

## THE PROBLEMS OF THE ALLOCATION OF REVENUES FROM SALE OF REAL ESTATE TO THE PROPER SOURCE OF REVENUES FOR THE PURPOSES OF PIT

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**Summary.** The aim of this article is to present the controversy of the allocation of revenues from sale of real estate to the proper source of revenues for the purposes of PIT – to income from paid disposal or to income from business activity. The correct classification of a benefit determines the tax base, revenue recognition timing, tax-deductible costs, principles for settlement of amounts due. The significance of this problem is even greater because the recognition of the sale of real estate as an activity within the taxpayer's business activity affects not only the taxation rules, but also in many cases determines whether such taxation will occur at all. The assumption that the sale of real estate did not occur as part of business activity gives the opportunity to take advantage of the non-taxation preferences in the event of 5 years from the end of the calendar year of purchase or construction. The provisions, however, does not allow for the introduction of a clear and precise border between these two sources of revenues, which in consequence causes numerous disputes between taxpayers and tax authorities.

**Key words:** source of revenue, sale of real estate, business activity

### INTRODUCTION

The Act on Personal Income Tax<sup>1</sup> includes, in Art. 10, the list of so-called sources of revenues. For each of them, separate taxation rules are set out with respect to determining the tax base, revenue recognition timing, manner of payment of advances, tax-deductible costs, principles for settlement of amounts due, documentation duties. The revenue of one type can come only from one source. It is impossible to allocate the same revenue in one part to one source of revenues and in another part to another source. This problem is of significant importance in practice, as losses from the particular source cannot be covered from income from another source. Doubts related to taxation of gains from sale of real estate pertain to their proper allocation to a certain source of revenues. This is because in this case, both Art. 10, sect. 1, point 8, letter a pertaining to revenue from paid disposal, and Art. 10, sect. 1, point 3 pertaining to revenue from the business activity can apply [Bobrus 2012].

In accordance with Art. 10, sect. 1, point 8, letter a of the PIT Act, paid disposal of real estate or parts thereof is a source of revenue if paid disposal does

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<sup>1</sup> Act of 26 July 1991 on Personal Income Tax, Journal of Laws of 2019, item 1387 as amended [henceforth cited as: PIT Act].

not take place within the framework of the business activity and does not occur before the expiry of 5 years from the end of the calendar year of purchase or construction. This provision indicates one of the most important reasons for which the distinction between the two sources of revenue is so important – this is because concluding that in the particular actual status the taxpayer carries out the business activity results in the taxpayer being unable to make use of the great privilege in the form of no taxation after the expiry of a predetermined period. Taking into account real estate prices and the scale of this phenomena, the problem in question is of significant importance in practice.

The number of rulings on this subject reflects the level of uncertainty.<sup>2</sup> Taking into account the scope of the issues discussed and the need to limit the length of the article, it should be noted that the text is not comprehensive. Consequently, the detailed analysis of some issues was limited to the most important matters. First of all, the definition of the business activity in the PIT Act is analysed. Then, the controversies related to the sale of real estate by a natural person, who does not carry out the registered business activity, are presented. In the next section, the issue often causing doubts in practice is examined, i.e. problems related to the sale of premises used both for residential purposes and for the purposes of carrying out the business activity. Then, sale of premises used only for carrying out the business activity is discussed. Conclusions are presented in the last section that summarises these deliberations. The primary research method used in the paper is the dogmatic and legal method.

## 1. NOTION OF THE BUSINESS ACTIVITY IN PIT

As indicated in the introduction, the distinction between sale of real estate performed as part of the business activity and sale of real estate outside business activity is of significant importance [Kaptur 2009, 24]. This is because, it determines the taxation rules (base, rate, time limits). Moreover, losses from the particular source cannot be covered from income from another source. Additionally, the correct allocation of a gain determines not only how the income will be taxed, but also determines whether such taxation will apply.

Concluding that the sale took place within the framework of performance of the business activity excludes the option to avoid taxation after the expiry of 5 years from real estate purchase or construction. As indicated by the Supreme Administrative Court, as a result of the reservation “if paid disposal does not take place within the framework of the performance of the business activity,” introduced in Art. 10, sect. 1, point 8 of the PIT Act, in the context of the allocation of revenues obtained from sale of property to revenues from the source governed by this provision or revenues from non-agricultural business activity (Art. 10, sect.

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<sup>2</sup> There are almost two thousand rulings pertaining just to Art. 10, sect. 1, point 8, letter a of the PIT Act.

1, point 3), it will be of decisive importance to determine whether revenues result from taxpayer's activity that can be attributed the features of non-agricultural business activity under Art. 5a, point 6 of the PIT Act.<sup>3</sup>

Consequently, in order to classify the revenue from sale of real estate to revenues from business activities, it is necessary to primarily examine the taxpayer's activities that the legislator considers business activities.<sup>4</sup> Pursuant to Art. 5a, point 6 of the PIT Act, the following gainful activities are considered business activities or non-agricultural business activities: a) manufacturing, construction, trading, service activities; b) activities involving prospecting, exploration and mining of minerals from deposits; c) activities involving using tangible assets and intangible assets – carried out on somebody's behalf, regardless of their outcome, in an organised and continuous manner, revenues from which are not classified to other revenues from sources listed in Art. 10, sect. 1, points 1, 2 and 4–9 of the PIT Act.

For tax purposes, the legislator adopted a universal definition of non-agricultural business activity.<sup>5</sup> In order to obtain revenues from this source, the taxpayer does not need to be an entrepreneur<sup>6</sup> [Bartosiewicz and Kubacki 2015]. Carrying out a business activity is an objective concept, not dependent on the taxpayer's beliefs. The primary issue is whether a specific *modus operandi* of the taxpayer allows recognising their activity as a business activity. However, as emphasised in the doctrine, conclusions in this respect are based exclusively on evidence and have little to do with the interpretation of the law [Brzeziński 2015, 14–15].

The introduction of the definition of lawful "business activity" in the PIT Act has not definitely addressed problems related to its application. This is because the question is: when does the sale of real estate by a natural person, who is not an entrepreneur and sells real estate that is not classified as a tangible asset, bears the risk of being recognised by tax authorities as made within the framework of the business activity?

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<sup>3</sup> Judgement of the Supreme Administrative Court of 31 August 2018, II FSK 489/18, LEX no. 2566030.

<sup>4</sup> At this point it is necessary to note too that the business activity within the meaning of the VAT Act is not identical to non-agricultural business activity within the meaning of the Act on Personal Income Tax. In particular, it is possible to carry out the business activity within the meaning of the VAT Act (and to be a VAT payer) and not to generate any revenues from non-agricultural business activity within the meaning of the Act on Personal Income Tax.

<sup>5</sup> Provisions of Art. 5a of the PIT Act were introduced to the Act by the Act of 27 July 2002 on amendments to the Act on Personal Income Tax and on amendments to certain other acts (Journal of Laws No. 141, item 1182 as amended). In accordance with the initial wording of this article, the notion of non-agricultural business activity represented the business activity within the meaning of the Tax Ordinance, except for the activity referred to in Art. 13 (activity performed personally). The current wording of this provision was introduced to the Act by the Act of 16 November 2006 on amendments to the Act on Personal Income Tax and on amendments to certain other acts (Journal of Laws No. 217, item 1588 as amended).

<sup>6</sup> The classification of the particular activity as the business activity cannot be determined exclusively or primarily by formal features of the activity. Even the fact that the activity is not entered into relevant registers is irrelevant.

## 2. SALE OF REAL ESTATE BY A NATURAL PERSON WHO DOES NOT CARRY OUT REGISTERED BUSINESS ACTIVITIES

The practice shows that the sale of more than one real estate may result in the risk of recognising that the sale took place within the framework of the business activity, and thus, recognising that the taxpayer cannot take advantage of the lack of tax if the sale took place after the expiry of 5 years from the purchase / construction.

For instance – how many plots of land should be sold in order to recognise such activities as “continuous,” will connecting the plot of land to utilities and publishing the announcement on the sale thereof prove “organised” activity? The wording of regulations alone does not provide explicit answers to questions asked in such a way. In this context, it is difficult to overestimate the importance of the guidance drawn from judicial decisions pertaining to the issue in question.

It is worthwhile to mention several judgements referring to the elements of transactions involving real estate sale, which courts recognise as decisive for concluding that the business activity is carried out, taking into account the particular facts of the case. As emphasised by the Supreme Administrative Court,<sup>7</sup> a simple list of norms included in Art. 10, sect. 1, point 3 and 8 together with provisions of Art. 5a, point 6 of the PIT Act does allow developing a universal model that would explicitly determine the manner of distinguishing, in a consistent way, sale classified as related to non-agricultural business activity from paid disposal. Separating plots of land from single real estate, also requiring prior obtaining relevant administrative decisions or ensuring proper access thereto, does not go beyond the activities considered the ordinary management of one’s own property matters.

In another judgement,<sup>8</sup> the court stated that Art. 5a, point 6 of the PIT Act, which defines non-agricultural business activity for the purposes of this Act, includes a catalogue of necessary features of this activity, such as: continuity, organised character, being carried out on one’s own behalf, for own or someone else’s account; administrative judicial decisions also clarify these features as running the business activity with the consideration of economic balance, focusing on profit. On the other hand, the taxpayer’s intent to carry out a certain type of activity is not such a necessary feature. Objectively verifiable and objectively existing actual circumstances decide whether the taxpayer’s activity is classified as the business activity or managing private property, rather than the taxpayer’s initial intent, especially arising from declarations made post-factum. In the case providing a basis for the judgement, during the period of thirteen years, the taxpayer concluded several dozen transactions of purchase and sale of real estate. It is

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<sup>7</sup> Judgement of the Supreme Administrative Court of 4 April 2019, II FSK 1100/17, LEX no. 2652916.

<sup>8</sup> Judgement of the Supreme Administrative Court of 24 July 2019, II FSK 2703/17, LEX no. 2722337.

worthwhile to emphasise that in the judgement in question, the Supreme Administrative Court noted that in order to conclude whether the taxpayer carries out the business activity, it is insufficient to verify the particular year examined by the authorities (in this case, only two transactions were concluded in that year). Consequently, it allows assuming that when identifying the source of revenues, to which the gain from real estate sale should be allocated, all the circumstances that could support the process of the revenue allocation should be taken into account. It is difficult not to agree with the conclusion that sale shows features of the business activity when the taxpayer concluded more than twenty transactions of sale of real estates that the taxpayer had purchased and resold after a few months or 2–3 years (as in the case in question), achieving the price at least 2 times higher. This is because in this case a certain mode of operation can be identified, resale intent occurs already at the purchase stage, activities taken with respect to real estate are aimed at maximising its value.

The existence of the relationship between revenues obtained and the source referred to in Art. 10, sect. 1, point 3 of the PIT Act may be confirmed by an overall set of interrelated taxpayer's activities, which are repeated, organised, and consistently lead to a profit, especially involving repeated purchases of real estate, their preparation for sale and repeated sale of properly prepared real estates in order to generate a profit.<sup>9</sup>

It should be emphasised that each case should be analysed on an individual basis, taking into account its specific circumstances. However, the existing broad definition of the business activity will support recognising a majority of types of gainful activities, the functions and subject of which is organised to some degree, as business activities within the meaning of the PIT Act. It is worthwhile to emphasise that carrying out a business activity is an objective concept, not dependent on the taxpayer's beliefs. Even the fact that the activity is not entered into relevant registers is irrelevant.<sup>10</sup>

In accordance with the judgement of the Voivodeship Administrative Court in Bydgoszcz,<sup>11</sup> the conclusion whether the particular entity carries out the business activity depends on determining whether the activity satisfies all conditions listed in Art. 5b of the PIT Act.<sup>12</sup> This is because only if all these conditions are met,

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<sup>9</sup> Judgement of the Voivodeship Administrative Court in Łódź of 18 April 2019, I SA/Łd 805/18, LEX no. 2671339.

<sup>10</sup> See: Judgement of the Supreme Administrative Court of 12 May 1994, SA/Łd 365/93, POP 1997, vol. 2, item 42, and judgement of the Supreme Administrative Court of 1 April 2010, II FSK 1930/08, LEX no. 570255, in which the court emphasised that the classification of the activity of the particular type as the business activity cannot be determined exclusively by formal features thereof, such as the entry into the register.

<sup>11</sup> Judgement of the Voivodeship Administrative Court in Bydgoszcz of 26 September 2007, I SA/Bd 512/07, <http://www.orzeczenia.nsa.gov.pl> [accessed: 3.02.2020].

<sup>12</sup> In the case subject to this judgement, the taxpayer purchased 8 undeveloped real estates and 5 interests in real estates, in 2004 concluded preliminary sale agreements for 4 real estates and 1 interest in real estate that were finalised in 2005, whereas in 2003, 12 transactions of sale of undeveloped real estates were concluded. Taking into account the circumstances referred to by tax autho-

the taxpayer's activity can be considered the business activity. In this case, the taxpayer purchased 8 undeveloped real estates and 5 interests in real estates, in 2004 concluded preliminary sale agreements for 4 real estates and 1 interest in real estate that were finalised in 2005, whereas in 2003, 12 transactions of sale of undeveloped real estates were concluded. Taking into account the circumstances referred to by tax authorities, i.e. the scale of agreements concluded, their frequency, as well as the selection of real estates purchased (real estate attractive from an economic point of view: land designated for residential buildings, express roads, service premises), the assessment made by the authorities and the conclusion that the legal nature of these activities satisfies the conditions included in Art. 5a, point 6 of the PIT Act do not raise any doubts.

It is difficult to identify objective criteria for concluding that it is impossible to reclassify revenues from sale of real estate to revenues from the business activity.<sup>13</sup> Some examples include: holding of real estate for several years, its acquisition by inheritance or donation, using the funds to meet life needs, i.e. children education, travels.

At this point, it is worthwhile to refer to the position of the Director of the National Tax Information that indicates a restrictive and pro-fiscal understanding of the notion of business activity by tax authorities. In the motion filed to the authority issuing rulings, the taxpayer stated that he had purchased real estate 20 years ago, intended to divide it into ten smaller building plots and was going to sell each these building plots. He had already applied to the community authorities for the access road arrangement. Additionally, he was going to take steps aimed at connecting these plots of land to the power supply grid and the water supply network. In order to target the purchasers, he was going to public announcements on sale of land in the press and on the Internet. The taxpayer stated that the agricultural land in question had been and was cultivated, and the taxpayer had never concluded transactions involving the purchase and paid disposal of real estate, whereas the plot of land subject to the motion had not been even rented, leased or the subject to any other similar legal act. The taxpayer noted that he did not carry out the business activity either. In the note of 7 February 2019, the Director of the National Tax Information<sup>14</sup> concluded that meeting three conditions decides on the classification of the particular activity of the taxpayer as conducted

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rities, i.e. the scale of agreements concluded, their frequency, as well as the selection of real estates purchased (real estate attractive from an economic point of view: land designated for residential buildings, express roads, service premises), the Voivodeship Administrative Court without any doubts concluded that the legal nature of these activities satisfies the conditions included in Art. 5a, point 6 of the PIT Act.

<sup>13</sup> This issue was subject to several individual rulings (e.g. ruling issued by the Director of the Tax Chamber in Poznań of 22 May 2007, A1-D-415-26/2007, and ruling issued by the Director of the Tax Chamber in Olsztyn of 21 December 2007, PBF/4117-005-19/07), as well as judgements (e.g. judgement of the Voivodeship Administrative Court in Olsztyn of 25 June 2008, ISA/OI 198/08, LEX no. 395271).

<sup>14</sup> Letter of 7 February 2019 from the Director of the National Tax Information, 0115-KDIT2-1.4011.434.2018.4.KK.

within the framework of non-agricultural business activity: the activity is aimed at generating a profit, is carried out in an organised and continuous manner, on one's own behalf, for own or someone else's account. Taking into account the taxpayer's activities aimed at sale of real estate, such as, *inter alia*, connecting the plots of land to utilities, searching for purchasers by publishing announcements in the press and on the Internet, the Director of the National Tax Information concluded that all three conditions are met. The Director of the National Tax Information has come to the conclusion that the description of the situation indicated that the taxpayer would carry out professional activities aimed at targeting purchasers. In order to obtain revenues from the business activity, the taxpayer does not need to have the formal status of an entrepreneur, the particular activity does not need to be entered into a register as required by separate regulations pertaining to formal requirements that should be met by a person carrying out the business activity. When concluding that the applicant is an entrepreneur professionally selling plots of land, the Director of the National Tax Information established that both planned transactions of sale of plots of land and the intent to conclude other transactions of this type, due to their nature, are not unintended and incidental [Nogacki 2019].

The aforementioned document and its justification allow accepting the hypothesis that in the particular case, the taxpayer, who is not an entrepreneur, by selling even a limited number of plots of land, acts as an entrepreneur and his income should be subject to tax in the same way as income from the business activity. The authority has assessed just one aspect of the taxpayer's behaviour – number of plots of land sold. Would the authority also conclude that the taxpayer carries out the business activity if the taxpayer did not decide to divide the land, with other elements of the activity being the same?

At this point, it is worthwhile to refer to the judgement of the Court of Justice of the European Union,<sup>15</sup> which was issued with respect to VAT, but can also be useful in relation to PIT.<sup>16</sup> The Court of Justice pointed out that the number and scale of the sales are not in themselves decisive. Similarly, the fact that, prior to the disposal, the party concerned proceeded to divide the land into plots in order to obtain a higher overall price from that land is not, in itself, decisive, and nor is the period of time over which those transactions take place or the level of income derived therefrom. Indeed, all those circumstances could fall within the scope of the management of the personal property of the party concerned. That is not however the case where the party concerned takes active steps to market property by mobilising resources similar to those deployed by a producer, a trader or a person supplying services. Such active steps may consist, *inter alia*, in the carrying out on that land of preparatory work to make development possible, and the deploy-

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<sup>15</sup> Judgement of the Court of Justice of the European Union of 15 September 2011, C-180/10 and C-181/10.

<sup>16</sup> Similar arguments are presented with respect to the PIT Act, *inter alia*, in the judgement of the Voivodeship Administrative Court in Łódź of 7 March 2017, I SA/Łd 16/17, LEX no. 2254343.

ment of proven marketing measures. Since those initiatives do not normally fall within the scope of the management of personal property, the supply of land designated for development in such a situation cannot be regarded as the mere exercise of the right of ownership by its holder. The judgement of the CJEU refers to the decisive aspect of the assessment of the taxpayer's behaviour – the element that should be taken into account when classifying the revenue from sale of real estate – professional character of activities taken, circumstances causing that the particular transaction resembles the activities of a real estate agency. At the same time, the assessment of the particular actual status should be always comprehensive and objective.

### 3. SALE OF PREMISES USED BOTH FOR RESIDENTIAL PURPOSES AND FOR THE PURPOSES OF CARRYING OUT THE BUSINESS ACTIVITY

In practice, private flats, not entered into the register of fixed assets, are often used for the purposes related to the business activity [Krywan 2020]. Such a solution is very convenient in many respects, and the most importantly – it does not generate additional costs related to the potential rental of premises. In the case of the decision to sell such a flat, doubts occur whether the revenue should be classified as revenue from the business activity or from paid disposal. Does using one room in the flat for meetings with clients by a legal advisor, medical practice by a physician or for the purposes of professional dressmaking activity mean that in the case of sale, the flat will be subject to tax in accordance with principles applicable to the business activity?

First of all, it should be emphasised that the legislator treats the sale of residential premises in a special way. In such a situation, different rules will apply than in the case of e.g. sale of plots of land. In Art. 14, sect. 2, point 1, letter a of the PIT Act, the legislator included detailed regulations on revenues from the business activity, and decided that revenues from the business activity include revenues from paid disposal of assets classified as fixed assets or intangible assets subject to registration in the register of fixed assets and intangible assets, used for the purposes related to the business activity. However, this provision should be applied subject to Art. 14, sect. 2c of the PIT Act, in accordance to which the aforementioned revenues do not include revenues from paid disposal of: residential building, a part of or an interest in such a building, residential premises constituting a separate property or an interest therein, land or an interest in the land, or the perpetual usufruct right or an interest therein related to such a building or premises, cooperative ownership right to residential premises or an interest therein, and the right to a single-family house in a housing cooperative or an interest therein, used for the purposes related to the business activity and in special sections of agricultural production.

Art. 14, sect. 2c of the PIT Act stipulates that in the case of the aforementioned real estates and property rights used for the purposes related to the business activity carried out, provisions of Art. 30e of the PIT Act should be followed. In accordance with Art. 30e, sect. 1, income tax on income from paid disposal of real estates and rights listed in Art. 10, sect. 1, point 8, letters a–c amounts to 19% of the tax base. Appropriate application of Art. 30e of the PIT Act leads to the conclusion that since in accordance with Art. 14, sect. 2c of the PIT Act the sale of these items does not generate the revenue from the business activity, this revenue should be allocated to another source of revenue, i.e. to sources listed in Art. 10, sect. 1, point 8 of the PIT Act, to which Art. 30e of the PIT Act refers. At the same time, in accordance with this provision, paid disposal of real estate or parts thereof and an interest in real estate is a source of revenue if paid disposal does not take place within the framework of the business activity and does not occur before the expiry of 5 years from the end of the calendar year of purchase.

The application of the aforementioned provision is confirmed by Art. 10, sect. 3 of the PIT Act, in accordance to which provisions of sect. 1, point 8 apply to paid disposal of, *inter alia*, residential premises constituting a separate property or an interest therein used for the purposes related to the business activity. Taking into account the above, the revenue from paid disposal of residential premises constituting a separate property or an interest therein, used for the purposes related to the business activity, is recognised only if disposal takes place before the expiry of 5 years from the end of the calendar year of their purchase.

The aforementioned position is accepted in judicial decisions. In the judgement of the Voivodeship Administrative Court in Wrocław,<sup>17</sup> it is stipulated that the legislator explicitly decided that revenues from paid disposal of the residential building and related land are not included in revenues from the business activity. The aforementioned allocation is not affected by the fact that the residential real estate was entered into the register of fixed assets and intangible assets. The aforementioned deliberations lead to the conclusion that sale of the residential building and related land does not generate revenues from the business activity, but the revenue from the source referred to in Art. 10, sect. 1, point 8 of the PIT Act, i.e. revenue from paid disposal of real estate.

In the judgement of 6 March 2012,<sup>18</sup> the Voivodeship Administrative Court in Warsaw confirmed that revenues from paid disposal of residential real estate would always be allocated to the source of revenues referred to in Art. 10, sect. 1, point 8 of the PIT Act.

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<sup>17</sup> Judgement of the Voivodeship Administrative Court in Wrocław of 19 March 2014, I SA/Wr 75/14, LEX no. 1568199.

<sup>18</sup> Judgement of the Voivodeship Administrative Court in Warsaw of 6 March 2012, III SA/Wa 1429/11, LEX no. 1368049.

#### 4. SALE OF RESIDENTIAL PREMISES USED ONLY FOR THE PURPOSES OF THE BUSINESS ACTIVITY

In the light of the foregoing, the only question to be resolved is what happens when the taxpayer – entrepreneur sells residential premises used only for the purposes of the business activity. It seems that the answer to such a question stems from the aforementioned provisions – Art. 14, sect. 2c of the PIT Act and Art. 10, sect. 3 of the PIT Act. This is because no revenue from the business activity will be generated from sale of residential premises that are not used by the taxpayer for residential purposes, and are used to carry out the business activity.

This opinion is shared by the Director of the National Tax Information. In the individual ruling of 29 January 2019,<sup>19</sup> it was stipulated that paid disposal of the residential building would not generate revenue from the business activity, referred to in Art. 14 of the PIT Act, due to the exception (pertaining to residential buildings) included in the aforementioned Art. 14, sect. 2c of the aforementioned Act. Tax consequences of this sale should be evaluated on grounds of Art. 10, sect. 1, point 8, letter a of the PIT Act. Consequently, in the case of sale of residential real estate, revenue from the source referred to in Art. 10, sect. 1, point 8, letter a of the aforementioned Act is recognised when sale takes place before the expiry of five years from the end of the calendar year of purchase or construction. It is not an isolated opinion. In the individual ruling of 14 July 2017,<sup>20</sup> it was stipulated that the amount received from sale of residential premises would not be recognised as the revenue from non-agricultural business activity. Consequently, this sale should be allocated to the source of revenue referred to in Art. 10, sect. 1, point 8 of the PIT Act. As a result, within the meaning of the PIT Act, no revenue will result from disposal of residential premises if sale takes place after the expiry of 5 years from the end of the calendar year of purchase thereof.

The Supreme Administrative Court expressed the similar opinion in the judgement<sup>21</sup> [Borkowski 2018, 114–20] in which the court concluded that even if the taxpayer used real estate for the purposes of individual business activity by renting out residential premises, disposal of such premises would not be considered the business activity.<sup>22</sup>

Additionally, it is worthwhile to note that the situation in the case of sale of residential premises by a real estate agency would be different. This is because in this case sale of a flat should be considered sale of “a commodity,” and as a result, the revenue will have to be classified to the revenue from the business activity. This is because, as emphasised in judicial decisions, it is necessary to distinguish

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<sup>19</sup> 0114-KDIP3-1.4011.616.2018.1.MT.

<sup>20</sup> 0112-KDIL3-3.4011.82.2017.MC.

<sup>21</sup> Judgement of the Supreme Administrative Court of 14 November 2017, II FSK 2728/15, LEX no. 2411799.

<sup>22</sup> Similar position is presented in the individual ruling issued by the Director of the National Tax Information of 20 May 2019, 0114-KDIP3-1.4011.260.2019.1.EC.

sale within the framework of the business activity, where these commodities are only the subject of the business activity carried out (construction and sale), from the situation where they are used only for the purposes related to the business activity, which means not only that they have to be fixed assets, but also have to be entered into the register of fixed assets. This means that in the first case, it is impossible to recognise paid disposal as the source of revenues referred to in Art. 10, sect. 1, point 8, letters a–d of the PIT Act, while in the second case – it is possible subject to certain conditions.<sup>23</sup>

## CONCLUSIONS

The PIT Act came into force almost thirty years ago, but the problem of the allocation of the revenue from sale of real estate to the proper source of revenues still raises controversy. Lack of explicit rules in this respect causes continuous uncertainty of taxpayers. Persons obtaining revenues from sources other than non-agricultural business can be concerned that their revenues would be classified as revenues from the business activity, while taxpayers receiving revenues from the business activity cannot be sure whether their revenues would not be allocated to other sources.

Having this in mind, is it possible to precisely distinguish particular sources of revenues in a way eliminating any doubts? For instance, it is worthwhile to consider the postulate to give priority to the “business activity” source [Jamroży 2014, 7–9]. In the context of sale of real estate, such a solution would not address all problems, because would it be justified to assume that the sale of two plots of land constitutes the business activity? It seems that the only solution is an individual assessment of the moment when the taxpayer’s behaviour acquires professional features of the business activity – for instance whether the taxpayer purchased real estate with an intent to resell it, whether repeating transactions can be considered organized, or whether the taxpayer uses the funds obtained in such a way to buy more properties. It is worthwhile to consider whether the actions taken by the taxpayer, who is not an entrepreneur, do not resemble typical activities of a real estate agency, taking into account their complexity. It is worth emphasizing that the *in dubio pro tributario* principle should be taken into account when assessing specific cases.

There is also a possibility to consider the suggestion contained in the doctrine to propose to the Minister of Finance arranging a national contest for the definition of the business activity and select the best one from among the definitions submitted [Brzeziński 2015, 14–15]. Taking into account the number of positions presented until now, it is difficult to assume that the golden mean would be found

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<sup>23</sup> Judgement of the Supreme Administrative Court of 14 November 2017, II FSK 2728/15, LEX no. 2411799.

in this way, but it would certainly prompt reflection on the general condition of the tax law.

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#### PROBLEMY ZWIĄZANE Z ZAKWALIFIKOWANIEM PRZYCHODÓW ZE SPRZEDAŻY NIERUCHOMOŚCI DO WŁAŚCIWEGO ŹRÓDŁA PRZYCHODÓW W PIT

**Streszczenie.** Celem niniejszego artykułu jest przedstawienie kontrowersji związanych z zaliczeniem dochodu ze sprzedaży nieruchomości do właściwego źródła przychodu w podatku dochodowym od osób fizycznych – do przychodu z odpłatnego zbycia lub do przychodu z działalności gospodarczej. Właściwe zakwalifikowanie danego przysporzenia decyduje o zasadach ustalania podstawy opodatkowania, momencie powstania przychodu, kosztach podatkowych, zasadach regulowania należności. Znaczenie tego problemu jest tym większe, że uznanie zbycia nieruchomości za czynność w ramach działalności gospodarczej podatnika wpływa nie tylko na zasady opodatkowania, ale również w wielu przypadkach przesądza czy do takiego opodatkowania w ogóle dojdzie. Przyjęcie bowiem, iż sprzedaż nieruchomości nie wystąpiła w ramach działalności gospodarczej daje możliwość skorzystania z preferencji związanej z brakiem opodatkowania w sytuacji upływu 5 lat od nabycia lub wybudowania nieruchomości. Treść przepisów nie pozwala jednakże na wprowadzenie jednoznacznej i precyzyjnej granicy pomiędzy tymi dwoma źródłami przychodu, co w konsekwencji powoduje liczne spory podatkowników z organami podatkowymi.

**Słowa kluczowe:** źródła przychodu, sprzedaż nieruchomości, działalność gospodarcza

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