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THE PRINCIPLE OF EQUALITY BEFORE THE LAW AND REAL PROPERTY SALES LIABLE TO PERSONAL INCOME TAX

Summary
Under the Constitution of Poland, everyone shall be equal before the law. It means that each citizen shall have the right to be treated equally by the public authorities and no one can be discriminated against for any reason whatsoever. Moreover, in accordance with the Constitution of Poland everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. The obligation of taxation of the revenue (income) from a real property transfer by natural persons results from the Personal Income Tax Act. Therefore, in this paper there has been discussed a constitutional principle of equality before the law and also there have been outlined the issues related to taxation of real property sales by natural persons over the last ten years against the background of sometimes contradictory judgements and thereby unequal and inconsistent approach of tax authorities and administrative courts to this issue.

Key words: *principle of equality before the law, taxation of real property sales, personal income tax*

Introduction

In the Polish society, there is a belief that everyone is equal before the law, each citizen has the right to be treated equally by the public authorities, and no one can be discriminated against for any reason whatsoever. This belief is so strong that it was reflected in the Constitution of the Republic of Poland[1] passed on 2 April 1997 and thereby it became one of the chief constitutional principles. This legal act of the highest priority grants not only rights but also responsibilities.

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[1] Journals of Laws of 1997 No. 78, item 483, as amended, hereinafter referred to as: the Polish Constitution or the Constitution.

According to Article 84 of the Polish Constitution, one of the responsibilities is that everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. Article 84 of the Polish Constitution is closely related to Article 217 of the same act, according to which 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.[2] When defining the sources of taxation in the Act of 26 July 1991 on the personal income tax[3], the Polish legislator decided that one of the numerous sources of tax revenue (income) should be the real property sales by natural persons. The principles and methods of taxation of such a legal action have been changing significantly over the last decade. The application of regulations in that regard has caused a lot of doubts and controversy. Therefore, the presentation of selected issues regarding the real property sales liable to personal income tax for private individuals not involved in business activities seems legitimate, illustrated by court judgements in the context of the constitutional principle of equality before the law, taking into account the practice of tax authorities and court judgements given in that regard.

1. The constitutional principle of equality before the law

The principle of equality was included in the Polish Constitution of 1997 in Chapter II *The Freedoms, Rights and Obligations of Persons and Citizens*, in Article 32, which in Section 1 states that *All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities,* and in Section 2 that *No one shall be discriminated against in political, social or economic life for any reason whatsoever*. In this way, Article 32 of the Polish Constitution regulates the principle that orders the comprehending and obeying all the rights – the principle of equality.[4] According to B. Banaszek, this Article clearly defines the addressee of the principle of equality. These are *public authorities*, which

[2] See more: M. Handzel, *Konstytucyjne podstawy systemu finansowego państwa* [in:] *Instytucjonalne uwarunkowania systemu finansowego jako środowiska rozwoju sfery realnej* (ed.) L. Podkaminer, Bielsko-Biała 2015, p. 83-84.
[3] Journals of Law of 2016, item 2032 as amended.
[4] Ibidem, *Polskie Prawo Konstytucyjne*, W. Skrzydły (ed.), 2002, p. 169.

mean the legislator, executive bodies (including local government bodies) and courts.[5] As the above author states, equality should be referred to the legislative process and non-discrimination to the application of the law.[6] Nevertheless, the phrase *equality* does not mean absolute equality, according to which the same rules of law shall be applicable to everyone.[7] As B. Gronowska states, equality means equal rights, equality before the law (including equality of legal protection) and equal treatment by public authorities. Such an understanding of equality cannot mean identity.[8] According to the author mentioned above, there is a close relationship between the principle of equality and prohibition of discrimination[9], whereas discrimination is understood as a differential treatment of persons who are objectively in the same (or essentially similar) situation, and this treatment has no reasonable (objectively justified) grounds.[10]

Equality in law may be understood as formal or substantive equality. Formal equality means equal treatment by the law to all the addressees of the standard. There is no differentiation.[11] Nevertheless, such an understanding of the principle of equality brings significant restrictions, which cause that the principle cannot constitute the basis of the whole legal system in force due to the fact that this principle does not include the complex nature of legal relations as well as the fact that legal standards are frequently addressed only to some groups of citizens.[12] On the grounds of the Constitution equality in the law, which means equal rights, should be understood as substantive equality.[13] The Constitutional Tribunal, at the very beginning of its judicial activity, determined the essence of the formal equality, which states that *all public law entities distinguished equally by a given essential feature (relevant), shall be*

[5] See: B. Banaszak, *Konstytucja Rzeczpospolitej Polskiej. Komentarz do art. 32*, p. 183.
[6] See: *Konstytucje Rzeczypospolitej oraz komentarz do konstytucji RP z 1997 r.*, J. Bocia (ed.) 1998, p. 71.
[7] Ibidem, p. 71.
[8] See: *Prawo Konstytucyjne*, Z. Witkowski (ed.) 2009, p. 159-160.
[9] Ibidem, p. 159.
[10] Ibidem, p. 160.
[11] See: *Prawo Konstytucyjne Rzeczypospolitej Polskiej*, P. Sarnecki (ed.) 2008, p. 159.
[12] Ibidem, p. 159.
[13] Ibidem, p.159.

treated equally. Therefore, they shall by treated without any differentiations, neither discriminative nor favouring.[14]

In case law of the Constitutional Tribunal, the principle of equality is not equated with the prohibition of differentiation. The Tribunal does not preclude the preference to some groups (positive discrimination, equalizing favouring) when necessary to achieve real equality.[15] In the name of equality, the law should individualize the situation of the citizens in view of some essential features (relevant). The main concern is to set the criteria allowing the differentiation of principles that refer only to some persons, which do not infringe the principle of equality before the law at the same time, from the principles distinguishing the groups of addressees in a favouring or discriminative manner.[16] It is emphasized in the doctrine that the criteria must be:

- relevant, therefore they should be related directly to the purpose and content of the provisions, which include the controlled standard, as well as they should serve the purpose and content, which means that the implemented differentiations have to be reasonably justified,
- proportional, therefore the interest that the differentiation of the standard addressees' situation should be beneficial to must be adequate to the interest that shall be infringed due to the unequal treatment of the entities,
- must be related to other values, principles or constitutional standards that justify a different treatment of similar entities.[17]

The principle of equality by public authorities refers to the application of the law. According to this principle, the body that gives the judgement based on the law in force should give identical judgements in the same cases.[18] The principle of equality should be somewhat considered in conjunction with the principle of justice. The principle of equality corrects the principle of justice, and even concretizes it. In a manner of speaking, the principle of equality and the principle of

[14] See: the judgement of the Constitutional Tribunal of 9 March 1988 file no. U 7/87, See also: B. Banaszak, op cit, p. 183, and P. Sarnecki (ed.) op cit, p. 160.
[15]Ibidem, B. Banaszak, op cit., p. 185, see also: the judgement of the CT of 29 September 1997, file no. K 15/97 and of 11 February 1992, file no. K 14/91.
[16]See: J. Falski, *Ewolucja wykładni zasady równości w orzecznictwie Trybunału Konstytucyjnego*, Państwo i Prawo 2000, no 1, p. 49.
[17]Ibidem, B. Banaszak, op cit., p. 184-185.
[18] See: P. Sarnecki, op cit., p. 162.

justice are complementary.[19] Whereas the principle of equality includes equal treatment of all entities distinguished according to the relevant feature in a given social field, the principle of justice reveals if the choice of a certain criterion of differentiation was right and adequate to the situation of a given person.[20] According to the Constitutional Tribunal, if there occur unjustified differences in granting rights, then it is a problem of inequality. *Justice requires that legal differentiation of entities (their category) remains appropriately related to the differences in their actual situation as addressees of the given legal standards. Such distributive justice means that the equals should be treated equally and the similar – similarly. Therefore, the principle of justice can be expressed as the principle, according to which there cannot be established a law that would differentiate the legal situation of the entities, whose actual circumstances are the same. Such an understanding of equality means acceptance of different treatment of different entities by the law. However, this different treatment should be justified.*[21]

Summing up, it should be emphasized that the Constitutional Tribunal repeatedly accentuated in its judgements that the principle of equality is not strictly mandatory in the sense that it equalizes the situations of all entities on the grounds of their distinguishing features. The principle of equality requires that entities are treated equally if a certain feature distinguishes them. Therefore, according to the Tribunal, equality also means acceptance of different treatment of different entities by the law. It results from the fact that equal treatment of the same entities by the law in certain respects usually means different treatment of the same entities otherwise.[22] The essence of the principle of equality before the law is not equal treatment to everyone, but equal treatment only of a certain group of citizens, distinguished due to the legally relevant feature.[23] A basic issue for the assessment of retaining the principle of equality is to define the essential feature, because of which the provisions of the law differentiated the legal situation of their

[19] See more: W. Sokolewicz, *Konstytucja Rzeczypospolitej Polskiej – Komentarz, 2007 r.,* p. 59.
[20] Ibidem, p. 59, and also the judgement of the CT of 24 May 2006, file no. K 5/05.
[21] See: the judgement of the CT of 7 June 2004 (file no. P 4/03).
[22] See: the judgement of the CT of 11 April 1994 (file no. K 10/93).
[23] See: the judgement of the CT of 6 February 2002 (file no. SK 11/01); the judgement of 7 June 2004 (file no. P 4/03) and the judgement of 10 April 2002 (file no. K 26/00).

addressees.[24] Differentiation of the legal situation of citizens is then contradictory to the Constitution if similar entities or situations are treated differently, and those differences in treatment cannot be properly justified according to the Constitution.[25]

As a result of the above, derogation from the principle of equality is not identical to infringement of Article 32 of the Constitution. To resolve the issue it is necessary to assess the accepted criterion of differentiation of legal entities.[26]

Moreover, it should be noticed that in the doctrine and case law of the Tribunal there is a conflict on whether Article 32 Section 1 of the Constitution includes the legal right. At this point, the author of the paper would like to notice that if the doctrine inclines to adopt the law resulting directly from the linguistic interpretation of Article 32 Section 1 of the Constitution, the judgements of the Constitutional Tribunal do not include this law directly based on the content of Article 32. According to A. Łabno, defining the right to equal treatment is a controversial issue in judicature practice of the Constitutional Tribunal.[27] The Constitutional Tribunal determines it as the legal right of special nature, somewhat the "secondary right" or "meta-right".[28] As A. Łabno and B. Banaszak claim, Article 32 Section 1 of the Constitution establishes the legal right according to the linguistic interpretation, but the Constitutional Tribunal draws a different conclusion.[29] The Constitutional Tribunal restricts the interpretation of Article 32 to the constitutional principle and therefore there occur doubts, regarding both the theoretical grounds for the settlements and practice for the application of the standard of Article 32 Section 1 of the Constitution. According to A. Łabno, the position in favour of the right to equal treatment considered as the legal right seems appropriate, because it is enforced by the drafting of Article 32 Section 1

[24] See: the judgement of the CT of 24 June 1998 (file no. K 3/98).
[25] See: the judgement of the CT of 16 December 1997 (file no. K 8/97).
[26] See: the judgement of the CT of 12 May 1998 (file no. U 17/97).
[27] See: A. Łabno, *Zasada równości i zakaz dyskryminacji*, [in:] *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, L. Wiśniewski (ed.), Warszawa 2006, p. 38.
[28] To obtain more information on the problem with the recognition of Article 32 Section 1 of the Constitution as the legal right, see: A. Łabno, ibidem, p. 38-42; B. Banaszak, op cit, p. 186-187; the judgement of the CT of 24 October 2001 (file no. SK 10/01) and the dissenting opinions.
[29] See: A. Łabno, ibidem, p. 38, B. Banaszak, ibidem, p. 186.

of the Constitution, where the legislator applied the term *all*, which should be understood as *everybody*.[30]

While speaking about the principle of equality, in terms of this article, it seems reasonable to refer to the principle of the democratic rule of law[31] regulated in Article 2 of the Constitution, and to be more specific, to the rules[32] interpreted out of its wording, which specify the principle: the rule of the citizen's trust in the state, thereby also in the law, which this state establishes, the rule of the protection of acquired rights, the rule of determinacy related to legal regulations, the rule of legal certainty, and also the rule of decent legislation.

The recognition that the clause of Article 2 constitutes *an extremely important directive in terms of the legislation and law application according to the standards of the rule of law* led to the conclusion of the Constitutional Tribunal that it may also constitute the grounds for attributing constitutional principles related to the action of those bodies, which were not directly disclosed in the Constitution.[33]

Taking into account the case-law of the Constitutional Tribunal and the acquis of the doctrine, there may be briefly outlined the proper understanding in accordance with the principles mentioned above, which influence also the law application in terms of taxation of real property sales by natural persons.

The principle of trust (loyalty) refers not only to the procedure and form of the established law, but also to the application of law in general, including its legal interpretation.[34] Despite its uncertainty, the principle of trust results from the general principle of the democratic rule of law.[35] The principle of the protection of legitimate expectations requires that the state body (including the legislator) treats the citizens with respect to

[30] A. Łabno, ibidem, p. 39.

[31] More on the principle of the democratic rule of law: S. Wronkowska*, Charakter prawny klauzuli demokratycznego państwa prawnego (art. 2 Konstytucji Rzeczypospolitej Polskiej),* [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, S. Wronkowska (ed.), Warszawa 2006, p. 102 and next.

[32] See more on the principles of law and general ideas: A. Pułło, *Idee ogólne a zasady prawa konstytucyjnego*, Państwo i Prawo 1995, Nr 8, p. 16-26, and A. Pułło, *Z problematyki zasad prawa*; *Idee ogólne w prawie konstytucyjnym*, Przegląd Sejmowy 1996, Nr 1, p. 9-20.

[33] See: W. Sokolewicz, op cit., p. 17; the judgement of the CT of 17 February 2006 (file noTs 183/05).

[34] See: the judgement of the CT of 27 November 1997 (file no. U 11/97).

[35] See: the judgement of the CT of 20 December 1999 (file no. K 4/99).

minimum rules on integrity. Therefore, legal provisions cannot be traps, empty promises or break the established rules of the procedure, as well as they cannot provide the state bodies with opportunities to abuse their position towards the citizen.[36] As the Constitutional Tribunal states, the principle of the protection of legitimate expectations: *(...) is based on legal certainty, therefore it is based on such a group of legal features, which provide the entity with legal safety, enable the entity to decide on their own actions on the basis of the full awareness of prerequisites of the state bodies' actions and legal consequences (...) particular conduct and incidents*.[37] According to the Constitutional Tribunal, if new provisions refer to e.g. taxes, then two weeks of *vacatio legis* may be too short and the legislator is obliged to set a longer (appropriate) period of *vacatio legis*.[38] Next, it should be noticed that legal provisions must be formulated clearly enough so that the addressee can easily define legal consequences of their actions.[39] Establishing unclear and ambiguous provisions shall be considered an abuse of the principle of the rule of law. Therefore, according to L. Garlicki, establishing a law that includes mutually contradictory terms or allows free interpretation, abuses this principle.[40]

The legal certainty must guarantee the stable legal order in the state, and on the other hand, it must ensure the citizens that based on the current law they can freely take care of their lives. In other words, the principle of legal certainty provides the citizens with conditions favourable to accurate predicting the actions of the state authorities, which provides predictability of the rule of law in the legislative sector, but also in terms of the application of law, which gains a particular practical meaning in the levy issues.[41]

It should be noticed that the Constitutional Tribunal in its case law emphasized repeatedly the meaning of the infringement of Article 2 of the Constitution in the context of the tax law. The Tribunal pointed out that the requirement of precision and equivalence of the wording and legislative correctness derived from those principles has a special meaning in the tax law, particularly where it obliges to self-calculation of

[36] See: L. Garlicki, *Polskie prawo konstytucyjne – zarys wykładu*, 2008, p. 62.
[37] After; ibidem, see: the judgement of the CT of 25 June 2002 (file no. K 45/01).
[38] See: for example: the judgement of the CT of 23 March 2006 (file no. K 31/06).
[39] See: the judgement of the CT of 11 January 2000 (file no. K 7/99).
[40] See: L. Garlicki, op cit., p. 64.
[41] See: W. Sokolewicz, op cit., p. 36.

the tax, which means the calculation and payment of the tax. Only the payment of the due tax causes the termination of the tax liability. Otherwise, the taxpayer is exposed to tax arrears, and even penal-fiscal liability.[42] A significant lack of the precision of legal provisions, which causes their vagueness, leads often to the lack of specificity of those provisions, because it is impossible to establish precise legal standards based on them. Vagueness of the provisions and imprecision of the legal standards infringe the citizens' trust towards the state and the state law.[43] The Constitutional Tribunal in its judgement of 20 November 2002[44] decided that theoretically distinguished and named principles on the grounds of the existing factual situations are linked: in practice, vagueness of the provision means uncertainty of the legal situation of the addressee of the standard and leaving its shaping to the bodies applying the law.

The principle of trust, otherwise referred to as the principle of loyalty of the state towards the addressee of the legal standards, has an established position in case –law of the Constitutional Tribunal.[45] In the justifications of numerous judgements, the Constitutional Tribunal emphasized that in a democratic rule of law establishing and applying the law cannot be a trap for the citizens.[46]

In the judgement of 22 May 2002,[47] the Constitutional Tribunal pointed out that establishing vague, ambiguous provisions, which do not allow the citizens to predict the legal consequences of their conduct, constitutes an infringement of the Constitution. In the justification of the judgement of 2 April 2007,[48] the Constitutional Tribunal emphasized that the principle of the protection of legitimate expectations and the law established by the state is a constitutive element of the rule of law defined in Article 2 of the Constitution. From the point of view of the

[42] Ibidem, the judgement of the CT of 27 November 2007 (file no. SK 39/06).
[43] See: J. Bauta-Szostak, B. Bogdański, *Nieruchomości sprzedaż najem dzierżawa 2010 skutki w PIT, CIT i VAT*, p. 46.
[44] The judgement of the Constitutional Tribunal of 20 November 2002 (file no. K 41/02).
[45] See: the judgement of the Constitutional Tribunal of 15 February 2005 (file no. K 48/04).
[46] See: the judgement of the Constitutional Tribunal of 3 December 1996 (file no. K 25/95), of 10 April 2001 (file no. U 7/00), of 7 June 2004 (file no. P 4/03), of 29 November 2006 (file no. SK 51/06).
[47] See: the judgement of the Constitutional Tribunal of 22 May 2002 (file no. K 06/02).
[48] See: M. Handzel, ibidem, p. 83.

protection of legitimate expectations and the law established by the state, in the field of public levies Article 84 of the Constitution is also essential. According to this provision, everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. In this article there is used the quantifier "everyone", which should be expresses the prevalence of obligation to maintain the state and support its functioning by all persons who benefit from its care. [49] Mentioning taxes in this article is not only an example of public duties, which the entity should bear, but it also has a wider meaning, because in the tax law it is insufficient when taxation is shaped formally by a legal act, but it should also be formed in a material sense, so this act should include a certain content.[50] Therefore, Article 84 of the Constitution stipulates precise defining of essential elements of the levy proportion in the act, so that the entity can predict the fiscal consequences of their actions. It should be therefore noticed that the principle of the protection of legitimate expectations and the law established in the sector of public levies is based on Article 2 in connection with Article 84 of the Constitution. According to the Constitutional Tribunal, the analysed principle requires particularly that the person concerned knows the exact content and the amount of the due levies at the moment of taxable events.

Therefore, the legislator, when regulating real property sales liable to personal income tax, and also law enforcement should take into consideration the constitutional principle of equality before the law, because a different attitude towards the same circumstances may cause a sense of infringement of this principle among taxpayers. How to explain a taxpayer that the same circumstances of a real property sale within five years from the date of its acquisition, for the same period, may be taxed differently?

2. Taxation of real property sales – general notes

In case of a real property sale by natural persons, who are not involved in a business activity, such a disposal should be liable to income tax if it took place within five years from the end of the calendar year, in which the real property was acquired.

At the beginning, it should be noticed that in the provisions of the Personal Income Tax Act there is no definition of real property. In this

[49] See M. Handzel, ibidem, p. 83.
[50] Ibidem, p. 83.

regard, the most appropriate is to refer to the provisions of the act of 23 April 1964 – the Civil Code[51], which states in Article 46 that real property is an area being the separate ownership unit, and also buildings permanently fixed to the ground or their parts if under the specific provisions they are separate ownership units.

It should also be noticed that paid disposals are disposals based on: a sales agreement, exchange agreement and any other agreement, which provides for a payment in any form. The term "acquisition"[52] should be widely understood; it includes not only an acquisition by purchase but also by exchange, inheritance, donation, dissolution of joint property or any other paid form.[53] It is worth noting that a preliminary agreement regarding an acquisition or a disposal is exclusively binding and does not transfer the ownership, therefore it does not influence the calculation of the five-year period. The principle is taxation of the sales within five years, starting from the end of the calendar year, in which the acquisition took place. For example, if a taxpayer constructed a building on a land, the five-year period is calculated form the date of the acquisition of the land, because the building is not a separate object of the property right.[54]

Taking into consideration the amendments to the provisions of the Personal Income Tax Act over the last ten years in terms of the regulations regarding a paid disposal of the real property and the transitional provisions in force, such a sale of real property may be taxed in three ways. The criterion that determines the tax system to be applied shall be the year, in which the real property is acquired. Therefore, despite the fact that since 2009 the rules of real property taxation have not changed and the expiration of tax liability shall take place after a period of five years, the provisions of 2006 or 2007-2008 in this regard may apply, having regard the provisions of the Tax Order Act on the limitation of tax liabilities. For example, if a taxpayer purchased real property in 2006 and sold it 28 December 2011, in this situation the provisions of the Income Tax Act in force in 2011 were not applicable,

[51] Journal of Laws of 2016, item 380 as amended.

[52] More on the meaning of the term "acquisition": W. Dmoch, T. Szymura; *Podatek dochodowy od osób fizycznych 2008. Komentarz do art. 10*, p. 69-72; also the comment J. Marciniuka (ed.)*; Podatek dochodowy od osób fizycznych 2009. Komentarz do art. 10,* p. 135-136.

[53] See: I. Kocemba; *Opodatkowanie dochodów (przychodów) z tytułu odpłatnego zbycia nieruchomości i praw majątkowych*, Biuletyn Skarbowy nr 1/2009; p. 13.

[54] See: J. Bauta-Szostak, B. Bogdański, *Nieruchomości sprzedaż najem dzierżawa 2010 skutki w PIT, CIT i VAT*, p. 19.

but the provisions of 2006, because according to Article 7 of the act of 16 November 2006 on the amendment to the Personal Income Tax Act and the amendments to some other acts, for the revenue (income) from a paid disposal of real property and other ownership rights, acquired or constructed until 31 December 2006, the provisions in force before 1 January 2007 are applicable. Moreover, taking into consideration the regulations regarding the limitation of tax liabilities and their interruption regulated in the act of 29 August 1997 – the Tax Order Act[55], it should be noted that if a taxpayer on 28 December 2011 sold the real property acquired in 2006, the deadline for the tax payment was 11 January 2012, and such a liability (if it was not interrupted) is barred by limitation within five years, starting from the end of the year, in which the tax liability arose, therefore it is actually barred by limitation on 31 December 2017. This means, the tax authority in the tax proceedings in this regard may apply those provisions in practice.

According to Article 8 Section 1 of the act of 6 November 2008 on the amendments to the Personal Income Tax Act, the Corporate Income Tax Act and some other acts[56], for the revenue (income) from a paid disposal of real property and the rights defined in Article 10 Section 1 Subsection 8 a)-c) of the act amended in Article 1, acquired or constructed (put into use) between 1 January 2007 and 31 December 2008, the provisions of the act amended in Article 1 are applicable, the wording effective on 31 December 2008. With reference to the above, there should be three legal conditions distinguished:

- taxation of the real property sold within five years, whereas its acquisition took place before 1 January 2007;
- taxation of the real property sold within five years, whereas its acquisition took place between 1 January 2007 and 31 December 2008;
- taxation of the real property sold within five years, whereas its acquisition took place after 1 January 2009.

[55] Journal of Laws of 2017, item 201 as amended.
[56] Journal of Laws of 2008, No 209, item 1316 as amended.

3. The rules of taxation of the real property sales, acquired before 1 January 2007

The Personal Income Tax Act in Article 10 Section 1 Subsection 8 a)-c), the wording effective until the end of 2006, stated that the source of the revenue was a paid disposal of: real property or its part and an interest on real property; the cooperative ownership right to residential or commercial property and the right to a single-family house from a housing cooperative; the land perpetual usufruct right, provided that such a paid disposal does not take place, but was completed within five years, starting from the end of the calendar year, in which the acquisition or construction took place.

The legislator anticipated also exceptions from the general rule of taxation of real property sales within five years, in which the legislator determined the real property that is not liable to this tax, regardless of the fact that the period of five years has not expired yet. These exceptions were included in Article 21 Section 1 Subsection 28-30, 32-32a of the Personal Income Tax Act. Moreover, according to Article 21 Section 1 Subsection 32 d) of the above-mentioned act, the revenue from the real property and ownership rights sales defined in Article 10 Section 1 Subsection 8 a)-c) is tax-free if their acquisition was by donation or inheritance.[57]

The sale of real property or ownership rights acquired before 1 January 2007 (provided that the disposal took place within five years, starting from the end of the calendar year, in which the acquisition or construction took place) was liable to a 10% tax assessed on the basis of the revenue, i.e. regardless of the value of the costs spent on the construction or acquisition of the property.[58] This means that the taxpayer could not reduce the tax base by the cost of acquisition, but only by the cost related to the sale of the property. Taxation of the revenue without

[57] It should be emphasized that the acquisition by inheritance means both tha acquisition based on the decision regarding the confirmation of the inheritance acquisition and the acquisition of the property or ownership right by the division of inheritance (See:the judgement of the Supreme Administrative Court in Warsaw of 8 February 2007, file no. II FSK 187/06). Until the issue was not solved by the SAC, some tax authorities presented different position by misinterpreting Article 21 Section 1 Subsection 32 d).

[58] See: R. Styczyński, M. Szczypiór; *Podatki 2009 r. Przegląd zmian PCC, CIT, VAT na 2009 r. Kompendium,* p. 56.

reducing it by the tax-deductible costs is commonly known as flat-rate taxation.[59]

The revenue from a paid disposal of the real property or ownership rights was their value expressed in the price defined in the agreement, reduced by the costs of the paid disposal.[60] However, if for no reason the price differed significantly from the market value of those objects or rights, the revenue was defined by a tax authority or tax inspection authority as the market value. However, those authorities were obliged to call on the parties of the agreement to change the value or indicate the reasons for the price that differed significantly from the market value. If no reply is received, no changes to the value took place or no reasons for the lower value were indicated, the tax authorities defined the value including expert witnesses.

The tax was paid without a call, within 14 days from the date of the paid disposal (signing the notarial deed transferring the ownership rights) into the account of the Tax Office, managed by the head of the Tax Office competent for the taxpayer's place of residence.[61] The obligation to pay the flat-rate tax from the paid disposal was connected with the obligation to submit a relevant tax statement. The tax statement had to be submitted within the period of the tax payment. The tax statement relevant to the flat-rate tax settlement from real property sales was PIT-23.

The legislator, by the regulation included in Article 21 Section 1 Subsection 32 a) and e) of the Personal Income Tax Act, enabled the taxpayers the exemption from the tax payment from the paid disposal of real property if the revenue is spent within 2 years on the purposes

[59] See: J. Bauta-Szostak, B. Bogdański; op cit. p. 31.

[60] It is worth emphasizing in the context of this paper that the content of Article 19 Section 1 of the Personal Income Tax Act, the wording effective until 31 December 2000, was recognised by the Constitutional Tribunal in the judgement of 27 November 2007 (file no. SK 39/06) to the extent, in which it omits the element of the standard defining that the value expressed in the price determined in the sales agreement, which constitutes the revenue from the sales of the property and ownership rights and other objects is reduced by the due goods and services tax as incompatible with Article 2 in relation to Article 84, Article 217 and Article 64 Section 1 and 3 of the Polish Constitution Then the provision included the wording "selling costs".

[61] If the taxpayer does not pay the due tax on time, there arise tax arrears. More on the execution of the tax arrears: M. Handzel, *Egzekucja zaległości podatkowych jako element bezpieczeństwa finansowego państwa – wybrane zagadnienia* [in:] *Bezpieczeństwo finansowe państwa i organizacji gospodarczej*, S. Owsiak (ed.), Bielsko-Biała 2014, p. 87-101.

defined in this article. Then the taxpayer within 14 days from the date of the disposal should submit an appropriate statement to the relevant Tax Office competent for the taxpayer's place of residence and submit PIT-23. However, taking into account the court judgements and the practice of tax authorities, when the taxpayer did not submit the statement, it did not deprive them of the right to the exemption, although right after the implementation of this regulation, tax authorities made this tax relief contingent on submitting such a statement, but they departed from this practice rapidly.[62]

According to Article 21 Section 1 Subsection 32 a) and e) of the Personal Income Tax Act, the tax-free revenue was the revenue from real property and ownership rights sales:

a.) in the expenditures made within two years from the date of the sale for the purpose of:

- an acquisition of a residential building on the territory of the Republic of Poland or its part or a share in this property, a residential unit which is a separate property or a share in this property, and also an acquisition of a land or a share in the land or the perpetual usufruct of land or a share in this right related to this building or the housing unit,
- an acquisition of the cooperative ownership right to a housing unit on the territory of the Republic of Poland or a share in this right, the right to a single-family house in the housing cooperative or a share in this right,
- an acquisition of a land on the territory of the Republic of Poland or a share in this land, the perpetual usufruct of land or a share in this right related to the construction of the residential building, including a land or a share in the land or the perpetual usufruct of land or a share in this right related to the construction of the residential building in progress,

[62] See: the judgement of the Supreme Court of 6 June 2002 (file no. III RN 90/01), which decided that if the statement was not submitted by the taxpayer, defined in Article 28; Section 2 of the Personal Income Tax Act, it causes the loss of entitlement to the flat-rate tax deferral, but it does not exclude the exemption form it in case of meeting the conditions in Article 21 Section 1 Subsection 32 a) of the Personal Income Tax Act. The Supreme Court agreed also that it is the deadline of the substantive law and is not subject to restoration.

- a construction, development, superstructure, reconstruction, renovation or modernization of the owned residential building, its part or the owned residential unit, located on the territory of the Republic of Poland,
- a development, superstructure, reconstruction or adaptation of the owned non-residential building or its part, non-residential unit or non-residential room for residential purposes, located on the territory of the Republic of Poland,

b.) in the expenditures made within two years form the date of the sale for the purposes of the credit or loan repayment, and also the interest on the credit or loan taken for the purposes defined in a), from a bank or credit union, located on the territory of the Republic of Poland, including the repayment of the a credit or loan and the interest on this credit or loan taken before the date of obtaining this revenue.

It should be noted that the taxpayers who benefited from so called interest exemption regulated in Article 26b (the wording effective until the end of 2006) could not benefit from the exemption defined in Article 21 Section 1 Subsection 32 e) of the Personal Income Tax Act.[63]

The revenue from real property sales was exempt from the income tax, which was spent on the purposes mentioned above within two years from the date of the sale. This gave reasons for frequent doubts if the new property can be acquired before the conclusion of the real property sales agreement, based on which the income was liable to exemption be exempt from taxation. The discussed provision introduced only the deadline for the expenditure of the funds obtained from the paid disposal of the property. It did not refer to the earlier period of time when the funds could be spent. Therefore, it had to be stated that the conclusion of the real property sales agreement related to an acquisition of a new property by a taxpayer before the conclusion of the sales agreement related to the "old" property should not cause the loss of the right to exemption from taxation.[64] It is worth mentioning that in practice of tax authorities and in court judgements once an expenditure within two years

[63] It should be noticed that in this case the taxpayer could benefit from such an exemption but they had to submit the adjustments to the annual statement, in which they would not benefit from so called interest exemption. The taxpayer would have to analyse which exemption would be more profitable.

[64] See: J. Bauta-Szostak, B. Bogdański; op cit. p. 59-62, including numerous examples of the judgements by administrative courts, given by the authors.

was allowed if it was made as an advance and then this advance was included in a notarial deed related to the ownership transfer even after two years from the date of the sale[65], and another time the expenditure was not allowed, because it was stated that an acquisition within two years means transferring the ownership to the acquirer during this period.[66]

The next dispute solved in two ways in practice was the problem if the expenditure made on the repayment of the mortgage credit taken for the repayment of the property that has just been sold was in accordance with the exemption based on Article 21 Section 1 Subsection 32 e). Therefore, the position of some courts was that the catalogue included does not provide for an exemption when the funds obtained from the sales for the purpose of the repayment of a loan taken for an acquisition of a property, which the taxpayer disposed of.[67] Similarly, an administrative court decided that a taxpayer who spends the funds from the property sales on the repayment of the credit taken for its acquisition has no right to exemption, defined in Article 21 Section 1 Subsection 32 e) of the Personal Income Tax Act unless this repayment is made for the purpose of an acquisition of another property.[68] Another court gave a completely different opinion on this issue and stated in the justification of the judgement that it does not have to be an acquisition of a new right but also a repayment of a mortgage credit taken for the acquisition of the right, the sales of which provided the revenue.[69]

Another dispute was if the repayment of a refinance credit is liable to the exemption from Article 21 Section 1 Subsection 32 e) of the Personal Income Tax Act. On one hand, the courts admit that such a credit may be a refinance credit, provided that it is used for the residential purposes[70] and that there cannot be made a conclusion on the basis of the provision of Article 21 Section 1 Subsection 32 e) of the act mentioned above that a refinance credit taken before obtaining the revenue for the repayment of

[65] Ibidem, e.g. the judgement of the SAC of 9 April 1997 (file no. SA/Ka 1920/95).
[66] Ibidem, e.g. the judgement of the SAC of 8 April 1999 (file no. III SA 5249/98).
[67] See: the judgement of the Province Administrative Court in Warsaw of 9 November 2007 (file no. III SA/Wa 1074/07).
[68] See: the judgements of the PAC in Łódź of 5 March 2008 (file no. I SA/Łd 1135/07) and a similar judgement of the SAC of 5 November 2009 (file no. II FSK 863/08).
[69] See: the judgement of the SAC of 6 April 2007 (file no. II FSK 509/06) and a similar judgement of the PAC in Wrocław of 7 December 2007 (file no. I SA/Wr 1420/07).
[70] Ibidem, the judgement of PAC in Kielce of 12 November 2009 (file no. I SA/Ke 393/09).

a construction and mortgage credit lost the status of a credit, which is defined in the provision mentioned above.[71] On the other hand, the courts claimed that the catalogue included in Article 21 Section 1 Subsection 32 e) of the act mentioned above did not allow in this regulation the credit to be a repayment of another credit even if it financed directly or indirectly the residential needs of the taxpayers.[72]

As J. Bauta-Szostak and B. Bogdański emphasize, all the previously discussed purposes related to an acquisition, construction or development of the properties located on the territory of Poland. Such a condition is yet contradictory to the basic principles of the European Union – a principle of a free movement of persons and the principle of free movement of capital.[73] Therefore, the legislator in 2009 implemented changes in this regard. However, the taxpayers in this regard could rely on the incompatibility of the Polish regulation with the EU law from the moment of the Poland's accession (i.e. 1 May 2004) until the implementation of amendments in 2009.[74] The judgement favourable to taxpayers was issued by ECJ in a similar case on the grounds of Portuguese legislation.[75] The Polish courts gave also a similar opinion, claiming that restricting the exemption of the expenditures of the funds coming from the sales on acquiring the properties located in the territory of Poland is incompatible with the Community law.[76]

If the conditions defined in Article 21 Section 1 Subsection 32 e) of the Personal Income Tax Act were not met, the tax was payable at the latest on the next day after the two-year period, starting from the date of the sales, including the interest calculated:

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[71] Ibidem, the judgement of the PAC in Reszów of 5 listopada 2009 (file no. I SA/Rz 703/09) and a similar judgement of the PAC in Kielce of 29 October 2009 (file no. I SA/Ke 365/09).

[72] Idem, the judgement of the PAC in Wrocław of 30 November 2010 (file no. I SA/Wr 1151/10) and the judgement of the SAC of 24 September 2009 (file no. II FSK 650/08).

[73] See: J. Bauta-Szostak, B. Bogdański; op cit. p. 62-63.

[74] It concerns the regulation of the income tax, the wording effective until 31 December 2006, provided that on the basis of acquired rights, in case of using the revenue for the purposes defined in Article 21 Secion 1 Subsection 32 a), the period of spending is passed to the years 2007-2008.

[75] More on: J. Bauta-Szostak, B. Bogdański; op cit. p.63.

[76] See: the judgement of the PAC in Warsaw of 4 November 2009 (file no. III SA/Wa 832/09) and the judgement of PAC in Warsaw of 14 September 2009 (file no. III SA/Wa 942/09).

- from the 15th day after the date of the property sales until the date on which the two-year period expired, starting from the date of sales – in the amount of half the interest on tax arrears,
- on the next day after the two-year period expired, starting from the date of the sales until the date of payment – full interest on tax arrears.

4. The rules of taxation of real property sales acquired between 1 January 2007 and 31 December 2008

By the Act of 16 November 2006, amending the Personal Income Tax Act and some other acts there were implemented changes in terms of taxation of the paid disposal of a property and the ownership rights by natural persons. Those principles related to the properties, which were acquired, constructed after 31 December 2006 and before 1 January 2009.

The basic principle, according to which after five years, starting from the end of the year, in which the property was acquired or constructed, the sales of the property is not liable to income tax, did not change.

Taxation principles applicable to the properties acquired in the period mentioned above resulted from Article 30e of the Personal Income Tax Act, in terms of which the seller paid the income tax in the amount of 19% of the income. The base for calculating the tax was the income (not the revenue as up to 2006), which was the difference between the revenue from the paid disposal of the property or ownership rights and deductible expenses established in accordance with Article 22 Section 6c and 6d of the act mentioned above, increased by the depreciation write-offs made on the disposed properties or rights. Tax-deductible expenses from the paid disposal of the property were:

- documented costs of acquisition or
- documented costs of manufacturing,
- increased by documented expenditures, which increased the value of the properties, made by the taxpayer during the ownership.[77]

If the property was acquired by inheritance, donation or in any other unpaid way, the deductible expenses were:

- documented expenditures, which increased the value of the properties, made during the ownership and

[77] Ibidem, Article 22 Section 6c of the Personal Income Tax Act.

- the amount of the paid inheritance and donation of such a proportion, in which the value of the property disposed of, accepted to be liable to inheritance and donation tax, is equal to the total value of the property accepted to be liable to inheritance and donation tax.[78]

The acquisition or manufacturing costs could include, for example: the price, tax on civil law transactions paid on the acquisition of the property, notary and court fees paid on the acquisition of the property, real property agent's fees paid on the acquisition of the property, credit or loan interest, taken for the purpose of the acquisition or construction of the property, construction costs, renovation costs.

The costs of the acquisition or manufacturing of the property, defined in Article 6c of the Personal Income Tax Act were increased annually, starting from the year after the one, in which the disposed properties were acquired or manufactured, until the year preceding the tax year, in which the properties were disposed of, at the level compatible with the consumer price index in the first three quarter period of the tax year in relations to the same period of the previous year, announced by the President of the Central Statistical Office in the Official Journal of the Republic of Poland "Monitor Polski".

The income tax on the paid disposal of the property was payable at the submission of the annual tax return for the tax year, in which the disposal took place. The tax should be declared in the annual tax return PIT-36, PIT-36L or PIT-38. The tax return included only the due tax, not the revenue and deductible expenditures.

For the revenue from the paid disposal of the property acquired in 2007-2008, the legislator did not provide any relief in the form of spending the revenue for the residential purposes, as it was in the previous regulation, but provided the exemption regulated in Article 21 Section 1 Subsection 126 of the Personal Income Tax Act, i.e. residency relief. According to this article, the tax-free revenues were the revenues from the paid disposal of:

- a residential building, its part or a share in ownership of this building,
- a residential unit being a separate property or a share in the ownership of this property,
- a cooperative ownership right to the residential unit or a share in this right,

[78] Art 22 item 6d of the Act on personal income tax.

- a right to a single-family house in a housing cooperative or a share in this right if the taxpayer was registered in this building or unit mentioned in a)-d) for a permanent stay for a period of time not shorter than 12 months before the date of the disposal, subject to Article 21 Section 21 and 22 of the act mentioned above.

The exemption was applicable to the revenues of the taxpayer, who submitted a statement that they meet the requirements of the exemption in the relevant Tax Office within the time of submitting the annual tax return[79], defined in Article 45 Section 1 of the Personal Income Tax Act for the tax year, in which the paid disposal of the property took place. The exemption, defined in Article 21 Section 21 of the act mentioned above was applicable to both spouses.[80]

The exemption caused numerous problems with its interpretation and applying by tax authorities, and because of appeals from the tax decisions – by administrative courts. One of the disputes was the following issue: if in a given residential units, one of the spouses was registered and the other not, was the exemption applicable to both of them? In this case, tax authorities presented the position unfavourable to taxpayers, claiming that both spouses had to be registered for at least 12 months before the disposal, so that they could benefit from the exemption based on Article 21 Section 1 Subsection 126 of the Personal Income Tax Act.[81] However, most of administrative courts presented an opposite position, claiming that the residency relief was applicable to both spouses, despite the fact that only one of them met the requirement of registration.[82] Such an interpretation that regards some expression as unnecessary cannot be considered correct (…) every word used in the legal text is necessary for

[79] It should be emphasized that originally the legislator gave the taxpayers 14 days for submitting the statement, starting from the date of the property disposal. However, later in the amendment to the Personal Income Tax Act the deadline was changed for the date of the annual tax statement submission, i.e. no later that 30 April of the following year in relation to the year, in which the property sales took place.

[80] Ibidem, Article 21 Section 22 of the Act on personal income tax.

[81] See: the judgement of the PAC in Warsaw of 14 November 2007 (file no. III SA/Wa 1387/07); the judgement of the PAC in Warsaw of 21 December 2009 (file no. III SA/Wa 1224/09).

[82] See: the judgement of PAC in Łódź of 17 December 2009 (file no. I SA/Łd 757/09), a similar judgement of the PAC in Gliwice of 25 March 2010 (file no. I SA/Gl 858/09); the PAC in Lublin of 21 January 2009 (file no. I SA/Lu 622/08); the PAC in Poznań of 2 September 2010 (file no. I SA/Po 384/10).

the reconstruction of the tax standard of the proceedings.[83] In addition, the Constitutional Tribunal claimed in one of its acts that the interpretation, which leads to the conclusion that some part of the provision should be considered unnecessary, could not be allowed.[84]

The next dispute on the grounds of this provision was the issue regarding the date from which the registration should be counted. In the justification of one of the judgements, the court rightly decided that there were no grounds for the statement that the registration started from the date of the acquisition of the property.[85] Article 21 Section 1 Subsection 126 of the Personal Income Tax Act neither determined the initial date of the registration, nor required its continuity before the date of acquisition, therefore there were no normative bases to accept that the registration for a permanent stay in a given place started for the seller on the date of acquisition of the property disposed of.[86] Therefore, the significant fact was the registration[87] of the taxpayer for a permanent stay in a unit disposed of, or a building, for at least 12 months before the date of disposal, without the requirement of the continuity of registration. On the contrary, another administrative court decided that the period of registration should be counted from the date of acquisition.[88]

Another disputable issue solved in many ways in practice was if the residency relief covered the land under the building. According to one opinion, the residency relief should relate to the whole property sold, which means the land and the residential building constructed on it, which did not result from the content of the Personal Income Tax Act, but from the provisions of the Civil Code, which state that the land and the buildings constructed on it constitute the whole property and cannot be subject to a separate disposal. In this case, the residential building is

[83] See: the judgement of the SAC of 8 June 1994 (file no. SA/Po 692/94), see also: B. Brzeziński, *Podstawy wykładni prawa podatkowego*, Gdańsk 2008, p. 48.
[84] See: the Act of the CT of 14 June 1995 (file no. W 19/94).
[85] See: the judgement of the PAC in Lublin of 17 January 2008 (file no. I SA/Lu 728/07).
[86] See: the judgement of the PAC in Warsaw of 11 February 2008 (file no. III SA/Wa 1992/07).
[87] The SAC in the judgement of 14.05.2001 decided that the registration regarding the permanent stay in a given residentail unit means residing in a certain place at an indicated address with an intention of a permanent or long-term stay, concentrating the life in a given place, including setting a centre of personal and material interest.
[88] See: the judgement of the PAC in Bydgoszcz of 18 December 2007 (file no. I SA/Bd 697/07).

not traded, but the land property built-up with this building.[89] If the ownership right to a residential unit, the ownership right to a residential building and the land perpetual usufruct, where the building is located, cannot be subject to a legal trade, then the subject of the sales cannot be divided into certain elements only because of the tax law.[90]

According to the second opinion, the exemption was applicable only to a part of the income obtained from the whole property by the taxpayer, to the extend in which the exemption related the revenue from the residential building disposed of. Article 21 Section 1 Subsection 126 a) of the Personal Income Tax Act constituted *lex specialis* in relation to the regulation of Article 10 Section 1 Subsection 8 a) of the act mentioned above, making an exception from the rule that the property sales is subject to the income tax. On the grounds of the definition of "property" included in Article 46-48 of the Civil Code, it was obvious to the court that the term "building", being a part of the whole property, has a narrower connotation (the meaning of the word) and therefore there arises a situation when the disposal of the building is subject to the exemption, not the whole property, where it is located.[91] Using by the legislator in Article 21 Section 1 Subsection 126 of the Personal Income Tax Act the expression *the disposal of the residential building, its part or a share in it*, according to another court, did not constitute a deviation from a civil understanding of the term "property" and did not contradict the building being its part. The civil law and tax law belong to two different areas of law, which means that the same event actually could be judged differently and different legal effects could be assigned to it. On the grounds of the civil law, a disposal of the whole property took place, but on the grounds of the tax law, this action caused the fiscal obligation only with reference to a part of the income from the land sales.[92]

In the doctrine of the tax law, significant differences are in order to regulate the tax and civil law, because the civil law concerns private interest, and the tax law – the general interest. It means that the civil law concentrates on the maintenance of legal order and legal certainty, and the tax law is based on the principle of equality and universality of

[89] See: the judgement of the PAC in Warsaw of 22.04.2010 (file no. III SA/Wa 2040/09).
[90] See: the judgement of the PAC in Olsztyn of 23.09.2010 (file no. I SA/Ol 576/10).
[91] See: the judgement of the PAC in Wrocław of 30.10.2009 (file no. I SA/Wr 1100/09).
[92] See: the judgement of the PAC in Poznań of 19.05.2010 (file no. I SA/Po 116/10).

taxation.[93] Tax law and other fiscal issues are a part of new legal complexes and gain special features, necessary to reach the purposes of taxation set by the legislator.[94]

5. The taxation rules real property sales acquired after 31 December 2008

By the amendment to the Personal Income Tax Act of 6 November 2008,[95] the Polish legislator partly changed the method of real property taxation effective in the years 2007 - 2008. The basic principle was not changed, according to which the property sales by a natural person, apart from the business activity, is not subject to taxation if it takes place after 5 years from the end of the tax year, in which the property was acquired or constructed. In addition, the general rules of taxation of the property paid disposal were not changed, as well as regulations regarding the rules of establishing the income to be taxed and the tax rate. A significant change was the liquidation of so-called residency relief and the possibility of spending the obtained revenue on private residential purposes.

The new exemption was included in Article 21 Section 1 Subsection 131 of the Personal Income Tax Act, according to which the revenue from the paid disposal of the property and ownership rights is tax-free, which are determined in Article 30e of the act mentioned above, in the amount, which is equal to the product of this income and the share of expenditures on private residential purposes in the revenue from the paid property disposal and ownership rights if starting from the date of the paid disposal and no later than within two years from the end of the calendar year, in which the paid disposal took place, the revenue obtained from the disposal of this property or the ownership right was spent on private residential purposes; documented expenditures on those purposes are included in the revenue from the paid disposal of the property and ownership rights.

According to Article 21 Section 25 of the Personal Income Tax the expenditures on the purposes defined in Section 1 Subsection 131 of this act are:

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[93] Ibidem, R. Mastalski, *Stosowanie prawa podatkowego*, Wrocław 2008, p. 27.
[94] See: M. Zirk-Sadowski, *Problem autonomii prawa podatkowego w orzecznictwie NSA*, Przegląd Orzecznictwa Podatkowego 2004, no. 2, p. 113-123.
[95] Journal of Laws of 2008, No 209, item 1316.

- expenditures on:
  - acquisition of a residential building, its part, or a share in this building, a residential unit being a separate property, or a share in this unit, and also an acquisition of a land, or a share in this land, or a land perpetual usufruct, or a share in this right, related to this building or unit,
  - acquisition of a cooperative ownership right to the residential unit, or a share in this right, a right to a single-family house in a housing cooperative, or a share in this right,
  - acquisition of a land for a residential building construction , or a share in this land, a land perpetual usufruct, or a share in this right, including also a construction of a residential building in progress, and acquisition of another land, or a share in this land, a land perpetual usufruct, or a share in this right if within the period defined in Section 1 Subsection 131, the land changes into the land for a construction of a residential building,
  - construction, development, superstructure, reconstruction, or renovation of the owned residential unit,
  - development, superstructure, reconstruction, or adaptation to residential purposes of the owned non-residential building or unit,

– located in a member state of the European Union or in other state within the European Economic Area, or in the Swiss Confederation;

- expenditures on:
  - repayment of a credit (loan) and the interest on this credit (loan) taken by the taxpayer before the date of obtaining the revenue from the paid disposal, defined in Article 10 Section 1 Subsection 8 a)-c), for the purposes defined in Subsection 1,
  - repayment of a credit (loan) and the interest on this credit (loan) taken by the taxpayer before the date of obtaining the revenue from the paid disposal, defined in Article 10 Section 1 Subsection 8 a)-c), for the repayment of the credit (loan) defined in a),
  - repayment of any other credit (loan) and the interest on this credit (loan) taken by the taxpayer before the date of obtaining the revenue from the paid disposal, defined in Article 10 Section 1 Subsection 8 a)-c), for the repayment of the credit (loan), defined in a) or b)

– in a bank or credit unit, seated in a member state of the European Union or other state within the European Economic Area, or in the Swiss Confederation, in a bank or credit unit, seated in a member state of the European Union, or other state within the European Economic Area, or the Swiss Confederation, subject to Section 29 and 30;

- the value of the obtained from a paid disposal, by exchange, located in a member state of the European Union or other state within the European Economic Area or the Swiss Confederation:
  - a residential building, its part or a share in this building, a residential unit being a separate property, or a share in this unit, or
  - a cooperative ownership right to a residential unit, a right to a single-family house in a housing cooperative, or a share in those rights, or
  - a land or a share in a land, a land perpetual usufruct, or a share in this right, assigned to a construction of a residential building, including a land, or a share in a land, or a land perpetual usufruct or a share in this right, with a construction of a residential building on this land, or
  - a land, or a share in a land, or a land perpetual usufruct, or a share in this right, related to a building or unit defined in a).

According to Article 25 Section 26 of the Personal Income Tax Act, the owned private building, unit or room, defined in Section 25 Subsection 1 d) and e) of the act mentioned above, is a building, unit, or room being a property or co-property of the taxpayer, or to which the taxpayer has a cooperative right to a unit, single-family house in a housing cooperative, or a share in those rights.

Article 21 Section 27 of the act mentioned above states that in case of expenditures on residential purposes in a member state of the EU other than the Republic of Poland, or other state within the European Economic Area, or the Swiss Confederation, the exemption defined in Section 1 Subsection 131 is applicable, provided that there are legal grounds resulting from the agreement on avoidance of double taxation or other ratified international agreements, in which the party is the Republic of Poland, to obtain by a tax authority the tax information form the tax authority of the state, on the territory of which the taxpayer makes expenditures for the residential purposes. The legislator in Article 21

Section 28 of this act does not consider the expenditures defined in Section 25 if they are spent on:

- acquisition of a land, or a share in this land, a land perpetual usufruct, or a share in this right, a building, its part, or a share in this building, or
- construction, development, superstructure, reconstruction and adaptation, or renovation of a building, or its part

– for recreational purposes.

Income tax is declared in a separate annual statement PIT-39. The taxpayer declares the income exempt from taxation, regardless of whether the expenditures for residential purposes were already made or not yet. In case when the conditions of the exemption from the tax in relation to the use of the revenue for the private residential purposes are not met, the taxpayer is obliged to submit an adjustment to the annual statement PIT-39 and pay the tax, including the interest on the delay.

It seems that in the light of the regulation effective since 2009, the disputable issues are reduced, but in practice of the interpretation and law application, they exist. For example, they relate to some expenditures declared as the deductible cost, or the expenditures on private residential purposes.

Conclusions

A vague wording of a provision causes that there arises a possibility of a different interpretation of its content and therefore, its different application in analogical situations. The above examples prove that application of some provisions of the Personal Income Tax Act in terms of taxation of real property sales brought many difficulties to both tax authorities and administrative courts. In practice, depending on the Tax Chamber or administrative court, to which the taxpayer was assigned, the identical situation of the real property sales could be taxed differently. Such actions have caused a sense of injustice and unequal treatment of taxpayers by tax authorities and administrative courts. Therefore, it so crucial those legal standards effective in this regard are precise enough so that there is no misinterpretation, and as a result – different taxation of the same legal action subject to taxation. If a casuistic regulation of a given issue is impossible or difficult, it seems that at least tax

authorities and administrative courts should treat this issue fairly and try to eliminate the cases of different attitude in the same matter.

Legal acts

[1.] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No 78, item 483, as amended.

[2.] The Personal Income Tax Act of 26 July 1991, Journal of Laws of 2016, item 2032 as amended.

[3.] The Act of 23 April 1964 – The Civil Code, Journal of Laws of 2016, item 380 as amended.

[4.] The Act of 29 August 1997 – the Tax Order, Journal of Laws of 2017, item 201 as amended.

[5.] The Act of 16 November 2006 amending the Personal Income Tax Act and some other acts, Journal of Laws.of 2006 No 217, item 1588 as amended.

[6.] The Act of 6 November 2008 amending the Personal Income Tax Act and the Corporate Income Tax Act and some other acts, Journal of Laws No 209, item 1316 as amended.

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