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Flat-Rate Tax on Ship Construction or Ship Reconstruction as a New Institution of Polish Tax Law

Zryczałtowany podatek w zakresie budowy statku lub przebudowy statku jako nowa instytucja polskiego prawa podatkowego

ABSTRACT

At the beginning of 2017, a new form of taxation was introduced into the Polish tax system – flat-rate tax on ship construction or ship reconstruction. It should be one of the elements of support for the Polish shipbuilding industry. However, this solution has many disadvantages. First and foremost, difficulties arise from the interpretation of the provisions of the act introducing a new tax. In addition, the introduction of a flat-rate tax on ship construction or ship reconstruction resulted in the European Commission launching a verification procedure in terms of its compatibility with the internal market. These circumstances mean that potential taxpayers are suspicious of this form of taxation. It may turn out that this tax will share the tonnage tax fate, which was also introduced as a tax preference, and did not gain popularity among taxpayers at all and thus did not fulfil the function assigned to it. The purpose of the article is to describe the construction elements of the new form of taxation with an indication of the doubts arising in connection with its introduction. The article also attempts to evaluate the presented solutions.

Keywords: tax on ship construction or ship reconstruction; shipbuilding industry; taxpayers

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Data: 15/11/2026 16:02:32

INTRODUCTION

The so-called Shipyard Act[1] came into force on 1 January 2017. The act is supposed to constitute state aid for the shipbuilding and complementary industries. Owing to the difficult situation of the shipbuilding industry, a draft act stipulating financial support instruments for shipyards operating in Poland was prepared. The solutions introduced by the act can be divided into two groups. The first are the fiscal forms of support, and the second are non-fiscal instruments.

The Shipyard Act provides for three types of fiscal support. The first solution is a new taxation form – flat-rate tax on the value of sold production,[2] available as an alternative to income taxes. The second type of support involves the changes within the scope of value added tax. The act provides for the extension of the catalogue of vessels, whose construction and equipping are subject to 0% value added tax rate. The third change aimed at the support of shipbuilding industry comes down to the extension of the possibility to establish special economic zones. The act stipulates the possibility to include the lands where shipbuilding or complimentary production take place and which so far – due to the status of the entity having legal title to the land – could not benefit from this preference.

The admission of the shipbuilding industry to the possibility of benefiting from the regional support as part of a loan for technological innovations is a non-fiscal form of support. This preference is an outcome of the extended scope of the application of instruments stipulated in the Act of 30 May 2008 on certain forms of support for innovative activity.[3]

The purpose of the article is to describe the construction elements of the new form of taxation with an indication of the concerns arising in connection with its introduction. The article also attempts to evaluate the presented solutions.

GENERAL CHARACTERISTICS OF THE TAX ON SHIPBUILDING

The tax on shipbuilding is the youngest institution of the Polish tax law. The act does not clearly indicate the tax collecting entity. The Public Finance Act stipulates that this tax supports the national budget.[4] Its taxpayers are shipping entrepreneurs.

[1] Act of 6 July 2016 on the mobilisation of shipbuilding and complementary industries (consolidated text Journal of Laws 2019, item 471).

[2] Also referred to as the tax on shipbuilding. See www.finanse.mf.gov.pl [access: 22.08.2018].

[3] Consolidated text Journal of Laws 2019, item 1402.

[4] Article 111 point 1 of the Act of 27 August 2009 on public finance (consolidated text Journal of Laws 2019, item 869); A. Błaszko, *Finanse publiczne. Komentarz do ustawy*, Warszawa 2017, pp. 321–322.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

Taxpayers who are subject to this tax can be divided into two groups. The first can be defined as domestic taxpayers.[5] These are natural persons, legal persons, limited joint-stock partnerships, partners in civil law partnerships, general partnerships, and limited partnerships having residence or registered office or management board respectively within the territory of the Republic of Poland.

The second group of taxpayers subject to the tax on shipbuilding is foreign entrepreneurs. These are foreign persons conducting business activity abroad and Polish citizens conducting economic activity abroad. Foreign persons are, however, natural persons who do not have Polish citizenship, legal persons with their registered office abroad, and organisational units that are not legal persons possessing the legal capacity with their registered office abroad.[6] An additional condition to recognise an entity as a taxpayer subject to the tax on shipbuilding is conducting business activity involving ship construction or ship reconstruction in Poland.

Such a definition of a shipping entrepreneur is unclear. The catalogue of taxpayers enumerated by the act is created based on inconsistent criteria. Moreover, the way of indicating the subjective scope of this tax is made additionally complicated by the premise connected with the place of business activity, which occasionally will be investigated twice. Once for verification whether a taxpayer is a foreign person, and the second time to determine the right to choose the discussed tax. Diverse criteria deciding on the possibility to select the tax on shipbuilding are applied for particular taxpayers.

In case of natural persons, the following factors require verification:

– residence,
– citizenship,
– place of business activity,
– type of business activity.

A natural person who is a Polish resident may be a taxpayer of the tax on shipbuilding if he conducts business activity in Poland. If the natural person is not a Polish citizen, he may be regarded as a foreign entrepreneur if he conducts business activity abroad. However, in order to choose the discussed tax, hi is required to conduct business activity in Poland at the same time. It is unclear if a Polish citizen with residence in Poland conducting business activity both abroad and in Poland is a domestic taxpayer or a foreign entrepreneur within the meaning of the provisions concerning the tax on shipbuilding.

[5] For the purpose of this article, this term means entities determined in Article 2 point 4 letters from a to b of the Shipyard Act.

[6] Article 2 para. 1 item 4 letter c of the Shipyard Act and Article 3 point 5 of the Act of 6 March 2018 on the rules for participation of foreign entrepreneurs and other foreign persons in trade on the territory of the Republic of Poland (consolidated text Journal of Laws 2019, item 1079).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

In case of legal persons, the provisions suggest that for determining the subjective scope of the tax on shipbuilding, the following three criteria require analysis:

– place of registered office or management board,
– place of business activity,
– type of business activity.

Such a way of determining the taxpayers subject to the tax on shipbuilding suggests that the analysis of the occurrence of all enumerated factors is necessary to determine the subjective scope of the tax. However, the wording of the consecutive provisions of the act shows that, in fact, the premises determining the possibility to select the tax on shipbuilding are the place and the type of business activity. The remaining factors are necessary only for the appropriate completion of the form involving the declaration on the choice of this tax.[7] However, they have no influence on the right to choose this solution, its amount, and its remaining elements.

Appropriate completion of the statement concerning the choice of the tax on shipbuilding requires indicating the status of a taxable person. In order to fulfil this aim, it is necessary to analyse the previously enumerated factors. Apart from the above-mentioned concerns, establishing a natural person's residence may also cause difficulty. The provisions of civil law define the place of residence as a locality where a natural person resides with an intention to stay there permanently.[8] The Personal Income Tax Act proposes a different definition. In accordance with its wording, the place of residence is determined by the centre of vital interests of the taxpayer and the duration that the taxpayer stays within the territory of the country.[9] The way of determining the place of residence of a natural person for the requirements of the tax on shipbuilding is unknown. The provisions do not include any guidelines within this scope. As a rule, an appropriate determination of residence is decisive for the local jurisdiction of the tax authority. In case of the tax on shipbuilding, the competent authority is the head of the tax office competent for the income tax.[10] Thus, the statement on the choice of tax on shipbuilding should be completed with the place of residence determined based on the provisions of the Personal Income Tax Act. However, this view does not directly result from the wording of the legal act. It is rather dictated by practical reasons.

[7] Appendix no. 1 to the Regulation of the Minister of Development and Finance of 13 January 2017 on the declaration templates on the choice of flat-rate tax on the value of the sold production and declaration on the amount of this tax (Journal of Laws 2017, item 144).

[8] Article 25 of the Act of 23 April 1964 – Civil Code (consolidated text Journal of Laws 2019, item 1145).

[9] Article 3 para. 1a of the Act of 26 July 1991 on personal income tax (consolidated text Journal of Laws 2019, item 1387).

[10] Article 11 of the Shipyard Act.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

Assuming the rationality of the legislator,[11] it should be stated that such a way of indicating the taxpayers subject to the tax on shipbuilding has its justification. Unfortunately, both the wording of statutory regulations and the explanatory memorandum to the draft act do not indicate the reasons underlying such a complex way of defining of taxpayers subject to the discussed tax. It seems that the definition of a shipping entrepreneur could be considerably more transparent. The shipping entrepreneur could be defined as a natural person, legal person, or organizational unit without the legal capacity conducting activity within the territory of the Republic of Poland involving ship building or ship reconstruction. The more so that neither the residence or the place of registered office or management board nor the fact of conducting business activity abroad do not predetermine the possibility to choose the tax on shipbuilding.

The subject of the discussed tax is the revenue obtained from the activity conducted within the territory of the Republic of Poland involving ship building or ship reconstruction.[12] The act defines the ship as a vessel used for sea or inland navigation, with the hull exceeding 5 metres, as well as offshore drilling or production platforms. In order to recognise a vessel as a ship, it is necessary for the vessel to be subject to technical supervision of an organisation that has been acknowledged by the European Commission in accordance with the EU provisions on common rules and standards for ship inspection and survey organisations.[13] It is worth noticing that this definition does not overlap with the definition of a ship included in the provisions on maritime safety,[14] nor in the Maritime Code.[15] It means that the construction or reconstruction of floating equipment can be subject to tax on a preferential basis. Moreover, the construction or reconstruction of objects that are not ships within the scope of the provisions on maritime safety can be subject to the tax on shipbuilding.[16]

Introducing different ways of understanding of synonymous terms may be justified by the specificity of legal solutions, for which they are defined. However, in accordance with the principles of legislative technique, the aim should be to maintain an identical scope of meaning of the same words used in different legal acts.[17]

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[11] L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2004, pp. 35–38.

[12] Article 5 para. 1 of the Shipyard Act.

[13] Article 2 para. 1 point 5 of the Shipyard Act.

[14] Article 5 point 1 of Act of 18 September 2011 on maritime safety (consolidated text Journal of Laws 2019, item 1452).

[15] Article 2 § 1 of the Act of 18 September 2001 – Maritime Code (consolidated text Journal of Laws 2018, item 2175).

[16] For example, fixed offshore drilling platforms.

[17] § 10 of the Regulation of the Prime Minister of 20 June 2002 on "The Principles of Legislative Technique" (consolidated text Journal of Laws 2016, item 283).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

The act also includes the definition of ship construction and ship reconstruction. Ship construction means building a complete, new, and seaworthy ship. Therefore, this definition does not indicate clarified activities whose execution means construction. Instead, it indicates the features of a product resulting from the construction.[18]

The notion of ship reconstruction involves two types of activities. First of all, it involves reconstruction whose value exceeds the level indicated in the act. In that case, the regulations also do not determine which activities may be considered as reconstruction – the decisive criterion is thus the investment value. Secondly, ship reconstruction involves the change of the intended purpose of the ship or the change of the source of propulsion – then, the cost of the introduced changes has no impact on the possibility to select the tax on shipbuilding. An additional condition that has to be fulfilled to benefit from the preferential taxation is when the reconstruction is fully executed by the shipping entrepreneur.[19]

The mentioned definitions having key significance for determining the subjective scope of the tax on shipbuilding are quite general. Therefore, these can become a source of interpretative uncertainties emerging in practice. In order to eliminate the negative tax consequences of the incorrect classification of the business activity by the taxpayer, the act imposes the requirement to obtain a certificate evidencing the construction of a ship and its conclusion and the reconstruction of a ship and its conclusion by the taxpayer in order to benefit from the possibility to select the tax on shipbuilding. The necessity to obtain a certificate does not eliminate the interpretative difficulties that may result from the discussed provisions. The condition to obtain a certificate does not guarantee better protection of the taxpayer's rights – it only transfers the potential dispute about the scope of investment from the tax authority to the public authority appropriate for the issuing of the certificate which is the Director of the Maritime Office or the Director of the Inland Navigation Office. It is all the more reasonable that ascertaining whether the taxpayer's activities constitute ship construction or reconstruction may require specialist knowledge that may exceed the competences of tax authorities. The refusal to issue a certificate[20] is made by way of a decision that can be subject to complaint in accordance with the Administrative Procedure Code.[21]

As it was already mentioned, the prerequisite to use the preferential taxation rules is conducting business activity within the territory of Poland. The provisions do not include any guidelines concerning the way of determining the place of

[18] Article 2 para. 1 point 1 of the Shipyard Act.

[19] Article 2 para. 1 point 3 of the Shipyard Act.

[20] The certificate constitutes an attestation within the meaning of Administrative Procedure Code (Article 4 para. 5 of the Shipyard Act).

[21] Article 219 of the Act of 14 June 1960 – Administrative Procedure Code (consolidated text Journal of Laws 2020, item 2056).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

business activity. As the extensive case-law based on the provisions of the Act on value added tax shows, determining the place of business activity may lead to numerous practical concerns.[22]

The tax base in the tax on shipbuilding constitutes the taxpayer's revenue due for the sale of the ship or ship reconstruction obtained in the tax year, excluding value added tax. The act indicates in detail the due revenue generation date. It is the day of the delivery of goods or provision of service. However, the due revenue generation date determined in such a way cannot take place later than the day of issuing an invoice or making the whole payment.[23] Therefore, indeed, the tax can be paid on the received revenue and not on due revenue. The possibility to settle the tax after receiving the receivables from the contracting party is undoubtedly a beneficial solution. The taxation of the revenue means that calculating the tax base does not involve any tax deductible costs.

The scale in case of the tax on shipbuilding is proportionate to the percentage rate. Its amount totals 1%.[24] Thus, it is a very low tax rate, especially in comparison to the income tax rates, for which this tax is a substitution. However, what is subject to taxation is the revenue, and not the income. In case of business activity with low profitability, the taxation of revenue instead of income – even with the use of a low tax base – is not always viable economically (for example, when the taxpayer suffers a loss).

The revenue subject to the tax on shipbuilding is not combined with other revenues of a shipping entrepreneur subject to income tax regulated by separate legal acts. As a consequence, the taxpayer is obliged to keep a record of obtained revenue and incurred expenditure in a way allowing for separate taxation of particular types of financial means.[25]

The tax on shipbuilding is a voluntary tax for the taxpayer. Thus, in order to pay it, it is required from the shipping entrepreneur to submit a declaration on the selection of this tax. The declaration should be submitted until the 20th day of the first month of the first tax year of the taxable period. The taxable period during which a shipping entrepreneur is subject to a flat-rate tax amounts to three consecutive tax years. Before the expiry of that period, the change of the tax form is impossible.[26]

As it was already mentioned, a prerequisite to select the tax on shipbuilding is conducting business activity within the scope indicated in the act. However, if it turned out that the shipping entrepreneur classified their business activity incor-

[22] Article 28b of the Act of 11 March 2004 on value added tax (consolidated text Journal of Laws 2018, item 2174); T. Michalik, *VAT. Komentarz*, Warszawa 2017, pp. 451–459.

[23] Article 5 of the Shipyard Act.

[24] Article 6 of the Shipyard Act.

[25] Article 5 para. 3 and Article 9 of the Shipyard Act.

[26] Article 8 of the Shipyard Act.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

rectly, their revenue should be subject to regulations of the personal income tax or corporate income tax from the first day of the month of the tax year in which the taxpayer selected taxation in the form of a flat-rate tax. At the same time, the regulations protect the taxpayer against the consequences of an incorrect decision – for the period between the first day of the month in which the shipping entrepreneur selected the flat-rate tax until the end of the month when the shipping entrepreneur did not receive a certificate no tax arrears arise due to unpaid advance income tax payments.

Settling the tax on account of the tax on shipbuilding, similarly to income taxes, is a two-step process. Over the course of a year, the taxpayer calculates and pays advance tax payments to an appropriate bank account. After the tax year is over, the taxpayer submits the annual tax declaration.[27] The tax year in case of the tax on shipbuilding may overlap with the calendar year or last for the period of twelve following months.[28] Moreover, if the taxpayer is also subject to corporate income tax due to the generation of other revenues, then the tax year for the income tax has to overlap with the tax year for the tax on shipbuilding.

CONCLUSIONS

The tax on shipbuilding was introduced as a tax preference that is part of the financial support addressed to Polish shipyards. It is a state, material, ordinary, direct, and income tax.[29] Its preferential character is supposed to be a result of applying a low tax rate at the level of 1% in its construction. However, the tax base is not decreased by the cost of revenues. The explanatory memorandum to the draft act does not include the calculation that would indicate the profitability in case of which the low amount of tax rate balances the higher (in comparison to income taxes) tax base.

The new solutions are supposed to foster the mobilisation of shipbuilding and complementary industries through ensuring legal, organisational, and financial framework necessary to create industrial, scientific, and financial activity in Poland aimed at the development of the existing and creation of new Polish economic entities possessing the capability to conclude and implement contracts for the construction of seagoing and inland ships as a final product created within the territory

[27] Article 13 of the Shipyard Act.

[28] Article 2 para. 3 of the Shipyard Act.

[29] W. Wójtowicz, *System podatkowy i klasyfikacja podatków*, [in:] *Prawo podatkowe – część ogólna i szczegółowa*, ed. W. Wójtowicz, Warszawa 2009, pp. 19–23; A. Gomułowicz, *Klasyfikacja podatków*, [in:] A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe*, Warszawa 2016, pp. 161–165.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

of Poland as well as at the development and creating entities within the scope of complementary industries. The introduced regulations are supposed to foster the development of the shipbuilding industry in Poland and, by the same token, support the development of research and development centres connected with shipbuilding as well as contribute to the increase of demand for qualified employees. Their aim is also the development of research and development centres working on innovative types of ships, especially involving eco-friendly solutions (using alternative low carbon fuels, solutions for attaining exhaust fumes and ballast water purity, hybrid vessels or fully electric vessels). They are also supposed to contribute to ensuring competitive rules of functioning of the Polish shipbuilding and complimentary industries on international markets.[30]

Poland is not the only country of the EU that strives for the improvement of its economic situation within the field of shipbuilding industry through the appropriate legal and organisational solutions. Extending the application of the 0% tax rate in the value added tax seems to have the greatest significance for entrepreneurs. This solution was effectively introduced in other EU Member States and has gained common approval of potential addressees. Also, relaxing the rigors of establishing special economic zones is an answer to the postulates resulting from the practice of law application. Considering the rigorous prerequisites that ensure benefiting from the support provided for innovative activity, awarding shipping entrepreneurs technology credit or technology bonus seems to have no significant influence on the improvement of the financial situation of Polish shipyards.

The tax on shipbuilding seems to have even smaller significance for the shipbuilding industry. Its construction is vitiated by an array of drawbacks. First of all, the provisions shaping its technical elements are unclear. Secondly, taxation of revenue in case of conducting business activity bearing high economic risk, among others, due to the necessity to engage large capital does not constitute an incentive to select this tax form. Thirdly, the decision about the choice of the tax on shipbuilding is made for the period of three tax years. Taking into consideration the decreasing profitability of shipbuilding industry, this period can effectively prevent shipbuilding entrepreneurs from selecting this tax form. Fourthly, the tax on shipbuilding may constitute unauthorised public aid within the opinion of the European Commission. Due to that, an investigation was initiated concerning that case.[31] Therefore, taxpayers can select the flat-rate tax only during the validity period of a positive decision of the European Commission regarding the compliance of

[30] The explanatory memorandum to the Draft Act of the Shipyard Act, Printed of the 8th term Sejm no. 557, pp. 14–21.

[31] State aid – Poland – State aid SA.46981 (2016/N) – Flat rate sales tax in the shipbuilding sector. Invitation to submit comments pursuant to Article 108 para. 2 of the Treaty on the Functioning of the European Union (OJ EU C 80, pp. 11–21).

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Data: 15/11/2026 16:02:32

the flat-rate tax with the internal market. Such wording of provisions has a considerably debilitating impact on the reliability of law, and the unpredictability of taxation solutions is considered the greatest disadvantage of the Polish tax system.

All of the above conditions seem to suggest the conclusion that the tax on shipbuilding is completely unnecessary and that its introduction will not have any beneficial impact on the improvement of the situation of the Polish shipbuilding industry. Thus, its role in the economic development will be imperceptible. The analysis of the budgetary implementation statements shows that so far no entrepreneur has selected the tax on shipbuilding which undoubtedly indicates that the solution does not fulfil the function that was attributed to it.

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Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 15/11/2026 16:02:32

ABSTRAKT

Wraz z początkiem 2017 r. do polskiego systemu podatkowego została wprowadzona nowa forma opodatkowania – zryczałtowany podatek w zakresie budowy statku lub przebudowy statku. Ma on stanowić jeden z elementów wsparcia polskiego przemysłu stoczniowego. Rozwiązanie to obarczone jest jednak licznymi wadami. Przede wszystkim trudności przysparza interpretacja przepisów ustawy wprowadzającej nowy podatek. Ponadto wprowadzenie zryczałtowanego podatku w zakresie budowy statku lub przebudowy statku spowodowało uruchomienie przez Komisję Europejską procedury weryfikacyjnej pod kątem jego zgodności z rynkiem wewnętrznym. Okoliczności te powodują, że potencjalni podatnicy nieufnie podchodzą do tej formy opodatkowania. Może więc się okazać, że podatek ten podzieli los podatku tonażowego, który także został wprowadzony jako preferencja podatkowa, a w ogóle nie zyskał popularności wśród podatników i tym samym nie spełnił przypisywanej mu funkcji. Celem artykułu jest omówienie elementów konstrukcji nowej formy opodatkowania wraz ze wskazaniem na pojawiające się w związku z jej wprowadzeniem wątpliwości. W artykule podjęto również próbę oceny zaprezentowanych rozwiązań.

Słowa kluczowe: podatek w zakresie budowy statku lub przebudowy statku; przemysł stoczniowy; podatnicy