.

¹⁵ M.P. No. 868.

The legislator has also provided for increases in the rate. The activity performed with a gross violation of the conditions specified in the licence or in the approved or notifiable geological works design is subject to an additional fee. The additional fee is independent of the other fees regulated by this Chapter. The additional fee is determined, by way of a decision, by the licensing authority or geological administration authority, respectively, which approved the geological works design or to which the geological works design was submitted (Art. 139(2) of the Geological and Mining Law).

It is also worth mentioning the sanction rate. Activities conducted without the required licence or without an approved or notifiable geological works design are subject to the so-called increased fee. For example, prospection and exploration of mineral deposits determined in the amount of PLN 50,000 for each commenced square kilometre of the area covered by such activities (Art. 140(3) sec. 1 of the Geological and Mining Law).

The revenue from the mining fee represents 60% of the revenue of the municipality in which the activity is conducted and 40% of the revenue of the National Fund for Environmental Protection and Water Management (NFEP&WM). The revenue from the fees mentioned in this section in respect of hydrocarbons comprises 60% of the municipal revenue, 15% of the district revenue, 15% of the provincial revenue in which the activity is conducted and 10% of the revenue of NFEP&WM (Art. 141(1a) of the Geological and Mining Law).

Due to the divergent interests of the parties, over time conflicts have arisen around mining fees, which comprise remuneration for the economic use of the environment. On the one hand, there is the paying entity, including KGHM, which strives to minimise it. On the other hand, there is the local government, which participates in the revenues and is interested in increasing revenues, as the mining fee is an important source of budget revenue for the municipalities in which the mineral deposits are exploited.

Currently, a draft law has been developed¹⁶ which provides for the establishment of the Polish Geological Survey, a Polish legal entity whose purpose is to perform broadly understood tasks of the state in the field of geology, as well as extremely significant changes in the redistribution of the fee. According to the project, the revenue from the mentioned fees constitutes 60% of the revenue of the municipality in which the activity is conducted, 35% of the Polish Geological Survey and 5% of NFEP&WM. The total annual inflow of the municipality from the transfer of the revenue may not, however, exceed PLN 500 per one inhabitant of the municipality. The surplus resulting from the difference between 60% of the revenue referred to in para. 1 and the total annual revenue of the municipality determined in accordance with para. 1c shall constitute the revenue of the Polish Geological Survey (draft wording of Art. 141(1d) of the Geological and Mining Law).

¹⁶ For more information see <https://legislacja.rcl.gov.pl/projekt/12289805/katalog/12378479#12378479> [Accessed 13 Sept. 2019].

At present, this applies mainly to a few municipalities,¹⁷ whose budgets in 2018 would no longer be increased by the huge amount of mining fees paid by KGHM so far. It regards even 30% of the budget revenue. For example, according to the preliminary calculations in the Lower Silesia case, the following municipalities may lose the most: Jerzmanowa (ca. PLN 9 million, i.e. over 30% of revenues; budget – PLN 36 million), Grębocice would lose ca. PLN 4 million annually (budget – PLN 40 million), Radwanice nearly PLN 3 million (budget – PLN 24 million).¹⁸

Apart from the fact that they are paid impositions, they are also – like taxes – cash, universal, non-refundable payments determined unilaterally by the state. In the judgment P 6/02 of 10 December 2002, the Constitutional Tribunal indicated that: “The fee is a public imposition with characteristics similar to those of a tax and a duty, but, unlike a tax and a duty, the fee is a payable imposition. The fees are collected in connection with clearly indicated services and activities of state or local government authorities, conducted in the interest of specific entities. They, therefore, constitute a kind of remuneration for obtaining an individual benefit offered by a public law entity. In the classic form, the fees are characterised by full equivalence, which means that the value of the administrative service corresponds to the amount of the fee collected”.¹⁹

Mining fee is connected with a fee understood as the remuneration for the use of the environment, which is at the disposal of public bodies. The mining fee is intended to compensate to a certain extent for the damage caused by the exploitation of minerals to the environment.²⁰

The mining fee constitutes a significant part of the municipality’s own revenue, which provides levelling of the negative effects of mining plant operations, in accordance with the subsidiarity principle. This solution has a long tradition in the Polish legal system (historical justification) and faithfully implements the constitutional principle of financial independence (in particular expenditure independence – Art. 167(1) and (4) of the Constitution of the Republic of Poland) of mining municipalities.

4 Conclusion

1. The functioning of the Tax on Extraction of Certain Minerals is controversial with regard to the single taxpayer in the country. This situation will be changed as of 2020, as entrepreneurs who extract hydrocarbons, i.e. crude oil, natural gas (including shale

¹⁷ Municipalities Polkowice, Jerzmanowa, Radwanice and Grębocice, rural commune Lubin.

¹⁸ Mostly KGHM (copper) and the Turów mine (lignite) are considered. Available at: <https://legislacja.rcl.gov.pl/docs//2/12289805/12378479/12378482/dokument248974.pdf> [Accessed 24 July 2018]; Opłata eksploatacyjna, available at: <http://info.wyborcza.pl/temat/wyborcza/op%C5%82aty+eksploatacyjne> [Accessed 17 June 2018].

¹⁹ See Smoleń, 2002: 257–258.

²⁰ See also the judgement of the Supreme Administrative Court in Warsaw of 15 September 1998, SA 526/98.

gas) and their natural derivatives,²¹ will start paying two new taxes to the state – a Tax on Extraction of Certain Minerals and a Hydrocarbon Tax. The ratio legis is related to geological surveys conducted, which indicate a high probability that large hydrocarbon deposits occur in Poland, particularly in shale formations.²²

2. It is indicated that the tax adversely affects the long-term profitability of the company's mining operations and may lead to a reduction in investments that require significant expenditures. The assessment of the effects of the introduction of the Tax on Extraction of Certain Minerals should be conducted not only as a process of implementing the imposition at present, but above all should include the foreseeable effects in the future. It is important to refer to the impact of the tax on government revenues and the mining sector in the future and not only to examine the effects of the past, relatively short, period.

3. In conclusion, the mining fee is a public imposition which, in addition to its fiscal function (which is of secondary importance), also implements a number of non-fiscal objectives linked to the pursuit of compensation for operating costs and environmental damage, as well as for the consequences of such damage. The applicable legal structure of the fee must be considered a non-taxable charge, as compensation for environmental damage caused by the exploitation of minerals. It constitutes a particular price for the use of renewable and non-renewable environmental resources or the payment for the right to use the environment.

The compensation in question relates to municipalities affected by mining plant operations. In the context of the suggested changes, it is worth to note the accurate jurisprudence of the Constitutional Tribunal, according to which: if we assume that “at the starting point, i.e. at the moment of adopting the act, the municipalities had at their disposal funds to conduct their tasks, pursuant to Art. 167(1) of the Constitution, the reduction of the property being a source of their own revenue, with no compensation and unchanged level of tasks, constitutes a breach of the Constitution”.²³

It should be stressed that the distribution of revenue sources between the state and the local government should be adequate, should take place by law, in advance and basically for an indefinite period of time, on the basis of general and abstract premises – identical for each of the local governments (Art. 32 of the Constitution of the Republic of Poland).

²¹ With the exception of methane in coal deposits and methane deposits occurring as an associated mineral.

²² Act of 25 July 2014 on Special Hydrocarbon Tax (consolidated text, *Journal of Laws*, 2018, item 246, as amended).

²³ Judgment of the Constitutional Tribunal of 12 April 2000, K 8/98.

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