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The right of municipalities to differentiate market charge rates as an implementation of the local tax policy in Poland[1]

Prawo gminy do różnicowania stawek opłaty targowej jako realizacja lokalnej polityki podatkowej w Polsce[2]

Abstract. Within the scope of the granted fiscal sovereignty, municipalities in Poland have the right to determine the amount of local taxes and charges within the limits specified in the statute. As the law currently stands, the provisions of

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the Act of 12 January 1991 on Local Taxes and Charges do not differentiate the rate of market charges, nor do they indicate the criteria which would constitute clear grounds for differentiation. As a result, doubts arise as far as the admissibility and limits for differentiating market charge rates at different market places in a given municipality, or the form of sale are concerned. The aim of the study is to determine the criteria for the admissibility of differentiation of market charge rates by a municipal council (in particular on various market places located in the municipality) and to indicate the limits for determining the amount of public and legal charges. The authors identify the criteria which allow municipalities to differentiate market charge rates and analyse the problem of the ban on differentiating market charge rates on the basis of the subjective criterion. The authors juxtaposed the issues examined in the study with theses that result from the current jurisprudence of administrative courts.

Keywords: market charge; differentiation of market charge rates; market charge rate.

Streszczenie. Gminy w Polsce w zakresie przyznanego władztwa podatkowego mają prawo ustalania wysokości podatków i opłat lokalnych w granicach określonych w ustawie. W obecnym stanie prawnym przepisy ustawy z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych nie różnicują stawki opłaty targowej ani też nie wskazują kryteriów, które stanowiłyby jasne przesłanki do różnicowania. W związku z tym powstają wątpliwości w przedmiocie dopuszczalności oraz granic różnicowania stawek opłaty targowej na różnych targowiskach na terenie danej gminy czy też w zakresie formy dokonywania sprzedaży. Celem opracowania jest ustalenie kryteriów dopuszczalności różnicowania stawek opłaty targowej przez radę gminy (w szczególności na różnych targowiskach położonych na terenie gminy) oraz wskazanie granic ustalania wysokości obciążenia publicznoprawnego. Autorzy wyodrębniają kryteria, które pozwalają gminom na różnicowanie stawek opłaty targowej, oraz analizują problem zakazu różnicowania stawek opłaty targowej ze względu na kryterium podmiotowe. Badana problematyka została przez autorów zestawiona z tezami wynikającymi z aktualnego orzecznictwa sądów administracyjnych.

Słowa kluczowe: opłata targowa; różnicowanie stawek opłaty targowej; stawka opłaty targowej.

1. Introduction

The existing powers regarding the fiscal sovereignty of municipalities have a source in Article 168 of the Constitution of the Republic of Poland of 2 April 1997[3], in which the legislator states that "To the extent established by statute, units of local government shall have the right to set the level of local taxes and charges". The right to determine the amount of public levies[4] is first of all identified with the power to set the rates of local taxes and charges in the process of creating tax law. This view is confirmed by Article 9(3) of the European Charter of Local Self-Government of 15 October 1985[5], which states that "at least part of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate". Municipalities, in the extent specified by the law, decide independently on the level of local taxes and charges, and the basic tool to achieve this goal is the power to shape the rates of public levies[6].

However, the literature[7] favours a different view that "the right resulting from Article 168 of the Constitution should not be related only to deciding on the amount of taxes in the process of law-making". Shaping tax rates by way of establishing local laws is not the only way to decide on the amount of the tax burden. The amount of tax or charge may also be shaped in the process of applying the provisions of the tax law, e.g. in the area of granting repayment reliefs, where the tax authority issues an ap-

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3 Dz.U. [Polish Journal of Laws] of 1997, No 78, poz. [item] 483 with subsequent amendments.

4 In compliance with Art 5(2)(1) of the Public Finance Act of 27 August 2009 (consolidated text: Dz.U. of 2017, poz. 2077 with subsequent amendments) public levies include: "taxes, contributions, fees, payments from profits of state enterprises and sole shareholder companies of the State Treasury and state banks, as well as other cash benefits the obligation to pay which to the State, local government units, state special purpose funds and other units of the public finance sector results from separate acts".

5 Dz.U. of 1994 No 124, poz. 607.

6 M. Serowaniec [in:] Z. Witkowski, A. Bień-Kacała (ed.), *Prawo konstytucyjne*, Toruń 2015, p. 556; M. Popławski (ed.), *Stanowienie i stosowanie prawa podatkowego w gminach*, Białystok 2007, p. 25 et seq.

7 See: L. Etel, *O potrzebie zmian w lokalnym prawie podatkowym – cz. 1*, „Finanse Komunalne" 2011 No 11, pp. 5–19; L. Etel, R. Dowgier, *Podatki i opłaty lokalne. Czas na zmiany*, Białystok 2013, p. 184.

propriate decision of an individual and specific nature[8]. B. Banaszak explicitly states that not only do local taxes and charges play a fiscal role, but also enable local government units to turn them into an instrument for conducting their own development policy in their area[9].

The aim of the study is to determine the criteria for the admissibility of differentiation of market charge rates[10] by the municipal council and to indicate the limits for determining the amount of public and legal charges. As the law currently stands, the provisions of the Act of 12 January 1991 on Local Taxes and Charges[11] do not differentiate the rates of the market charge. The Act does not specify the criteria which would constitute clear grounds for differentiating the amount of such a benefit either. The authors will try to identify the criteria that allow municipalities to differentiate market charge rates, analyze the problem of the ban on the differentiation of market charge rates with regard to the subjective criterion and discuss the main objectives of differentiating the amount of tax burdens in this respect. The authors will juxtapose the analyzed issues with the theses resulting from the current jurisprudence of administrative courts in the field of differentiating market charge rates by municipalities. It should be remembered, however, that it is the standard of tax policy in Poland to maintain diversity of tax burdens[12].

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8 L. Etel, *O potrzebie*…, p. 6.

9 B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 759.

10 The market charge is a public levy, in respect of which there is no 'payment', so it is sometimes referred to as a 'quasi-tax' – see: G. Liszewski [in:] C. Kosikowski, J.M. Salachna (ed.), *Finanse samorządowe. 580 pytań i odpowiedzi*, Warszawa 2012, p. 280; P. Borszowski i K. Stelmaszyk indicate that the legislator does not always properly qualify the public levy as a tax or a charge – see. P. Borszowski, K. Stelmaszczyk, *Podatki i opłaty lokalne, podatek rolny, podatek leśny. Komentarz*, Warszawa 2016, p. 312.

11 Dz.U. of 2018, poz. 1445 with subsequent amendments, hereinafter referred to as Local Taxes and Charges Act.

12 B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, p. 219.

2. History of market charge rates differentiation

The first legal act which regulated the system of local taxes in Poland after World War II was the decree of 20 March 1946 on municipal taxes[13], which did not introduce a public levy that would be similar to the present day market charge, into the catalogue of local taxes[14].

The first references to this charge date back to the time when the Local Tax Act of 26 February 1951 entered into force[15]. The Act introduced into the system of general local taxes a compulsory market tax which covered the services provided personally and without the assistance of other persons, by people who traded in market places, market halls, and other similar places of sale, as well as in the streets, squares, and yards, without occupying permanent places of sale for that purpose, persons engaged in house-to-house sale, travelling portrait painters and photographers, as well as persons operating street weighing stations. The rates of this tax were calculated on a daily basis and depended on the type of the service provided[16]. The tax was collected by the boards of municipal and communal national councils competent according to the place where the service subject to the tax was performed and payable in advance for a week, a month or a quarter, which resulted in a reduction of the tax rate by 5, 10 and 20 per cent, respectively[17]. The Local Tax Act of 1951 also provided for an optional ability of the local national councils to introduce, by way of a resolution by national local councils, a market charge for trading in municipal market halls and market places.

Subsequent amendments to the acts that regulated the market tax resulted in changes in the legal structure of this levy in terms of its specificity (the tax became a charge), tax rates, catalogue of exemptions, as well as

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13 Dz.U. of 1947, No 40, poz. 198 with subsequent amendments.

14 Municipal taxes in that period included only: land tax, property tax, tax on premises, tax on public parties, entertainment and shows, tax on mines, tax on residential property. The Decree of 1946 did not introduce local charges.

15 Dz.U. of 1951, No 14, poz. 110 with subsequent amendments.

16 Depending on the type of the service provided the rates of the market tax ranged from 1.50 to 6.00 PLN a day.

17 B. Pahl, *Podatki i opłaty lokalne. Teoria i praktyka*, Warszawa 2017, p. 27.

the nature of its introduction, i.e. from an obligatory introduction of the tax to an option and vice versa.

The Decree of 20 May 1955 on certain local taxes and charges[18], which was in force for the following 20 years, introduced an obligatory charge, rather than an obligatory tax, into the tax system. The market charge was collected at market places from persons who had not concluded a tenancy (lease) agreement with regard to commercial premises (stalls) or an agreement of permanent supply of goods admitted for trade at market places, with the entity in charge of the market place. The market charge could also be collected in other places designated by the boards of national councils (e.g. fairs). Market charge rates were in the form of daily quota rates, and their amount depended on the form of sale, the selling entity and the place of sale[19].

On 1 January 1976, the Act of 19 December 1975 on certain local taxes and charges[20] entered into force, which completely changed the procedure of determining market charge rates. From the day it entered into force, the Act stipulated that it was the Council of Ministers which, by way of a regulation, determined the upper limits of market charge rates, provided that the rate could not exceed the maximum rate specified in the Act[21]. The competence to set the amount of daily rates for market charges was on the part of municipal and communal national councils, which did not have complete freedom in this respect and had to determine such rates so as not to exceed the rate specified in the Act[22].

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18 Dz.U. of 1963, No 16, poz. 87.

19 The Decree divided selling entities into agricultural production cooperatives with their members and other persons; as far as the place of sale was concerned, it was important whether the sales were made in capitals of voivodeships, poviat towns or in other towns. Market charge rates ranged from PLN 1 per day for sales of small quantities of vegetables to PLN 30 per day for sales from a car or a trailer.

20 Dz.U. of 1975, No 45, poz. 229 with subsequent amendments.

21 Article 23 of the Act stated that "the Council of Ministers shall set, by way of a regulation, upper limits of the market charge rate, provided that the daily rate may not exceed PLN 200".

22 B. Pahl, *Podatki*…, p. 35.

The last of the legal acts that regulated local taxes and charges before 1991 was the Act of 14 March 1985 on local taxes and charges[23]. In the light of this Act, the market charge was still obligatory. It was collected on a daily basis from natural persons who made sales at market places, with the exception of persons making sales subject to turnover tax or stamp duty. The amount of daily charge rates, exemptions, and the manner of its collection were determined by basic national councils[24].

3. Market charge rate as one of the structural elements of the charge

As of 1 January 2016, as a result of the amendment to the Act on Local Taxes and Charges[25], the nature of the market charge changed and it became optional, rather than obligatory compared to the previous *status quo*. The legislator thus left the decision to introduce the charge in a given municipality exclusively to the municipal council, as it was the body responsible for establishing provisions of tax law in the form of local legal acts.

The introduction of the market charge in the area of a commune requires the municipal council to adopt an appropriate resolution, in which the law-making body first expresses its intention to introduce the charge and then defines structural elements, which will allow its collection[26]. The legislator indicates these elements in Article 19(1), (2) and (3) of the Local Taxes and Charges Act, which contain the principles for determining and collecting the charge, the date of its payment, the amount of rates, and the power to introduce documentary collection, as well as exemptions from the charge. The adoption of such a resolution by the municipal coun-

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23 Dz.U. of 1985, No 12, poz. 50 with subsequent amendments.

24 B. Pahl, *Podatki*…, p. 38.

25 Pursuant to Article 9(10) of the Act of 25 June 2015 amending the Act on municipal self-government and certain other acts (Dz.U. of 2015, poz. 1045), the wording of Article 15(1) of the Act on local taxes and charges was amended to make the market charge optional.

26 B. Pahl, *Granice różnicowania stawek opłaty targowej przez radę gminy*, „Finanse Komunalne" 2016, No 7–8, pp. 78–84.

cil is a *sine qua non* to exercise the right to collect market charges in a municipality[27].

Interestingly, the provisions of the Local Taxes and Charges Act do not indicate whether a market charge and its structural elements should be introduced in two separate resolutions, or whether it may be covered by a single legal act included in local legal acts[28]. The literature indicates that it is permissible to adopt only one resolution on market charge, or adopt two resolutions: one introducing the charge, and the other determining the principles of determining and collecting, the date of payment, or the amount of market charge rates[29]. The legislator has left the number of resolutions on local charges, including the market charge, to be determined by individual municipal councils[30].

An essential element of the resolution on market charge for the parties to the tax and legal relationship is the determination of the rates of this public levy. The provisions of the Local Taxes and Charges Act in Article 19(1)(a) empower the municipal council to establish the principles for determining and collecting, as well as the dates of payment and the amount of charge rates set out in the Act, indicating the maximum daily rates. The maximum market charge rate is specified in Article 19(1)(a) and may not exceed PLN 778.20 per day in 2019[31]. In 2018, the market charge rate was PLN 765.94 per day[32]. The municipal council determines

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27 W. Morawski, J. Wantoch-Rekowski [in:] W. Morawski (ed.), *Ustawa o podatkach i opłatach lokalnych. Komentarz*, Gdańsk 2013, p. 486.

28 See the judgment of the Voivodeship Court in Opole of 19 July 2007 (I SA/Op 219/07, Central Database of Administrative Courts Decisions – hereinafter: CBOSA). In the judgment, the Court stated that a local legal act is such an act "which is the source of a norm with an abstract value, i.e. addressed to entities defined by type, shaping their legal situations (imposing obligations or establishing specific rights). Moreover, a universally applicable norm must be of a general nature, i.e. one which defines the addressees by indicating their characteristics and not by mentioning their name".

29 K. Gawrońska [in:] L. Etel (ed.), *Opłaty lokalne – komentarz*, Warszawa 2016, pp. 10–11.

30 G. Dudar, L. Etel, S. Presnarowicz, *Podatki i opłaty lokalne. Podatek rolny. Podatek leśny. Komentarz*, Warszawa 2008, p. 421 et seq.

31 The applicable market charge rate stems from the announcement of the Minister of Development and Finance of 25 July 2018 on the upper limits of quota rates of local taxes and charges in 2019 (M.P [Polish Monitor] of 2018, poz. 745).

32 Announcement of the Minister of Development and Finance of 28 July 2017 on the upper limits of quota rates of local taxes and charges in 2018 (M.P. of 2017, poz. 800).

the amount of market charge rates, adopting a relevant resolution, provided that it may not exceed the maximum rates specified in the Act[33].

The current provisions of the Act on local taxes and charges do not differentiate the market charge rate, nor does it contain provisions that would enable the introduction of different rates in a given commune. The legislator does not introduce regulations concerning the criteria or premises constituting the basis for the power to differentiate market charge rates either. Therefore, the following question arises: do municipal councils have the right to introduce different market charge rates at different market places located in the municipality? If so, what criteria allow that?

4. Criteria for admitting differentiation of market charge rates by municipal councils

As far as the resolutions on market charge rates are concerned, a crucial role is played by the issues regarding the power to differentiate the rates of this public levy[34]. A literal analysis of the provision of Article 19(1)(a) may lead to the conclusion that the law-making body of a municipality should determine only one market charge rate applicable in the entire municipality (not exceeding the maximum rate specified in the Act), regardless of the location of the market place, the manner of sale, or the type of the sold products. Nothing could be further from the truth. When carrying out the obligation to determine the amount of the rates, by way of a resolution, the municipality has the right to differentiate them, which is under-

[33] "In principle, the amount of the tax burden is independent of the amount of this revenue. In practice, however, when determining the amount of tax collected on sales at market places, it is differentiated, which may be considered as a way of making taxation dependent on the amount of revenue generated at marketplaces" – see R. Mastalski, *Prawo podatkowe*, Warszawa 2018, p. 607.

[34] B. Pahl argues that "the law-making bodies of a municipality are entitled to differentiate market charge rate" – B. Pahl, *Podatki i opłaty lokalne. Teoria i praktyka*, Warszawa 2017, p. 285; According to A. Olesińska, the municipal council may differentiate the market charge depending on the place of sale – A. Olesińska, *Prawo podatkowe*, Toruń 2004, p. 335.

stood as the power to adopt more than one market charge rate, indicating at the same time specific and acceptable rates, and taking into account: the nature of a given charge and the criteria that will determine when specific charge rates apply[35].

When analysing the admissibility of differentiating market charge rates, according to some tax law theorists[36], one cannot limit oneself only to the literal wording of the provision of Article 19(1)(a) of the Local Taxes and Charges Act, and one should also refer to constitutional norms, and above all to the provisions of Article 168 of the Constitution of the Republic of Poland, which is an expression of the financial independence of local government units. The notion of "determining the amount of local taxes and charges" referred to in the aforementioned provisions should be understood to mean that municipal councils, with respect to the competences granted by the legislator, may differentiate the amount of the market charge rate, and their entitlement is a manifestation of fiscal sovereignty. The introduction of the power to differentiate rates is also supported by the interpretation of the purpose. If it were decided that the municipality did not have such a right, it would be deprived of the ability to shape local tax policy[37].

According to the Supreme Administrative Court in Warsaw in the judgment of 6 May 2015[38] "within the limits established by Article 15 and 19(1)(a) of the Local Taxes and Charges Act, municipalities are free to determine the tax burden and may pursue their own local policy in this respect, including the differentiation of the tax burden", and thus there are no grounds to claim that the legislator deprived the municipal council of

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35 See L. Etel, M. Popławski, *Uchwała w sprawie opłaty targowej a pomoc publiczna*, „Przegląd Podatków Lokalnych i Finansów Samorządowych" 2009 No 2, pp. 25–29; M. Popławski [in:] L. Etel (ed.), *Opłaty lokalne – komentarz*, Warszawa 2016, pp. 161–162.

36 See B. Pahl, *Granice różnicowania stawek opłaty targowej przez radę gminy*, „Finanse Komunalne" 2016 No 7–8, pp. 78–84.

37 See L. Etel, M. Popławski, *Uchwała…*, s. 25–29; "There are no obstacles to differentiating the amount of market charge rates to be charged at different market places in the municipality." – see P. Majka [in:] W. Morawski (ed.), *Ustawa o podatkach i opłatach lokalnych. Komentarz*, Gdańsk 2016, p. 466.

38 II FSK 984/13, CBOSA.

the power to differentiate the market charge depending on, for example, the location of the market place or the entity that manages it. Furthermore, the court points out that by differentiating the rates of local charges, the municipality independently shapes the local tax policy desired at a given time, which affects the local economy and ensures freedom in responding to the immediate collective needs of the local community.

The above opinion was also corroborated by the judgment of the Supreme Administrative Court of 24 August 2016[39], where the court aptly points out that the right of a municipality to determine, and thus differentiate charge rates for particular market places, within the limits established in Article 19(1)(a), is an expression of enabling a local government unit to influence the local economy, by shaping the local tax policy desired at a given time, and so ensuring freedom to respond to the immediate collective needs of the local community. However, the justification of the Supreme Administrative Court judgment indicates that the municipality's right to differentiate market charge rates is not an absolute right, as the municipal council is obliged to act within the limits of the applicable provisions of law, and these limits are contained in particular in Article 19 of the Local Taxes and Charges Act, where the maximum rate of the daily market charge is defined.

The admissibility of differentiating market charge rates was repeatedly supported by other administrative courts in their judgments, which led to the formulation of the view that there were no grounds for assuming that the legislator deprived the municipal council of the power market charge rates depending on the location of the market place, the type of goods sold, and the manner of sale[40]. Administrative courts have very often expressed the opinion that the provisions of the Act on Local Taxes and Charges did not introduce a ban on differentiating market charge rates in relation to different market places run in a given commune either[41]. The

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39 II FSK 1218/16, CBOSA.

40 Judgment of the Voivodeship Administrative Court in Poznań of 10 October 2008, I SA/Po 1036/08, CBOSA.

41 Judgment of the Supreme Administrative Court of 27 July 2017, II FSK 1235/17, CBOSA; Judgment of the Supreme Administrative Court of 24 August 2016, II FSK 1218/16, CBOSA; Judgment of the Supreme Administrative Court of 8 February 2011,

Voivodeship Administrative Court in Szczecin, in a decision of 15 March 2017[42], indicated that "neither the Act on Local Taxes and Charges, nor any other provisions of law contain a ban on differentiating market charge rates to be collected at various market places in a commune".

On the other hand, the Voivodeship Administrative Court in Poznań, in its judgment of 18 November 2015[43], emphasized that "each time certain social and economic considerations determine the differentiation of financial burdens with respect to market charges in a given municipality, this lies within the authority of a municipal council and the scope of its economic and fiscal policy in the commune, as provided by the law. The selection of a given rate for different market places in a commune is an element of the economic policy pursued by a municipal council, and in this respect the municipal council is not restricted by the legislator"[44].

The first criterion that makes it possible to differentiate market charge rates in a given commune is the location of the market place. Pursuant to Article 15(2) of the Local Taxes and Charges Act "a market place is any place where sales are carried out". The Voivodeship Administrative Court in Warsaw, in the judgment of 14 February 2012[45], emphasized that "it does not matter where the sale is carried out and whether it is permanent or occasional. Since it is the sale of goods that determines the collection of the market charge, the authorities are also entitled to collect it for sales carried out outside the designated places".

Therefore, the whole area of a municipality is considered to be a market place if a sale is carried out in a given place[46], yet in order to

II GSK 232/10, CBOSA; Judgment of the Supreme Administrative Court of 18 December 2008, II FSK 1233/07, CBOSA; Judgment of the Voivodeship Administrative Court in Wrocław of 23 March 2011, III SA/Wr 927/10, CBOSA.

42 I SA/Sz 1126/16, CBOSA.

43 III SA/Po 752/15, CBOSA.

44 Similarly in the Judgment of the Supreme Administrative Court of 16 April 2013, II FSK 1615/11, CBOSA.

45 III SA/Wa 1542/11, CBOSA.

46 The obligation to pay the market charge will arise not only when the sales contract is effectively concluded, but also when we put the goods for sale, and the transactions do not take place at all – see: P. Borszowski, *Ustawa o podatkach i opłatach lokalnych. Komentarz*, Warszawa 2011, p. 228.

facilitate the sale process, and to ensure public safety and order, as well as the appropriate infrastructure, municipalities designate special places where sales may be carried out. In practice, it is very common for municipal councils to establish lower market charges, by way of tax resolutions, for places specially designated for trade, than in other parts of the municipality, which are not adapted for sale and trade. Such differentiation of the market charge rate, depending on the place of sale, is undoubtedly acceptable, as it is of an objective nature. It should be noted that the choice of a given rate for different market places in the municipality is an element of the economic policy pursued by the municipal council and in this respect the municipal council is not restricted in any way by the legislator[47]. The municipal council also has the right to differentiate market charge rates within one market place, depending on the sector in which the place of sale is located (such a differentiation of the market charge rate will then be related to the attractiveness of the place for sale from the point of view of both sellers and buyers[48]).

The second criterion applied by municipal councils in tax resolutions concerning the determination and differentiation of market charge rates is the criterion of the form of making sales. This criterion, like the previous ones, is of an objective nature and may be accepted as far as the differentiation of the amount of the market charge rate is concerned. This criterion in no way violates the constitutional principle of equality resulting from Article 32 of the Constitution of the Republic of Poland. In the case of this criterion, the municipal council may differentiate the market charge rate depending on whether the sale is made from specially designated trade stalls, from hand, from a basket, from a car, from a motorcycle, or from an area of land. When differentiating the rate of the market charge rate, on account of the form of sale, the only limitation is the amount of the maximum daily rate specified in the Tax Act[49].

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47 See the Judgment of the Supreme Administrative Court in Warsaw of 16 April 2013, II FSK 1615/11, CBOSA.

48 B. Pahl, *Granice…*, pp. 81–83.

49 Ibidem, p. 83.

As regards the differentiation of market charge rates, taking into account the criterion of the form of sale, the Voivodeship Administrative Court in Łódź presented its opinion in the judgment of 10 January 2014[50]. The court aptly pointed out that fixing market charge rates at different amounts for different forms of offering sales (different vehicles and area for sale) is within the boundaries of statutory authorization for the municipal council contained in Article 19(1)(a) of the Local Taxes and Charges Act. This provision does not introduce any prohibition in this respect, but rather gives the municipal council the freedom to set the public and legal burden at a certain level which does not exceed the daily amount indicated in the Act.

The last criterion, which may also be used in the resolution on the market charge in order to differentiate its rate, is the criterion of the type of goods sold. In such a case, the municipal council, when setting the amount of the charge rate, differentiates it depending on the type of goods sold, e.g. when selling second hand or new items.

It should be emphasized that all the above mentioned criteria for differentiating the market charge rate are based on a single denominator related to the nature of the criterion used, i.e. municipal councils may apply only the objective criterion related to the subject of taxation when shaping the rates of this public levy.

5. The prohibition of differentiating market charge rates on the basis of the subjective criterion

When referring to the criteria used by municipalities for differentiating market charge rates, one should pay attention to the issue of applying the criteria for differentiating the rates. The criteria used to differentiate market charge rates should be objective and never subjective. Therefore, it is unacceptable to shape the provisions of the tax resolution in such a way

[50] SA/Łd 1027/13, CBOSA.

that the local charge rate is directly related to the taxpayer, i.e. it is built with the use of the subjective criterion.

The rates of local taxes and charges should be shaped using the criterion that relates to the object of taxation, and not to the subject of the tax-law relationship (taxpayer)[51]. The application of the subjective criterion in the scope of differentiating the rates of local charges is inconsistent with the Constitution of the Republic of Poland, as it leads to the violation of the constitutional principle of equality of entities under the law resulting from Article 32 of the Constitution. In certain specific situations, in accordance with the judgment of the Constitutional Tribunal of 12 May 1998[52], it is permissible to derogate from the principle of equality under the law, but three conditions must be met, i.e.: "firstly, the derogations are relevant, i.e. they are rationally justified, secondly, they are proportional, i.e. the importance of the purpose of the differentiation must be appropriately proportional to the importance of the interests of the entities that will be violated, thirdly, they are related to other values, principles or constitutional norms that justify different treatment of similar entities".

As it is indicated in the literature, the principle of equality under the law (e.g. tax law) is related both to the sphere of tax law making, and to the sphere of tax law application. Therefore, it is possible to speak of "equality under tax law", i.e. equal application of tax law to all addressees of tax law and "equality in tax law", i.e. establishing such tax law that neither discriminates nor privileges the addressees of tax law norms[53].

In this respect, it can be stated that municipalities have limited fiscal sovereignty. Law-making authorities in municipalities are not entitled to introduce new taxes in their territory, as the constitutional provisions reserve only the form of the act (Article 217 of the Constitution does not

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51 M. Popławski, *Uchwały podatkowe w nadzorze regionalnych izb obrachunkowych*, Warszawa 2011, p. 215.

52 U 17/97, LEX No 32606.

53 A. Gomułowicz, *Aspekty ustrojowe opodatkowania* [in:] T. Dębowska-Romanowska, A. Jankiewicz (ed.), *Konstytucja, ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl*, Warszawa 1999, p. 377.

allow it[54]), and they must not establish subjective exemptions in the local legal acts or differentiate the rates of local taxes and charges, applying a subjective criterion. It should also be emphasized that municipalities have fiscal sovereignty only in the scope of those local taxes and charges which are collected by local tax authorities[55].

6. Objectives of differentiating market charge rates

The main objective of differentiating market charge rates with the use of objective premises in municipalities is the "achievement of a public goal"[56], which may for example include the re-establishment of order in the town, and consequently development of appropriate conditions for trade, both for sellers and buyers. When differentiating market charge rates, municipalities pay particular attention to the need to ensure safety, appropriate infrastructure, and spatial and communicational order[57].

In the judgment of 19 December 2008, the Supreme Administrative Court stated that, within the limits set by Article 15 and Article 19(1)(a) of the Local Taxes and Charges Act, municipalities are free to establish the charges and may pursue their own local policies. It is therefore also permissible to differentiate the charges in order to achieve public objectives, e.g. in the field of architecture[58].

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54 The limits of fiscal sovereignty in municipalities are justified by Article 217 of the Constitution, which states that "the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute".

55 B.Z. Filipiak, *Polityka podatkowa gmin czy realizacja władztwa podatkowego?* [in:] „Zeszyty Naukowe Uniwersytetu Szczecińskiego nr 864, Finanse, Rynki finansowe, Ubezpieczenia" 2015, No 76, vol. 1, Szczecin 2015, pp. 221–230, DOI:10.18276/FRFU.2015.76/1-19.

56 See Judgment of the Voivodeship Administrative Court in Gliwice of 28 April 2011, I SA/Gl 1277/10, CBOSA; Judgment of the Supreme Administrative Court of 16 April 2013, II FSK 1615/11, CBOSA.

57 Similarly in the Judgment of the Supreme Administrative Court of 27 July 2017, II FSK 1235/17, CBOSA.

58 II FSK 1233/07, CBOSA.

7. Conclusion

The Constitution of the Republic of Poland guarantees incomplete and, to a certain extent, limited fiscal sovereignty to the law-making bodies in municipalities. The imposition of new taxes, defining their basic construction elements, determining the category of entities that are exempted from taxes has been reserved by the legislator exclusively for the legislature. The imposition of public burdens takes place in a legal act with the rank of a statute.

Local government units, in accordance with the provisions of the Constitution, have the right only to determine the amount of local taxes and charges within the scope specified in the statute. The limitation of fiscal sovereignty is also visible at the stage of differentiating market charge rates. The municipal council has the right to differentiate market charge rates, but it may not exceed the maximum daily rate specified in the act and may not apply a criterion of a subjective nature in order to differentiate the charge rate. The application of subjective premises would threaten to violate constitutional provisions. The only criterion that can be applied at the stage of shaping market charge rates is the objective criterion. The municipal council may therefore differentiate the rates of this charge, taking into account the location of the place of sale, the form of sale and the type of products sold.

The right to differentiate market charge rates in such a way is an expression of the implementation of the municipality's local tax policy. This right may be derived by analysing inseparably the provision of Article 168 of the Constitution of the Republic of Poland and Article 19(1)(a) of the Local Taxes and Charges Act – these provisions do not contain a ban on the differentiation of market charge rates; on the contrary, they give the competence to establish their amount by applying specific objective criteria. If the legislator introduced such provisions to the Local Taxes and Charges Act that would directly allow the municipal council to differentiate market charge rates, the existing legal doubts in this respect would be eliminated. To sum up, the legislator did not deprive municipal councils of the power to differentiate market charge rates depending on the loca-

tion of the market place, the type of goods sold, and the manner or form of selling products. It introduced only a ban on differentiation of market charge rates with the application of an unacceptable subjective criterion.

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