

TAXATION OF NONPROFESSIONAL REAL ESTATE TRANSACTIONS

Introduction

The topic of this paper is taxation of nonprofessional real estate transactions. Nonprofessional transactions are defined as any methods of transferring the ownership of real estate that are not connected with economic (for profit) activities and take the form of such civil law acts as, for example, sale, gift, or exchange. Taxes that are charged for this type of transactions are considered as property taxes¹ – this group of levies includes estate and gift tax, civil law transaction tax, and (to an extent) personal income tax. Unlike these property taxes, turnover taxes are designed to cover professional property transactions that are performed as a part of economic activity of a taxpayer that is conducted in circumstances indicating the intent to obtain revenue on a frequent basis.

Estate and Gift Tax

Estate and gift tax² is a pecuniary payment charged on the basis of the acquisition of certain elements of property (including real estate) in principle in relation with an estate or a gift. Nevertheless, its objective scope is much broader than the name indicates. The tax covers the acquisition by natural persons of the ownership of an object or of property rights by means of the following acts: succession, legacy, further legacy, testamentary instruction, gift, donor's instruction, acquisitive prescription, voluntary dissolution of co-ownership, compulsory portion of an inheritance, if the entitled person did not acquire it in the form of a gift granted by the testator or

1 Property taxes also include levies that are charged on the property owned: real estate tax, farmland tax, forest tax, means of transportation tax.

2 This levy is provided for in the Act of 28 July 1983 on the estate and gift tax (the uniform text is available in Journal of Laws 2004, No. 142, item 1514 with changes).

by means of succession, or in the form of a legacy, voluntary pension, voluntary usufruct, or voluntary easement.

Another transaction that is subject to the tax is acquisition of rights to a savings deposit on the basis of an instruction in case of death or the acquisition of shares of an investment fund on the basis of an instruction in case of death of a participant in an open or specialized open investment fund.

The act on estate and gift tax includes a large catalogue of objective exemptions (there are eleven of them). The exemptions related to transfers of real estate are:

- 1) acquisition of ownership or perpetual usufruct of real estate under the condition that at the moment of the acquisition the real estate constitutes a farm or its part, or will become a part of a farm which is the property of the acquirer and this farm will be kept by the acquirer for a period of at least 5 years after the date of acquisition;
- 2) physical acquisitive prescription of demarcated parts of real estate by persons who are co-owners of a fraction of the real estate – to the level of their participation in the co-ownership;
- 3) acquisition by means of inheritance by persons considered to be in the 1st and 2nd tax group of immovable monuments included in the register of monuments, if the acquirer secures and preserves them in conformance to relevant laws;
- 4) acquisition by persons considered to be in the 1st tax group of ownership of an object or of property rights by virtue of a voluntary dissolution of co-ownership.

Since 1 January 2007, a new tax exemption has been in place: all titles of acquisition of ownership or property rights to an object (without limits on its value) are exempt from taxation if the acquirer is a spouse, descendant, ascendant, a stepchild, a sibling, a stepfather, or a stepmother of a person from whom the acquisition takes place. As to real estate, the possibility to take advantage of such a broad exemption depends on meeting the following condition: The acquirer must notify the head of the competent tax office within a period of one month after the day that the tax obligation takes effect or, in the case of acquisition of real estate by means of inheritance, the period of one month after the court's decision confirming the acquisition of an inheritance becomes legally valid, or within a period of one month after the day that the acquirer learned about the acquisition the real estate (in such a case the acquirer must present evidence that he learned later that he acquired the real estate). This condition does not have to be met by persons who acquire real estate by means of a gift because gift of a real estate takes the form of a notarial deed and it is the notary who informs tax authorities of such a gift.

The payers of estate and gift taxes are natural persons who are acquirers of objects or property rights; thus, in the case of a gift contract the recipient of a gift is the taxpayer.

The tax obligation takes effect, depending on the title of acquisition, among others, at the moment of acceptance of an inheritance, at the moment of performing an instruction, legacy or further legacy, at the moment of satisfaction of the compulsory part of an inheritance, at the moment of satisfaction of the promised benefit or making a statement, in the form of a notarial deed (gift), at the moment that the decision of the court confirming acquisitive prescription becomes valid, at the moment that a contract or agreement is concluded or a court's verdict becomes valid (voluntary dissolution of co-ownership), or at the moment of voluntary easement, pension, or usufruct becoming effective.

In the case that acquisition is not reported to be taxed, the tax obligation takes effect at the moment that a paper is prepared confirming the acquisition or that a verdict of a court confirming the acquisition becomes valid. In other cases of a "concealed" acquisition, the tax obligation takes effect at the moment that the tax payer refers to the fact of acquisition before tax authorities or fiscal control entities.

The base for the estate and gift tax is the net value of the acquired object, i.e. the value minus the debts and burdens encumbering the object. The taxpayer must declare an adequate value before tax authorities. If tax authorities determine that the value declared by the taxpayer is different (less) than the market value, the value can be determined on the basis of an opinion of a property expert. The taxation base does not include the equivalent of 110 m² of the acquired house or apartment (which is covered by the housing tax deduction).

The amount of tax is dependent, among others, on the personal relation between the person from whom or after whom the objects or property rights were acquired. For this purpose, acquirers are divided into three tax groups: the 1st group comprises the closest persons, i.e. spouse, descendants, ascendants, siblings, stepchild, son in law, daughter in law, stepfather, stepmother, and parents in law; the 2nd group comprises taxpayers who are more distant relatives, e.g. the descendants of siblings, spouses of siblings, and siblings of spouses; and the 3rd tax group comprises all other acquirers who are not included in the first two groups³.

What is peculiar to the estate and gift tax is the so-called housing tax deduction. The essence of the deduction (as mentioned above) is that the base of taxation is decreased by the equivalent of 110 m² of acquired house or apartment. The ability to take advantage of this deduction depends on the acquirer meeting several conditions.

3 The act provides for three progressive tax rates, one for each of the three tax groups. The lowest rate is for acquirers considered to be in the 1st tax group; the highest – for those in the 3rd tax group.

The most important one is that the acquirer can be (at the moment of acquisition) neither the owner nor the tenant of another house or apartment. If the acquirer is renting a premise or is the owner of a building, he must terminate the rent contract (transfer the property of the building or premise to his descendants, the State Treasury, or the commune) within 6 months of filing his tax declaration.

The tax authorities determine the amount of tax by virtue of a decision, based on the date revealed in the tax declaration filed by the taxpayer, in principle, within one month after the date of the tax obligation taking effect. Situations where the tax is calculated and collected by the remitter (notary) are an exception. Such situations take place in the case of contracts which transfer the ownership (among others of real estate) and which take the form of a notarial deed. With the exception of situations where the levy is collected by a remitter, the tax is payable within 14 days of the date of delivery of the decision that determines the amount of tax liability.

Civil Law Transaction Tax

The civil law transaction tax⁴ is imposed, as the name suggests, on some transactions governed by civil law (mostly contracts). Such contracts lead to an exchange of goods and services and, therefore, constitute a civil law transaction. Nevertheless, the legislator decided that this tax does not cover those legal transactions that result in one party becoming the payer of the value added tax. Consequently, there is a division of transactions into those which are subject to the VAT (professional transactions) and those that are not performed as a part of the conducted (or planned) for-profit activity (economic activity). The latter are subject to the civil law transaction tax.

The object of this tax is civil law transactions that are stipulated in relevant laws. These include: sales, exchanges, gifts – in the part concerning the takeover by the recipient of debts and liabilities of the donor, contracts concerning the division of inheritance, and contracts concerning the dissolution of co-ownership – in the part concerning repayments and supplementary payments. The tax also covers changes to contracts, if they result in an increase of the taxation base, as well as verdicts of courts (including arbitration courts) and settlements, if they have the same effects as contracts that are covered by this tax.

The law on the civil law transaction tax includes a large catalogue of exemptions and objective exclusions. As for taxation of real estate transactions, the most notable are exemptions and exclusions of the following transactions:

4 The tax is provided for in the statute of 9 September 2000 on civil law transaction tax (uniform text is available in Journal of Laws 2007, No. 68, item 450 with changes).

- 1) sale of real estate or of the right to perpetual usufruct concluded in relation to the execution of claims resulting from the limitation of ways to use real estate based on environmental protection laws;
- 2) sale of housing premises in which the Military Housing Agency is a part;
- 3) sale of objects in execution or bankruptcy proceedings;
- 4) some contracts that transfer the ownership of real estate or its parts, along with their elements, except for houses or their parts that are located in towns, under the condition that, at the moment of transaction, the acquired land constitutes a farm or will form a farm, or will become a part of a farm that is the property of the acquirer;
- 5) sale of real estate, if the buyer is its former owner (who had been expropriated) – in the amount of compensation received for expropriation, under the condition that the purchase takes place within 5 years of receiving the compensation;
- 6) exchange of a house or a part thereof, housing premises that constitute a separate real estate, if the parties to the contract are persons considered to be in the 1st tax group according to the law on the estate and gift tax.

The tax obligation, in principle, becomes effective at the moment a civil law transaction takes place (a contract is concluded), at the moment a court's decision becomes legally valid, at the moment that a verdict of a court of arbitration is delivered, at the moment an agreement is concluded or at the moment that a taxpayer refers to the fact of performing a civil law transaction – if the taxpayer had not filed a tax declaration within 5 years of the end of the year in which the payment term expired, and then refers before tax authorities or fiscal supervision entity to the fact of its conclusion.

The payers of the civil law transaction tax are the acquirers of real estate. One exception is the exchange contract, in which case both parties of the contract are the payers of the tax.

The taxation base, in principle, is the market value of the object or the property right. The exceptions are mostly exchange contracts and gifts. The value of an object or a property right that influences the taxation base is provided by the taxpayer in his tax declaration. If the taxpayer does not determine this value or the value that the taxpayer provides is different, in the opinion of the head of the competent tax authorities, from the actual market value, then the tax authorities can determine the value based on an opinion of an expert or on an expert appraisal presented by the taxpayer.

The tax rates are defined as a percentage of the taxation base and, in the case of contracts concerning real estate, are equal to 2% of the taxation base.

Taxpayers are required to file a tax declaration and to calculate and pay the tax within 14 days of the tax obligation taking effect. The tax can also be calculated and collected by tax remitters: notaries in the case of civil law transactions taking the form of a notarial deed.

Personal Income Tax

The last levy imposed on nonprofessional real estate transactions is personal income tax⁵. The payers of this levy are natural persons who sell real estate, a part thereof, or a share in real estate, or the perpetual usufruct right to a plot of land. Such sale is not subject to taxation if it has been effected more than 5 years after the end of a calendar year in which the real estate was purchased or built.

The tax covers the revenue from the sale of real estate defined as the value equal to the price stated in the contract, decreased by the cost of the sale. If the price is significantly different, without a justified reason, from the market value of the real estate, then the revenue is determined by competent tax authorities as an amount equal to the market value determined on the basis of an expert's opinion. The cost that diminishes the revenue from the sale of real estate include documented cost of acquiring or documented cost of building, plus documented outlays which increased the value of the real estate and which were made during the period it was owned by the seller.

The following revenue is exempt from the tax:

- 1) revenue from the sale of the whole real estate, or its parts, of a farm (as long as the land does not lose its farmland or forest status as a result of the sale);
- 2) revenue from a compensation paid in accordance with the law on real estate management or by virtue of a sale of real estate for purposes that would justify its expropriation;
- 3) revenue from the sale of the perpetual usufruct right and the sale of real estate purchased in accordance with the law on real estate management in exchange for property left abroad.

The tax rate is equal to 19% of the taxation base and the tax is payable without summons until 30 April of the year following the year in which the real estate was

⁵ Act of 26 July 1991 on personal income tax (the uniform text is available in Journal of Laws 2000, No. 14, item 176 with changes).

sold. This is also the term for submitting the tax statement with the calculation of the due amount of tax. What is peculiar to the taxation of sale of real estate is that the income from this source is not added in the yearly tax statement to other income of the taxpayer. This income is separately taxed at a flat rate of 19%, regardless of the total value of the taxation base.

Streszczenie

Przedmiotem niniejszego opracowania jest zagadnienie opodatkowania nieprofesjonalnego obrotu nieruchomościami. Za nieprofesjonalny obrót uznano wszelkie sposoby przeniesienia własności nieruchomości niezwiązane z działalnością gospodarczą (zarobkową), przyjmujące formę takich czynności cywilnoprawnych, jak np. sprzedaż, darowizna, zamiana. Podatki, które obciążają tego typu obrót zaliczane są do podatków majątkowych – do tej grupy danin zaliczyć można podatek od spadków i darowizn, podatek od czynności cywilnoprawnych oraz (w pewnym zakresie) podatek dochodowy od osób fizycznych.