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Taxation of Assets Used to Generate Energy—In the Context of the Transformation of the Polish Energy Sector from Coal Energy to Low-Emission Energy

Adam Kałużny¹ and Wojciech Morawski^{2,*} ¹ Deloitte Poland, 00-133 Warszawa, Poland; akalazny@deloittece.com² Department of Finance Public Law, Faculty of Law and Administration, Nicolaus Copernicus University, 87-100 Toruń, Poland

* Correspondence: wmoraw@umk.pl

Abstract: (1) Background—The aim of this paper was to indicate whether the taxation of facilities related to renewable or low-emission energy differed significantly from that of facilities generating electricity from coal. (2) Methods—The research was conducted using a descriptive method, and because of the legal nature of the article, a crucial role was played by the dogmatic method. (3) Results—The thesis according to which only the “construction part” is subject to the property tax is the result of many years of disputes between the taxpayers and the tax authorities. In practice, it is difficult to compare the tax burden on assets related to coal and low-emission power generation because of the construction of the tax base in Polish property tax law. Most often, however, the tax burden on assets, which is calculated in the context of the amount of energy produced, tends to favour coal-fired power generation. (4) Conclusion: The property tax regulations in Poland treat the assets used for energy production by all methods identically. In practice, because of the specificity of the tax base, this means a more favourable treatment of facilities associated with coal-fired power generation.

Keywords: renewable energy source in Poland; taxation; real estate tax; property tax



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1. Introduction

Power engineering requires large investments in facilities that are of a high value and have generally been operated for decades. As a result, in Poland, it is not surprising that entrepreneurs operating in this sector are among the top property taxpayers. At the same time, the rules of the taxation of such property have long remained unclear and—what is even worse—unstable.

The current study aimed to present the main principles of the property taxation of assets used in the energy sector. The study omits detailed considerations related to the interpretation of Polish tax regulations when they were the subject of disputes in doctrine and jurisprudence. In this case, this study is limited to the essence of the dispute and the prevailing view in jurisprudence.

The purpose of this study was to present the current tax treatment of renewable energy in Poland. Sections 2 and 3 provide a brief introduction to the issue of property taxation in Poland, introducing key concepts from the Polish property tax perspective: lands, buildings and structures, and presenting the main problems that arise on the basis of the current regulations. In Sections 4–10, the authors present the tax treatment of the different energy sources. Section 11 includes an approach for comparing the tax treatment of coal-fired and renewable energy sources. Section 12 presents the conclusions of the study.

The main objective of the study was to verify whether different energy sources were in fact equally treated in Poland from the property tax perspective and, if not, what are the legal sources of such inequality.

2. Property Taxation in Poland

2.1. Introductory Information

The system of property taxes (here understood as taxes on holding property) consists of three main taxes:

- Property taxes, as regulated in articles 1a–7a of the Act of 12 January 1991 on local taxes and charges [1];
- Agricultural taxes, as regulated by the Act of 15 November 1984 on agricultural tax [2];
- Forest taxes, as regulated by the Act of 30 October 2002 on forestry tax [3].

Here, the taxes on means of transport are regulated in Article 8 et seq. of the Local Taxes and Charges Act, which provides for the taxation of lorries, buses, trailers and so forth; for the current study, this is of significantly smaller importance. Hence, it will be omitted.

The subjects of property tax are as follows:

- Land;
- Buildings;
- Structures.

In turn, only land is subject to agricultural and forestry taxes. Land can be taxed with only one of the three above-mentioned taxes. As a rule, land is subject to property tax, but certain types of land may be subject (instead of property tax) to agricultural or forestry taxes, which are usually lower. Their structure is almost identical, and the legislator applies the same terms in the legal regulations on land taxation as these three taxes. This justifies their combined presentation.

All the above taxes constitute income for the municipalities that collect them. The place of taxation of a building, structure or land is determined by its location. In the case of facilities located in several municipalities, each municipality taxes the share of the facility proportional to the size of the facility in that municipality [4].

The presentation of detailed solutions must be preceded by an explanation of the terminology used regarding taxable objects other than land. The terminology for property tax is based on that used in the Act of 7 July 1994 of the Construction Law [5]. The precise and clear translation of the exact terminology used in this act is very difficult, having in mind that even for an average Polish speaker, the distinction between the Polish terms ‘budowla’ and ‘budynek’ is most often completely incomprehensible—many Polish individuals use these words interchangeably. However, against the background of the Construction Law and, consequently, the Local Taxes and Fees Act, this distinction is crucial.

In Polish law, the broadest category is that of ‘obiekt budowlany’, which is translated here as ‘architectural object’. This term should be understood as encompassing ‘budynek’ (English: building), ‘budowla’ (English: structure) or ‘obiekt małej architektury’ (English: small architectural object), including installations ensuring the possibility of using the facility in accordance with its intended use, as erected with the use of construction products [6]. The understanding of these terms is explained below.

2.2. Property Tax on Buildings

The Local Taxes and Charges Act recognises a building as ‘an architectural object within the meaning of the Construction Law, which is permanently attached to the ground, separated by means of wall barriers, and has a foundation and a roof’ [7].

In practice, this definition raises a great deal of controversy, but most of it is irrelevant to the problem of the taxation of energy facilities. For example, there are discrepancies in the judicial decisions as to whether a building with only part of a roof is still a building and is subject to taxation [8]. The problem may be the classification of an object as a building or structure and whether the technical devices mounted on buildings should be treated as part of them or as separate objects. These issues will be discussed during the analysis of the taxation of particular types of energy facilities.

The basis for the taxation of buildings in Poland is their usable area (Article 4(1)(1) of the L.T.C.A.), which is measured along the internal length of walls on all storeys, except for staircases and elevator pits. The following are also considered storeys: underground garages, cellars, basements and attics (Article 1a(1)(1)(5) L.T.C.A.). This means that in practice, every space in a building can be considered a storey, even if it is not a storey from the point of view of the Construction Law's regulations. This does not mean that the total area of every storey will always be taxed. The area of rooms or their parts and the part of the storey with a clear height from 1.40 m to 2.20 m is included in the building's usable area with a 50% weighting, and if the height is less than 1.40 m, this area is disregarded (Article 4(2) of the L.T.C.A.).

Rates apply to buildings depending on the use and nature of the building. They can vary from municipality to municipality because the tax law sets only maximum limits for each type of building. The highest maximum rates apply to buildings or parts of buildings connected to business activity and to residential buildings or parts of buildings occupied for business activity—24.84 PLN per 1 m² of usable area—while the lowest rates apply to residential buildings or their parts—0.85 PLN per 1 m² of usable area. The 'other' buildings or parts of buildings may be taxed at the maximum rate of PLN 8.37 per 1 m² of usable area (rates Valid for the Year 2021 are given; These rates are indexed annually. On 1 January 2021, the 1 EUR exchange rate was PLN 4.61).

2.3. Property Tax on Structures

The taxation of structures is one of the most controversial problems in Polish tax law. The problem comes in understanding the concept of structures. It is astonishing that a single concept can be the subject of so many contradictory judgements. For example, there are discrepancies in the judicial decisions as to whether a building with only part of a roof is still a building and is subject to taxation [9].

It would be superfluous to present detailed considerations here because of the complexity of national regulations. The core of the problem lies in the fact that tax regulations refer to the Construction Law when defining the concept of a structure as a subject of taxation. Pursuant to Article 1a(1)(2) of the L.T.C.A., a structure is the following:

1. An architectural object within the meaning of the Construction Law that is not a building or a small architectural object;
2. An architectural device (Polish 'urządzenie budowlane') within the meaning of the Construction Law, here connected with an architectural object, which ensures the possibility of using the object in accordance with its purpose.

The most serious problems are related to the first part of the definition, which refers to the definition of an architectural object within the meaning of Article 3(1) of the C.L.A. The definition of an architectural object in the Construction Law has evolved. Until 28 June 2015, it was the following: '(1) an architectural object should be understood as:

- (a) a building together with technical installations and technical devices;
- (b) a structure constituting a whole from a technical and utilitarian point of view together with installations and devices;
- (c) a small architectural object.'

In turn, the definition of a structure contained in Article 3(2) of the C.L.A consists of two parts. The first part is 'any architectural object that is not a building or small architectural object', while the second part contains an illustrative list of structures, giving examples of linear structures, airports, bridges, viaducts, flyovers, tunnels, culverts, technical networks, free-standing antenna masts, free-standing permanent ground-based advertising equipment, earthworks, defence structures (fortifications), protective, hydrotechnical structures, tanks, free-standing industrial installations or technical devices, sewage treatment plants, landfills, water treatment plants, resistance structures, overground, underground crosswalks, utility networks, sports facilities, cemeteries, monuments, the construction parts of technical installations (boilers, industrial furnaces, wind power plants, nuclear

power plants and other installations) and the foundations for machinery and equipment as technically separate parts of the objects that make up the utility unit. However, this catalogue of exemplary structures in the C.L.A. has changed over time; in particular, some new examples were added while others were excluded.

The ‘construction part’ is the key term for understanding the following considerations regarding the taxation of the structures. Here, it should be understood that part of the structure is not technical in nature. Thus, it refers to the part that is ‘built’ and serves the functioning of the technical part. The exact determination of the boundaries of the construction part has been one of the more difficult practical problems in disputes over property taxation.

The issue of construction parts is a problem that is specific to Polish property tax law as it arises from the terminological link between the definitions contained in the L.T.C.A. and the construction law. Comparison of the Polish regulations with those in force in other CEE countries leads to the conclusion that the electricity generation infrastructure is generally either outside the scope of property tax law (e.g., in the Czech Republic) [10] or it may be subject to taxation to the extent to which it constitutes real estate within the meaning of the regulations governing the keeping of fixed asset register (e.g., in Russia) [11]. On the other hand, comparing the Polish regulations with those in force in the Western EU member states, it should be pointed out that, e.g., in France, the lump-sum tax on grid enterprises (imposition forfaitaire sur les entreprises de réseau) is established in the lump sum paid per 1 MW of wind, photovoltaic or nuclear installations and, consequently, the issue of separating such installations into construction and technical parts does not pose any legal problem at all [12,13].

This definition is far from logical in its consistency. The definition of an architectural object refers to the definition of a structure and the latter to the former. Thus a vicious circle of references was evoked. In its judgement of 13 September 2011 [14], the Constitutional Tribunal found that this provision, despite its illogical nature, is consistent with the Polish Constitution, albeit under certain conditions. In the Constitutional Tribunal’s view, only structures that are defined ‘by name’ as structures in the Construction Law can be taxed (not necessarily in the definition of the structure itself). The Constitutional Tribunal emphasised the principle of the legal certainty of tax regulations. In the opinion of the Constitutional Tribunal, tax regulations must be precise, and taxation can take place only on something that undoubtedly falls within the scope of the subject of the tax. No doubts can be resolved here regarding the taxpayer’s disadvantage, for example, by reasoning on a per analogiam basis. This ruling caused the determination of whether an object is subject to property tax to be based on finding the name of a given type of facility in the Construction Law.

Typically, the next stage of the dispute would be to decide whether a given object is taxed in its entirety or whether only its construction part should be subject to tax. The first view was usually presented by the tax authorities, here based on the definition of an architectural object, where the following phrase appeared: ‘a structure constituting a whole from a technical and utilitarian point of view, including installations and devices.’ Taxpayers, on the other hand, cited a fragment of the definition of a structure, that is, ‘as well as construction parts of technical facilities (boilers, industrial furnaces, wind power plants, nuclear power plants and other installations) and foundations for machinery and equipment’ to show that only the construction part of the structure is taxable. Unfortunately, the administrative courts have inconsistently resolved this dispute. A detailed description of the lines of the administrative courts’ rulings concerning particular types of facilities will be presented below in Sections 4–10.

If we add to this the considerable practical problems in establishing the ‘limit’ of the construction part and then calculating the value of this part, it is not an exaggeration to say that the scope of taxation of industrial facilities (including power engineering facilities) in Poland has resembled a lottery.

Starting on 28 June 2015, the definition of an architectural object changed. It is worth noting that this happened somewhat incidentally because while amending the Construction

Law, Members of the Polish Parliament were not initially aware of the fact that they may have changed the scope of property taxes. Since then, the definition of an architectural object has been as follows: a building, structure or small architectural object, together with installations ensuring the possibility of utilising the object in accordance with its purpose and erected with the use of construction products. We are still dealing with a vicious circle of references, but the fragments indicating the structure as a whole from a technical and utilitarian point of view are no longer included. Thus, this new definition has slowly unified the jurisprudence in the direction of the assumption that only the construction parts of technical facilities are subject to property taxes, however, this does not mean that the jurisprudence is fully uniform [15].

What is important is that only those structures that are 'connected with the conduct of business' are taxed. This concept is defined in Article 1a(1)(3) of the L.T.C.A., according to which the structures connected with conducting business activity should be understood as land, buildings and structures owned by the entrepreneur or another entity conducting business activity (with some exceptions).

Here, a business activity should be understood as an organised profit-making activity carried out in one's own name and on a continuous basis. However, the following are not considered business activities: agricultural and forestry activities, nor, for instance, the rental of rooms to tourists on agritourism farms (under certain conditions).

The maximum rate of property taxes on structures is 2% of the tax base. The tax base is the value that constitutes the basis for calculating depreciation write-offs in a given tax year. Thus, in practice, this is the value determined at the moment of putting the object into use or acquiring it. Thus, it is a historical value that does not refer to the market value of the property at the time of taxation. In the case of structures that are not depreciated, the tax base is their market value as of the date of the tax liability for this tax, that is, the year of acquisition or construction of the structure by a given taxpayer. Again, this is the historical value of the structure. Inflation somewhat mitigates the effects of linking the tax base with the historical value of the structure. However, a lack of inflation causes the actual tax rate in relation to the market value of a structure in a given tax year to be higher than the statutory 2%. This problem was particularly significant when parts of 'nonbuilt' technical equipment, such as turbines, were subject to taxation (situations where technical devices are taxed are rare in practice, and most often, they are not taxed). This was because their value decreases with time, not only because of wear and tear but also because of technical progress.

As a result, it is difficult to compare the load capacity of the types of power generation facilities in Poland. The key issue is the moment at which we determine the amount composing the tax base. It is not unusual for two identical objects to be burdened with differing property tax amounts.

2.4. Taxation of Land with Property, Agricultural or Forestry Tax

Land may be subject to property, forestry or agricultural tax. These taxes do not differ significantly in their legal structure, and the differences mainly concern the amount of tax rates and the catalogue of exemptions. Basically, agricultural and forestry tax rates are much lower than property taxes.

The rule is that land is subject to property taxes. However, agricultural land or forests are not subject to property taxes, but if the agricultural land or forests are occupied (the term 'occupied' must not be equated with the term 'connected' regarding conducting economic activity) for business activities, they are subject to property taxes [16].

Paradoxically, this regulation does not mean that the forest, even if occupied for business, will always be taxed by forestry tax. The specificity of the Polish system of land taxation lies in the fact that the taxation is not determined by the way the land is used but by the way it is defined in the land and building register kept by territorial self-government units (poviats or municipalities), and this is based on the regulation implementing the Surveying and Cartographic Law [17]. In practice, even in city centres, there is land that

is formally defined as agricultural land. To tax it, the municipal tax authority must prove that it was occupied for business activities. However, only the part of the land on which this activity takes place will be occupied for business activity, not the whole plot of land (a separate real estate).

The basis for the taxation of land is its area.

The maximum (selected) property tax rates for 2021 are as follows:

- On land connected with conducting business activity, regardless of qualification in the land and building register—PLN 0.99 per 1 m² of area;
- On land under the stagnant waters or flowing surface waters of lakes and artificial reservoirs—PLN 4.99 per 1 ha of area;
- On other land, including land occupied for the purpose of conducting paid statutory public benefit activity by public benefit organisations—0.52 PLN per 1 m² of area.

The connection with business activity in the meaning of the above regulation cannot be identified with occupation for the purpose of conducting business activity. The land owned by the entrepreneur is connected to the business activity (in accordance with Article 1a(3) of L.T.C.A, 'By the terms used in the Act: (1) agricultural land, (2) forests, (3) waste-land (...)—it is understood to mean land thus classified in the land and building register') [18]. The latter characteristic determines whether agricultural land or a forest is subject to property taxes, and the connection determines what rate will apply to the land subject to the property taxes.

2.5. The Influence of Municipalities on the Amount of Tax Burdens on Entrepreneurs' Assets

Theoretically, municipalities have a large influence on the amount of tax burden on the property. Tax regulations at the state level in the case of property, agricultural and forestry taxes contain only the maximum tax rates, leaving the municipalities full freedom (limited obviously by, e.g., constitutional rules) in determining the amount. Additionally, municipalities may introduce tax exemptions.

However, this is only in theory because in practice, municipalities set the rates at or near the maximum. In practice, only tax rates on the property of persons who do not conduct business are lower than the maximum rates. Such fiscal policy of the municipalities results from their difficult financial situation and the characteristic structure of their income. In addition to income from taxes, municipalities also receive income in the form of subsidies from the state budget. The amount of subsidies partially depends on the municipality's tax income; therefore, the more money the municipality receives in the form of taxable income, the smaller the subsidy. To calculate the amount of the municipality's taxable income per capita (the so-called tax power of the municipality), the tax income that the municipality would achieve if it applied the maximum rates of local taxes and did not grant any tax exemptions is considered [19]. This mechanism discourages municipalities from pursuing an active tax policy.

3. Key Problems

Summarising the above presentation of the basic regulations on property taxation in Poland, a few key problems can be identified, the resolution of which affects the principles of the taxation of property used for energy production in Poland.

The first problem is determining whether a given facility is to be taxed as a building or as a structure—or whether the equipment inside the building is to be taxed as well.

The second problem is the rules of land taxation, which in some way are related to the operation of energy equipment. In practice, this problem occurs only with certain types of facilities.

The third problem—and the most important one from a financial point of view—is the question of whether a given object is taxable and, if so, whether it is taxed as a whole or whether it is taxed only on its construction part.

The analysis of the principles of taxation of particular types of facilities must be based only on the indication of the dominant judicial concept in the jurisprudence of

administrative courts. As a rule, generally, there have been no differences in the legal regulation of the taxation of technical facilities; these differences were created only in court practice.

The problem of taxation of wind power plants should be treated as a unique one because, in their case, the Polish legislator has made some radical changes to the rules of their taxation, which has caused enormous problems for the industry, resulting in significant fluctuations in the level of property tax.

This publication will omit the complicated problem of the taxation of the technical infrastructures used for energy transmission. This is because there is no specificity related to the functioning of low-emission power engineering.

4. Coal-Fired Power Plants

The jurisprudence of administrative courts on the taxation of coal-fired power plants was relatively stable. As a rule, facilities that had the characteristics of a building and were housing equipment used to generate electricity were taxed as buildings, with a tax calculated in relation to their usable area. This is very beneficial for an entrepreneur because the value of the equipment of the building increased neither the taxation basis of the structures nor, obviously, the building (whose tax basis is the usable area, not the value).

There have been judgements in which the courts have accepted the taxation of structures in buildings. However, the approach of the courts was moderate in these cases because they accepted the taxation of only construction parts (e.g., foundations) of turbines, boilers and so forth as structures [20]. In practice, this means that only the foundations for these facilities were taxed.

Most problems were related to the taxation of environmental protection equipment. The taxation of electrostatic precipitators and flue gas desulphurisation installations was the subject of numerous, often-changing decisions by the administrative courts. For many years, the courts ruled that the entire facility was subject to taxation, that is, technical equipment used for flue gas treatment and not only the construction part of the facility was taxed [21–24]. Only in a few judgements did the court allow for the possibility of taxing the electrostatic precipitator facility as a building [25], which was the most favourable from a tax point of view. In recent years, after the change of the definition of an architectural object on 28 June 2015, when the fragments pointing to a structure as a technical and usable whole disappeared, the administrative courts recognised that only the construction part of facilities, such as electrostatic precipitators, is subject to taxation [26].

In the case of coal-fired power generation, the taxation of land is not very important. The land on which the power plant is located is subject to property tax in the maximum amount, just as with any land related to business activity. However, this is not a particularly onerous burden; it is typical for an entity that conducts business activity.

The situation is different when it comes to lignite power plants, which are closely linked to existing mines in the vicinity (because of the unprofitable transportation of lignite). A lignite mine occupies quite a large area of land, which is taxed as land occupied and related to business activity, here with property taxes at the highest rates. The jurisprudence of the Polish courts has developed an important position from the point of view of taxation: during the rehabilitation of land left over after mineral extraction (even when it concerns the rehabilitation of a different portion of the industrial land), it is treated as occupied for business activity and is still taxed as being used for commercial purposes [27–31]. From this perspective, it has become an important problem to determine how to understand when rehabilitation has been completed, whether it is the day on which the taxpayer submits a relevant application for a decision confirming the completion of rehabilitation or the day on which the decision is issued (in practice, many months may elapse between these two occurrences). A favourable opinion has been formed in the jurisprudence, according to which the taxpayers may stop paying property taxes as soon as the rehabilitation works have been completed and the documents have been submitted to a competent office [32].

5. Wind Power Plants

The problem of taxing wind power plants in Poland resembles a dynamic action movie, where the situation constantly changes and the main protagonist is often staring into death's eyes, only to see a happy ending.

Until 2009, the practice of taxing entire wind power plants as structures prevailed in judicial decisions, which was unfavourable for taxpayers [33–35]. The courts opposed the separation of the construction part of the power plant as an independent structure, pointing to the need to pay attention to the existence of the 'whole from a technical and utilitarian point of view' of the power plant, in accordance with Article 3(1)(b) of the Construction Law.

Around 2009, there was a change in the jurisprudence line [36,37]. It did not only concern wind power plants, but also the taxation of many types of technical facilities, including both built and 'nonbuilt' elements. What is important here was that the courts began to pay attention to changes in legal regulations.

Before 26 September 2005, the relevant part of the provision of Article 3(3) of the Construction Law indicated that structures also included 'construction parts of technical equipment (boilers, industrial furnaces, and other installations).' After the change under the Act of 28 July 2005, i.e., the amendment of the Construction Law and on the amendment of some other acts, the relevant provision became as follows: 'construction parts of technical devices (boilers, industrial furnaces, wind power plants, [underlined by the authors] and other installations) and foundations for machines and devices, as technically separate parts of the facilities comprising the utility whole.' This change was only a 'pseudo-change' because even before 2005, wind power plants were to be treated as 'other installations', but it gave administrative courts the opportunity to withdraw from the earlier line of judgement, which was unfavourable to the taxpayer.

The confusion was caused by the Act of 20 May 2016 on investments in wind power plants [38]. As a result of the analysis of the course of legislative works, its authors were initially unaware of the fact that changes in the regulations could also exert tax consequences.

The key change was that the wind power plant was defined as 'a structure within the meaning of the Construction Law, consisting of at least a foundation, a tower, and technical elements, with a capacity greater than that of a microinstallation within the meaning of Article 2(19) of the Act of 20 February 2015 on Renewable Energy Sources' [39]. Moreover, the act changed the content of the listing of structures included in Article 3(3) of the Construction Law, which consisted of reversing the changes introduced on 28 June 2005; that is, wind power plants disappeared from the listing of the construction parts of technical equipment. When, over the course of legislative work, opinions appeared that the change in the regulation may have tax consequences, Article 17 of the draft act was added, which provided the following: 'From the date of entry into force of the act until 31 December 2016, the property tax on wind power plants shall be determined and collected in accordance with the regulations in force before the date of entry into force of the act.'

However, the changes were formulated so vaguely that the Supreme Administrative Court was required to decide by a panel of seven judges whether there was a change in the scope of taxation of wind power plants. In its judgement of 22 October 2018 [40], the Supreme Administrative Court stated that a wind power plant as a whole, that is, with its technical parts, is subject to taxation. One of the important arguments was that since there was a transitional provision, the judgement is worthy of attention not only because it was made by an extended panel of seven judges (the standard Supreme Administrative Court panel consists of three judges), but also because the Supreme Administrative Court judges approached the Prime Minister of the government with the so-called 'alert', pointing out that the principles of law making were not observed during the amendment of the law.

Although the cited judgement confirmed the change in the scope of the subject of taxation of wind power plants, establishing a tax base proved much more complicated than it might seem. In property tax, the tax base for a structure is, in principle, the initial value for tax depreciation purposes, except where the structure is not depreciated, in which case,

the tax base is determined by the market value. Taxpayers argued that the tax base for wind turbines in 2017 should be their market value set as of 1 January 2017 because it was then that the legislature created a completely new structure not subject to depreciation—which occurred because there was no item in the fixed assets register that would correspond to a ‘wind turbine structure’ within the meaning of the 2017 regulations. The courts accepted this approach [41].

However, when the verdict of the seven judges of the Supreme Administrative Court was passed, the legal status was already different. Under the act amending the Renewable Energy Sources Act and certain other acts of 7 June 2018 [42], another change of legal regulation was made, which consisted of ‘reversing’ the changes introduced by the Act of 20 June 2016 [43]. It expressly stated that a wind power plant consists of two elements: a structure, which consists only of construction parts, and ‘technical devices, (...) in which electricity is produced from wind energy.’ This meant that once again, only the construction part of the wind power plant should definitely be taxed. Oddly enough, the time scope of the change was regulated. It came into effect starting on 1 January 2018, that is, with a retroactive effect. From the taxpayers’ point of view, this was a partially favourable solution. However, in 2017, they had been burdened with an unreasonably high property tax, which made it unprofitable to produce electricity from wind. From the point of view of the municipalities, however, this was a difficult solution to accept. The municipalities had already collected property taxes for almost half of 2018, and their budget was based on these receipts. In addition, investments in wind energy are often located in poorly urbanised areas, that is, poorer than the average. In such municipalities, revenues from the taxation of wind power plants could represent a significant budget item.

In Poland, there is no doubt that a retroactive change in tax law is allowed only in exceptional cases that are in favour of the taxpayer. Hence, it was an acceptable change, even if one considers that in the understanding of civil law, a municipality is a separate legal entity from the state. From the point of view of the citizen, both the state and municipality are public entities, which are different forms of state power. In its judgement on 22 July 2020, the Constitutional Tribunal found that such a regulation violates the constitutional principle of the prohibition of retroaction of law, which the Tribunal based on Article 2 of the Constitution of the Republic of Poland and the principle of the democratic state of law contained therein. It does not seem admissible for municipalities to demand that taxpayers pay the tax that they were exempted from retrospectively. This would be another financial blow to taxpayers running wind farms. The justification of the Constitutional Tribunal’s judgement shows that it expects to compensate for the effects of the change on municipalities. Thus, the ruling did not resolve much.

Specific problems were associated with the taxation of offshore wind farms located outside the country’s territorial sea but in the Polish exclusive economic zone.

For many years, it was not possible to tax such wind farms. The reason behind this was a legal loophole. The Polish exclusive economic zone was located outside the territory of Poland and, thus, outside the jurisdiction of Polish municipalities. This meant that the local tax regulations adopted by municipalities were not in force; therefore, there was no tax rate applicable to constructions. For many years, this loophole was the subject of academic consideration because no offshore wind farms were built in Poland. Currently, these investments are already underway, which probably prompted the legislature to act.

Extending the regulation of property tax to the exclusive economic zone was seemingly the simplest solution. However, there would be a problem in determining the municipality that would derive tax revenue from the taxation of offshore wind farms.

Originally, there was the concept of subjecting offshore wind farms to a completely new tax, one that would not be a local tax and, therefore, would not involve the need for the municipal council to adopt its rates; this tax prevailed in the government. Such a solution was originally adopted in the draft law on the promotion of electricity generation in offshore wind farms of 23 December 2019, whose author was the Minister of State Assets. The draft provided for the introduction of a ‘tax on offshore wind farms’, the subject of

which would be conducting economic activity in the field of electricity generation from an offshore wind farm. The tax base was to be the installed electrical capacity of the offshore wind farm resulting from the concession, while the tax rate was to be set as a lump sum of PLN 23,000 per 1 MW. The tax was to constitute revenue for the state budget, and the competent tax authorities were to be the tax administration authorities with respect to the place of residence of the taxpayer [44].

However, a slightly different concept of taxing offshore wind farms was submitted to the Polish Parliament. The government draft act on the promotion of electricity generation at offshore wind farms, which was finally submitted to Polish Parliament and passed into law on 17 December 2020, adopted the introduction of a concession fee paid by an energy company performing economic activity with respect to electricity generation from an offshore wind farm (instead of a special tax on offshore wind farms). The new concession fee was regulated by the provisions of the Energy Law of 10 April 1997 [45], as modified by the Act of 17 December 2020. The use of the name ‘fee’ (Polish: ‘opłata’) should be treated as a typical political action. The Polish legislator quite consistently tries to avoid the word ‘tax’ in new legal regulations that in fact impose taxes on individuals.

It is worth stressing that this fee took over the majority of solutions (such as a special tax dedicated to offshore wind farms), which at an earlier legislative stage were included in the draft regulation of the tax on offshore wind farms. Thus, it is actually another incarnation of this previously proposed tax.

The subject of the concession fee was the performance of economic activity in the field of the production of electric energy from an offshore wind farm. This fee was the sum of the standard concession fee for the electricity-generating company and the fee concerning only the operation of the offshore wind farm. The latter amount would be the sum of the amount being the product of the installed capacity of the offshore wind farm, which results from the concession for the production of electric energy from this offshore wind farm and the appropriate coefficient, here expressed in PLN, as the amount that was established by way of the regulation of the Council of Ministers [46]. The coefficient was set at an amount not exceeding PLN 23,000. It can be said that the fee was similar to the property tax payable on land-based power plant constructions. The justification of the draft of this act clearly indicates that its amount was intended to correspond to the hypothetical amount of the property tax on an offshore wind farm.

6. Nuclear Power Plants

The construction of a nuclear power plant has been attempted for many years in Poland. So far, however, these have been preparatory works. However, there is an appropriate legal regulation in place. It is interesting that in the course of preparing the legal basis for nuclear power development, an effort was made to protect potential investors from the risk related to the unclear rules of nuclear power plant taxation. Here, the decision as to whether only construction parts or the entire structure are subject to 2% taxation has an enormous financial dimension. The solution that was intended to protect the investor was to clarify the definition of a structure in Article 3(3) of the Construction Law. Under the Act of 29 June 2011 on the preparation and implementation of investments in nuclear power facilities and accompanying investments, the term ‘nuclear power plants’ also appeared in a part of the definition ‘as well as construction parts of technical equipment (boilers, industrial furnaces, wind power plants, and other installations)’. Of course, this change was apparent because the phrase ‘and other installations’ would still apply to a nuclear power plant. However, because a similar ‘manoeuvre’ in the case of wind power plants (the addition of the words: ‘wind power plants’ to the definition of structure in the C.L.A.) solved the problem in favour of the taxpayers—perhaps even in the case of nuclear power plants—the legislator counted on a similar effect. In addition, a significant part of valuable technical equipment is located in nuclear power plant buildings; thus, only the building, not the equipment inside, would be taxed.

It is noteworthy that for the first time in Poland, a mechanism for dividing tax revenues from property taxes between municipalities was introduced. In the case of a nuclear power plant, which would generate a gigantic amount of revenue on the scale of a single municipality in Poland, it would be unfair to leave them in a single municipality. After all, this investment would generate costs (e.g., related to the construction of transport infrastructure and its maintenance) in a number of neighbouring municipalities.

The above act has not changed the fact that the property tax will formally constitute the income of the municipality where the nuclear power plant is located. Therefore, it is this municipality that will levy the tax and collect it. However, the municipality where the nuclear power plant or a part of it is located will be obliged to pay to the municipalities bordering it fees equal to 50% of the property tax paid on the power plant [47]. This fee will be divided into equal parts among all municipalities bordering the municipality where the nuclear power plant or part of it is located [48].

7. Water Power Plants

The rules on the taxation of water power plants seem to be quite clear. Namely, all hydrotechnical structures used for energy production constitute structures and should be taxed by property taxes. The issue of the taxation of technical devices used for energy production may raise some doubt. Taking into account the current views of the courts on the taxation of other technical devices (especially after the amendment of the Construction Law, which came into force on 28 June 2015), it should be assumed that only the construction parts of power plants are taxed, excluding, for example, power plant turbines.

However, in the jurisprudence of Polish administrative courts, one can find views that prevent a hydroelectric power plant from being taxed. In the judgement of 11 January 2018 [49], the Supreme Administrative Court reached the conclusion that a hydropower plant is not a structure related to conducting business activity. This stemmed from the fact that the power plant is under the control of the Regional Water Management Board (RWMB), which, in the understanding of Polish law, is a budgetary unit whose main purpose is not to conduct business activity. This results in the statement that as a structure, the power plant is not connected to running a business activity. However, this position is very controversial because the RWMB sells energy generated in a power plant; thus, although not being a typical enterprise, it undertakes activities that constitute an organised profit-making activity that is carried out in its own name and on a continuous basis [50]. The reasoning presented by the court would lead to privileges for entities that are organisational units of the Treasury in relation to entrepreneurs conducting similar activities.

A separate area of dispute between tax authorities and the owners of hydroelectric power plants is the issue of land taxation. Hydroelectric power plants are occasionally related to vast areas of undeveloped land. According to the regulations, if such land is classified as agricultural land or wasteland, it should be subject to property taxes only on the part occupied for business activity. The jurisprudence indicates that the land used by a hydroelectric power plant, for example, a floodplain or a protective zone, should be considered as land occupied for business activity [51]. At the same time, the courts emphasise that for each time it is necessary to determine which specific part of the plot of land should be allocated to floodplain/protective areas, the remaining part of the plot should not be treated as occupied for business activity and, consequently, should not be subject to property tax.

8. Geothermal Power Plants

In the case of geothermal energy equipment, a specific dispute is related to the taxation of wells with property tax. Within the meaning of Polish law, wells are mine workings, that is, they are treated analogous to, for example, the roadways in a hard coal mine. In the judgement of the Constitutional Tribunal of 13 September 2011 cited above, it was resolved that underground mine workings, understood as the space below ground, would not be subject to property tax, but the facilities located in that space may be subject to taxation

if they are structures. Numerous judgements of administrative courts have been passed in Poland regarding this, which were not always resolved in an unambiguous manner in which facilities in mine workings are taxed.

However, a geothermal well is a very specific excavation site, and it is difficult to apply the solutions concerning, for example, copper or hard coal mines directly to a geothermal well. If the principles analogous to those of typical mining excavations were applied, the cost of drilling would not be included in the tax base. The tax could be levied on the equipment in the well, at most, if it could be assigned to one of the names of the structures listed in the Construction Law Act, which would be quite difficult. In the case of typical excavations, the enclosures are treated as 'retaining structures', which are directly listed as structures in Article 3(3) of the Construction Law.

The manner of taxation of the equipment in the well seems to be followed by the Provincial Administrative Court in Szczecin in its judgement of 7 October 2015 [52], in which it accepted taxation of the geothermal well pipework with a Johnson filter, fittings and wellhead. In such a case, however, the question arose whether elements that are difficult to treat as 'built' should not be excluded from the scope of taxation (e.g., the wellhead) [53,54].

9. Photovoltaic Power Plants

From the point of view of the taxation of photovoltaic equipment assets, they should be divided into two groups. The first is photovoltaic cells mounted on buildings and the second is devices mounted on the ground.

In the case of the first objects, they are elements of the building. Their installation does not have any tax consequences because the building is taxed based on its usable area. Some tax authorities have argued that the photovoltaic panel on the roof of a building is a taxed structure because it is a building device that ensures that the building can be used for its intended purpose. This approach cannot be accepted because the panel is not exactly similar to the objects listed in the definition of a construction device: connections and installation devices.

When photovoltaic cells are installed on the ground with the use of the construction elements that support them, typical problems arise in deciding whether the device as a whole or only its construction part is taxable. Fortunately, however, in the case of photovoltaic power plants, the view has become that taxation is applicable only to their construction elements [55].

Currently, one may encounter investments in Poland involving the installation of photovoltaic panels on floats placed on water. From a technical point of view, the construction of a photovoltaic power plant on water is a rational solution; thus, it does not concern tax optimisation. However, these objects should not be treated as architectural objects and, therefore, should not be taxed at all.

A photovoltaic power plant occupies a relatively large area of land, meaning that land taxation is an important factor. From the point of view of Polish law, the land is divided into the so-called registered plots, which are separately included in the land and building register (where they have separate numbers). Problems may arise when only a part of a plot of land is occupied by a power plant. If the site is classified as agricultural or forestry land, only a part of the site that is actually occupied for the facilities of the photovoltaic power plant or that is necessary to operate it will be subject to property taxes.

In practice, there may be some doubts as to how to determine what area of land is actually occupied for business activities. The construction of photovoltaic panels (sometimes mounted on high support poles) causes the area under the panels to remain available, for example, as pasture. Taxpayers seek to argue that as a result, the area is not occupied for business activity because there is parallel agricultural activity (e.g., grazing sheep). For the time being, the courts have not accepted this approach, pointing out that the primary purpose of the land is to place photovoltaic panels on it, and the parallel 'secondary' agricultural activity cannot exclude the land from property taxes [56]. Such a standpoint is hard

to be accepted, especially in the case of photovoltaic panels built high enough above the ground that animals can graze there freely. In practice, such a characteristic is a condition for giving permission for the construction of the photovoltaic power plant.

10. Biogas Plants

In the case of biogas plants, the circumstance affecting the amount of property taxes is whether the vessels used for gas production will be considered buildings or structures. In Poland, there is currently a dispute in the jurisprudence as to whether an object that meets all the characteristics of a building—that is, has a foundation and a roof, is permanently attached to the ground and is separated from the space by means of envelope elements—is always a building. We share the view of the Constitutional Tribunal expressed in the judgement of 13 December 2017 [57]. This is supported by the wording of the provision of Article 1a(1)(2) of the L.T.C.A., according to which, the structure is ‘a construction object (...) which is not a building or a small architectural object.’ Thus, if an object meets the requirements to be considered a building, it is a building and, thus, can no longer be a structure.

In the jurisprudence practice of Polish administrative courts, a contrary view is quite often presented. If an object does not have such elements as windows and doors, it can be considered a structure, despite meeting all the features of the definition of a building. Such a fate also applies to biogas plant tanks, which are treated as structures [58]. Thus, their value, not the usable area, is taxed.

In the case of biogas plants that produce electricity for the sole use of agricultural entities, attempts have been made to convince the tax authorities that they constituted part of this activity. This would mean that they would be structures, albeit not related to running a business. The administrative courts, however, disagreed with this argumentation [59].

11. What Kind of Energy Is the Polish Tax law ‘Fond of’?

It is natural to ask the following: What methods of energy production are preferred in the context of property tax regulation? The answer to this simple question is very complicated for a number of reasons.

First, it should be noted that the value of the tax base for property taxes depends on the historical value (usually not the market value) of the object. Because of the relatively high levels of inflation in Poland from 1990–2010, older facilities will naturally be taxed more leniently. The low-emission power industry in Poland has only begun to develop in recent years. Older power plants are coal-fired power plants. This has allowed them to be more leniently taxed. In addition, the costs of building materials in Poland have been changing over time, for example, because of the boom in freeway construction. There are also significant differences in the construction costs in different regions of the country.

However, in Poland, two identical building structures built at the same time may be taxed at different rates. This is because the tax base is the value constituting the basis for calculating depreciation charges (in income taxes), which includes, *inter alia*, the financing costs calculated up to the date of putting the investment into use. Until recently, credit interest rates in Poland were radically higher than in Western European countries. This clearly meant that the value of the tax base of a power plant built from a loan was higher than that built from the entrepreneur’s own funds.

In practice, the costs of property taxes for wind power plants (which are the most popular in Poland) have varied greatly and ranged from about PLN 20,000 to about PLN 70,000 per 1 MW. It should be noted that the cost of the property tax in 2017 (calculated from the initial value of the entire power plant, not just the construction parts) was three to five times higher for most entrepreneurs compared with other fiscal years. This was linked to a short episode of taxation of the wind power plant as a whole (including the ‘nonbuilt’ part).

Comparing the costs of the taxes on the production of electricity from renewable sources, it is worth likening them to the costs of the property taxes borne by conventional

Polish coal-fired power plants. In the case of conventional power plants, the cost is substantially lower, and in the largest power plants, it amounts to about PLN 15,000 per 1 MW. In the case of lignite-fired power plants, the property tax paid by the mines located in the vicinity of the power plant could be added to this calculation, in which case, the cost of the property tax per 1 MW could even be doubled. In the case of the tax payable by hard coal mines, disputes about the scope of their taxation are still ongoing. Please find below the Table 1 presenting different amount of property tax relevant for different sources of energy.

Table 1. Different amount of property tax relevant for different sources of energy.

Type of Power Plant	Onshore Wind Power Plant	Onshore Wind 2017	Offshore Wind *	Photovoltaic **	Coal-Fired ***
Approximate Amount of Annual Property Tax per 1 MW (PLN)	20,000–70,000	80,000–280,000	23,000	22,000	15,000

Source: authors' own calculations based on data obtained from taxpayers; * In the case of an offshore wind power plant, the equivalent of the property tax is the concession fee set in the lump sum of 23,000 per 1 MW of installed capacity. ** Due to the small number of photovoltaic farms in Poland, the amount of tax on this type of installation is based on investors' estimations, which have not yet been confronted in practice on a large scale with the approach of tax authorities, in particular as regards the construction/non-construction division. *** The tax amount does not include the value of property tax paid by the mine where the coal used in the power plant is extracted.

It should be stressed, however, that the relatively lower taxation of assets used in coal-fired power generation is not the result of any tax preference for it. The general rules for the taxation of all energy facilities are identical (i.e., their construction parts are taxed). Therefore, the energy taxation system is neutral in this respect. The differences in the tax burden are partly because the construction of the tax base was based on the historical value of the facilities.

Theoretically, municipalities might prefer low-carbon energy production on their own, for example, by reducing property tax rates. In practice, however, such actions have not been observed. In particular, energy from renewable sources is usually produced in poorer municipalities, which treat such investments as a source of income.

It is important to note that the increase in property tax on the basis of tax regulations issued at the national level for certain types of low-emission power plants (as in 2017 for wind power plants) did not meet with a positive assessment from many municipalities. They were aware that the taxation at a level that makes the production of electricity from wind unprofitable must result in a decrease in investment in wind farms (and even closure of existing farms), and thus a loss of revenue for municipalities. In fact, the interests of investors and municipalities coincide to a large extent. Both the municipalities and investors care about such a level of taxation that would make renewable energy profitable.

12. Conclusions

The rules for the taxation of electricity generation facilities in Poland are theoretically quite simple. Only the construction parts of these facilities are taxed, not the equipment directly used to generate energy. In practice, though, the application of this principle is complicated and conflicting. This results in a large number of tax decisions being appealed before administrative courts.

In reality, the biggest problems for entrepreneurs arise from the imprecision of tax regulations, making it difficult to be sure that only the built part of a power generation installation is taxed.

This lack of precision is largely due to the fact that the regulations governing property tax are linked to the provisions of the construction law, which in turn is a branch of law that tends to use open-ended, unspecified concepts. The Polish Constitutional Tribunal tried to propose interpretation rules that would make it possible to adapt the definitions of the construction law to the requirements of the tax law in terms of the definiteness of the tax law (Judgment of the Constitutional Tribunal of 13 September 2011 (P 33/09)). However,

the practice of law application shows that 10 years after that judgment of the Constitutional Tribunal, doubts about the scope of property tax remain.

Unfortunately, we are occasionally faced with rapid changes in legal regulations that turn the business plans of entrepreneurs investing in renewable energy upside down. A particularly shocking example can be seen in the changes in the rules of taxation of wind power plants. In practice, they have exposed many entrepreneurs to bankruptcy. Fortunately, the legislator has decided to return to earlier, more favourable tax solutions.

The taxation system for different types of energy production facilities is neutral—the legislator does not favour any one method of energy production. However, the way the tax base in property tax is defined (the historical value of the object from the moment of its construction or purchase by the current taxpayer) means that older objects are usually preferred, which is a result of inflation. The structure of the Polish energy sector results in a tax preference for older coal-fired power plants. Changing the regulation to calculate the tax based on the current value of the plant would remove the de facto advantage of older coal-fired power stations. However, this would mean many practical problems.

The municipalities that charge property taxes could theoretically introduce tax preferences for low-carbon energy. Because of their difficult financial situations, in practice, they do not do this at all. It is also important to note that the low-emission energy sector is developing the most in regions that have so far been less industrialised and, therefore, poorer (where there is cheap, undeveloped land). We cannot expect these usually poor municipalities to support green energy. Municipalities can also influence residents' energy consumption attitudes by introducing legal restrictions. However, there is always a risk that such changes will be overruled by the courts [60].

The main research limits are connected with the uniqueness of the Polish property tax regulation, which makes it hard to compare the Polish regulations with property taxation in other countries. A strong connection between tax and construction law in Poland is a source of numerous problems (described in the study), which do not arise in other jurisdictions. Taxation of the energy sources in Poland and other countries may therefore be compared from the economical point of view, but it is questionable to compare it from the juridical perspective, which is the topic of the article.

The future research regarding the issue presented in this article should be focused on analysing the approach of the Polish legislator and the administrative courts, which changes dynamically.

This study involved the first broad analysis of the taxation of different sources of energy in Poland and may be useful for both scientists who develop research in the area of property taxation in different jurisdictions and for the authors of the tax law provisions.

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