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Tax aspects of inheritance and reprivatisation

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Payment for non-contractual use of real estate is not damages

Tomasz Piejak

Payments to the rightful owners of real estate taken over without legal grounds by the State Treasury or local governmental unit are subject to personal income tax as income "from other sources." Whether the payments are subject to VAT depends on the specific circumstances.

Non-contractual use of property occurs when a third party without legal grounds encroaches on the owner's property rights, so that the rightful owner is deprived of actual control over the property or the possibility of benefitting from the property. This situation often arises in reprivatisation cases, involving real estate taken over by the State Treasury or local governmental units on the basis of nationalisation decisions (in the case of takeover by the State Treasury) or communalisation decisions (in the case of takeover by local governmental units). A finding of the defectiveness of such decisions means they are removed from legal circulation with the same effect as if they had never been issued. This means that the owner from the time before issuance of the defective decision continued at all times to hold the right of ownership of the real estate.

In such situations, the rightful owners seeking to cure the unlawful status of the property may file suit against the unlawful holders to regain the property and to receive payment e.g. for non-contractual use of the real estate.

The payment for non-contractual use of real estate is essentially the fee for use of the property which the holder would have had to pay if its possession had been founded on an existent legal basis. In other words, it is a way to settle the books between the owner and the unlawful holder of possession by awarding the owner the benefits it would normally have received if it had delivered the property to the possessor on a specified legal basis (e.g. under a lease).

Personal income tax

The tax authorities and the administrative courts in tax proceedings take the position that payments for non-contractual use of real estate cannot be equated with damages. The Personal Income Tax Act of 26 July 1991 does not define the concept of "damages" for tax purposes, and thus it is reasonable to refer to the civil law. Art. 224 §2 of the Civil Code governs claims supplementary to a claim for delivery of possession. These claims include a claim for payment for non-contractual use of property, a claim for wear and tear, deterioration or loss of property, a claim for return of unconsumed benefits, and a claim for payment of the value of consumed benefits. This enumeration itself, according to the tax authorities and the courts, clearly indicates that the lawmakers distinguished payments for non-contractual use of real estate from damages. Both the existence of the claim for the payment and the amount do not depend

on whether the owner actually suffered a loss and the unlawful possessor received a benefit. The amount of the payment owed to the owner is determined by market rates for use of the given type of property and the duration of the possession by the defendant (unlawful possessor). Because the payment lacks the nature of damages, it does not enjoy any of the exemptions provided in the PIT Act for damages (Supreme Administrative Court judgment of 22 January 2010, Case II FSK 1327/08, and Province Administrative Court in Warsaw judgment of 23 October 2014, Case III SA/Wa 1666/14).

The PIT Act does not expressly mention payment for non-contractual use of real estate as income falling within any of the sources listed in Art. 10(1) of the act. In the view of the tax authorities and the administrative courts, it constitutes income from "other sources" as referred to in Art. 10(1)(9) and 20(1) (Province Administrative Court in Szczecin judgment of 13 May 2015, Case I SA/Sz 1216/14, and Province Administrative Court in Łódź judgment of 24 September 2015, Case I SA/Łd 1151/14). Art. 20 of the PIT Act contains a list of types of income subject to personal income tax. Under the well-established view, the phrase "in particular" used in this provision means that the definition of income from other sources is open-ended and there is nothing preventing this category from extending to types of income not expressly mentioned in this section. Anytime a material benefit is obtained, there is income from another source. Such income is subject to taxation under general rules pursuant to Art. 27(1) of the PIT Act, i.e. according to the tax scale. Such income must be reported in the annual tax return for the year in which the income is received.

Significantly, the payment for non-contractual use of real estate may be reduced by the costs incurred in connection with obtaining it. This is particularly important in the case of the often complex disputes with the State Treasury or local government, extending for many years, involving significant costs for legal advice and expenses incurred in connection with conducting court cases (court costs). The general rules for revenue-earning costs provided for in the PIT Act apply to income from other sources. Under Art. 22(1), revenue-earning costs are costs incurred in order to obtain, maintain or secure a source of income. The law does not set forth a fixed catalogue of expenses which can be qualified as revenue-earning costs. They may include any rational and economically justified expenses connected with obtaining income.

VAT

In resolving doubts whether non-contractual use of real estate is subject to VAT as a fee for providing a service under Art. 5(1)(1) of the VAT Act of 11 March 2004, the specific circumstances will always be decisive.

Under Art. 5(1)(1) of the VAT Act, supply of goods or services for consideration in Poland are subject to VAT. Under Art. 7(1), supply of goods is understood to mean the transfer of the right to dispose of tangible property as the owner, and under Art. 8(1), supply of services is understood to mean any transaction with a natural or legal person or organisational unit without legal personality which does not constitute the supply of goods.

But not every transaction can be regarded as a service within the meaning of the VAT Act. For that to be the case, there must be a direct causal connection between the service performed and the consideration received.

This connection is evident in the amount received as actual payment for the service performed within a defined legal relationship. In other words, the payment received should be the consequence of performance of the specific transaction by a person acting as a VAT payer.

According to the tax authorities and the administrative courts, the key is whether the rightful owner consents (even implicitly) to use of the real estate by the unlawful possessor, or takes steps to regain the property upon learning that it is being used without legal grounds. If after disclosure of the lack of a legal basis for use of the property by a third party, the owner continues to allow (even implicitly) the person's use of the property, then the payment received by the owner for non-contractual use of the real estate constitutes payment for the supply of services within the meaning of Art. 8(1) of the VAT Act. Conversely, if upon learning of non-contractual use of the property by a third party the owner takes steps to regain the property, the payment for non-contractual use of the property is not subject to VAT (Supreme Administrative Court judgments of 2 April 2014, Case I FSK 689/13, and 15 January 2015, Case I FSK 1980/13, and Province Administrative Court in Warsaw judgment of 24 July 2015, Case III SA/Wa 231/15).

Taxation of sale of recovered real estate

Aldona Leszczyńska-Mikulska

Income from the sale of recovered real estate expropriated under the Warsaw Decree may be subject to personal income tax.

Under Poland's Personal Income Tax Act (Art. 10(1)(8)(a)–(c)), the paid disposal by a natural person of real estate, a portion of real estate or a share in real estate, or certain property rights in real estate (including the right of perpetual usufruct), within 5 years after the end of the calendar year in which the property was acquired or built, and not made as part of the taxpayer's business activity, is subject to personal income tax. Currently PIT on this type of income is equal to 19% of the income, which is the difference between the revenue from the paid disposal and the costs of generating the revenue.

In practice there should not normally be any doubts in defining the date of acquisition or construction of the property, but determining this date can be problematic in the case of the sale of real estate which entered the ownership of the City of Warsaw under the "Warsaw Decree" (the Decree on Ownership and Usufruct of Land in Warsaw of 26 October 1945).

Under Art. 1 of the Warsaw Decree, with the aim of rebuilding and development of the capital, and particularly rapid disposal and proper use of the land, all land in the territory of Warsaw passed into the ownership of the municipality of Warsaw on the effective date of the decree. Under Art. 7 of the Warsaw Decree, the existing owner of the land or the owner's legal successors had 6 months from the date of taking over of the property by the municipality to file an application for award of the right of perpetual tenancy (now known as perpetual usufruct) for a token rent, or the right of construction, also for a token fee.

Over the last couple of decades many people have succeeded, through long-lasting disputes with the administrative authorities, in regaining land and taking possession of buildings and other structures taken under the Warsaw Decree, exercising the possibility of establishing the right of perpetual usufruct of the land in their favour in exchange for the lost ownership. Over the years a fierce debate has raged over the tax consequences of sale of regained property by the original owners, their heirs, or persons who acquired claims to the property, or their legal successors.

It may be concluded from an analysis of the judicial rulings in tax disputes that ultimately a clear line of case law from the administrative courts has developed, according to which the tax consequences of the sale of such property depends among other factors on whether the seller is the heir of the original owners, or acquired a claim for establishment of the right of perpetual usufruct to the land from the original owners or their heirs.

In a key decision for Warsaw Decree cases, the judgment of 7 May 2002 (Case III RN 18/02), the Supreme Court of Poland held, "The legislative intent was not to impose taxation on the sale of perpetual usufruct of real estate if the sale was made by the former owner of the real estate or his legal successors who obtained perpetual usufruct in realisation of the entitlements arising under Art. 7(1)–(4) of the decree. The court recognised that in the case of these persons, there was no acquisition of perpetual usufruct, because these persons were owners deprived of their ownership by the state, and the state never complied with the obligations specified in the decree to compensate the owners of the expropriated property for the material loss they suffered. In the court's view, this is how heirs of the former owners of the real estate should be treated if they obtained perpetual usufruct as a result of realisation of the entitlements arising under Art. 7(1)–(4) of the decree, which passed to them as heirs."

This view is also shared by the administrative courts, e.g. judgments of the Supreme Administrative Court of 28 April 2015 (Case II FSK 425/13) and 28 September 2006 (Case II FSK 1232/05), and judgments of the Province Administrative Court in Warsaw of 29 September 2006 (Case III SA/Wa 1541/06), 5 March 2013 (Case III SA/Wa 2606/12), 28 March 2013 (Case III SA/Wa 2498/12), and 7 May 2013 (Case III SA/Wa 3072/12).

According to the administrative courts, in a case where income from the sale of real estate expropriated under the Warsaw Decree is obtained by an heir of the original owner, the income may be subject to PIT if the sale of the property by the legal successors of the owner occurs within 5 years after acquisition of the real estate, understood to mean the time when the heir obtained the right to pursue the return of the property.

The date of acquisition of the real estate by such an heir should thus be the date of acquisition of the inheritance which included the

rights and claims connected with the real estate. Therefore, if the inheritance was acquired prior to 31 December 2010, the income from sale of the real estate in 2016 will not be subject to PIT. This position is also reflected in tax interpretations issued in individual cases of taxpayers, e.g. interpretations issued by the director of the Warsaw Tax Chamber of 17 April 2015 (no. IPPB2/4511-142/15-6/PW) and 27 March 2015 (no. IPPB4/415-1036/14-5/MS). In such case, the date the heir (or the original owner) acquired the right of perpetual usufruct of the land is irrelevant from the point of view of Art. 10(1)(8)(a)–(c) of the PIT Act.

The tax consequences of the sale of real estate under the PIT Act are different if the real estate is sold by a person who acquired the claim for establishment of the right of perpetual usufruct of the land from the original owner or his heirs through purchase or gift. Then the relevant date is the date of acquisition of the right of perpetual usufruct of the land from the City of Warsaw as a result of realisation of the acquired claim, regardless of the date of acquisition of the claim itself.

In the case law of the administrative courts, e.g. the Supreme Administrative Court judgment of 6 November 2015 (Case II FSK 2124/13) and a number of other rulings, the judges also rely on principles of reason and fairness, taking the view that if for the seller of real estate that was subject the Warsaw Decree the acquisition of the real estate did not constitute quasi-restitution of ownership (e.g. because the seller purchased a claim under Art. 7 of the Warsaw Decree), then the date of acquisition of the real estate should be assumed to be the date of acquisition of title (e.g. the date of the agreement establishing the right of perpetual usufruct), rather than the date of acquisition of the claims from the original (expropriated) owners or their legal successors. In such a situation, the taxpayer selling the real estate did not previously lose the real estate under the Warsaw Decree either directly or indirectly (for example because the property was not included in the inheritance received by the person). Thus the legal and tax situation of a taxpayer to whom the property was delivered in perpetual usufruct as a consequence of the taxpayer's purchase of the claim is different from the situation of a taxpayer for whom the right of perpetual usufruct was established as a sort of restoration, even if incomplete, of the person's original asset position which was diminished by operation of the Warsaw Decree.

Taxation of interest awarded against the State Treasury

Aldona Leszczyńska-Mikulska

Damages won from the State Treasury are exempt from personal income tax. Does this exemption also apply to statutory interest awarded in a legally final judgment?

Art. 21(1)(3) of Poland's Personal Income Tax Act exempts damages (material damages [*odszkodowanie*] or moral damages [*zadośćuczynienie*]) from income tax if the amount or rules for determining the damages arise directly from separate statutes or executive regulations issued under such statutes. Meanwhile, Art. 21(1)(3b) of the PIT Act exempts from taxation damages received pursuant to a judgment or judicial settlement, up to the amount specified in the judgment or settlement, except for damages:

- Obtained in connection with the conduct of business activity
- Concerning benefits which the taxpayer could have obtained if not for the injury.

In cases concerning taxation of damages received from the State Treasury (e.g. for losses caused by the inability to recover land from the State Treasury taken under the Warsaw Decree of 1945), there is a major doubt whether the PIT exemption indicated in Art. 21(1)(3b) of the PIT Act also applies to statutory interest awarded in a legally final judgment of a state court. This is important, if for no other reason, because with the passage of time in Warsaw Decree cases, the amount of interest awarded sometimes exceeds the principal amount of the damages.

Under Art. 160 §1 of the Administrative Procedure Code, in proceedings for damages for Warsaw Decree properties, damages are generally awarded pursuant to Art. 417 and Art. 361 §1 of the Civil Code. These provisions do not specify the rules for determining damages in an arithmetical sense (e.g. the amount of the damages or the method for calculating them), but instead regulate the scope of liability in damages. This means that the court will award damages taking into consideration all of the circumstances of the case in which the loss occurred. According to Art. 160 §1 of the Administrative Procedure Code, a party which has suffered a loss as a result of issuance of a decision in violation of Art. 156 of the code or the invalidation of such a decision is entitled to damages for the actual loss suffered. The amount of the damages is set by the court with consideration for, among other factors, the value of the property and the length of time the State Treasury unlawfully held the land over the years from the original filing of the previous owner's application to establish the right of temporary ownership.

Following an amendment to the PIT Act in 2003 affecting the wording of Art. 21(1)(3b), the view was developed in the case law of the administrative courts (in line with the position of the tax authorities) that while damages awarded in the judgment by the court enjoy a tax exemption (if they are damages for actual loss rather than lost benefits—*lucrum ces-*

sans), the same exemption does not cover statutory interest awarded in the judgment, which is thus subject to PIT. This view was taken for example by the Province Administrative Court in Warsaw in its judgment of 12 November 2015 (Case III Sa/Wa 4022/14—not legally final).

This ruling, and the many others like it, is surprising because statutory interest is calculated on the damages awarded and constitutes an integral part of the compensation adjudged against the State Treasury. The interest would not arise if not for the right to damages, and the claim for interest is therefore in a legal sense inherently connected with the same set of facts, the suffering of the same loss, although the substantive legal basis for calculation of the interest is different (Civil Code Art. 481). In other words, the interest which is auxiliary to the principal damages should enjoy a PIT exemption if the damages on which the interest is calculated are exempt from PIT.

However, in the judgment from last November cited above, the Province Administrative Court in Warsaw made a different interpretation of Art. 21(1)(3b) of the PIT Act. Citing the Supreme Administrative Court's judgment of 24 January 2008 (Case II FSK 1629/06), the province court held that there is no basis for interpreting the concept of "lost benefits," which has a fixed meaning in legal terminology, differently in tax cases. The interest payable in the event of a debtor's failure to make timely performance of a monetary obligation (Civil Code Art. 481 §1) should be treated as compensation for the extended and unlawful use of the creditor's capital. Looking at it in another way, it is damages for depriving the creditor of the possibility of deploying the capital, and thus depriving the creditor of the anticipated benefit of the capital (e.g. through profitable investment). Consequently, interest is compensation for the fact that the creditor could not use the money earlier. This leads to the conclusion that interest received on the basis of a judgment for the debtor's delay in performing a monetary obligation (Civil Code Art. 481 §1) constitutes damages concerning benefits which the taxpayer could have received if the loss had not been suffered.

The issue of interest received on the basis of a judgment for the debtor's delay in performing a monetary obligation was also the subject of analysis by the Supreme Administrative Court in its judgment of 26 August 2009 (Case II FSK 588/2008). In that judgment as well, the court took the view that interest received on the basis of a judgment for the debtor's delay in performance of a monetary obligation (Civil Code Art. 481 §1) constitutes damages for benefits which the taxpayer could have obtained if the loss had not been suffered, and as such is not exempt from personal income tax, because Art. 21(1)(3b)(b) of the PIT Act excludes such damages from the tax exemption.

As the Supreme Administrative Court indicated in its judgment of 20 December 2012 (Case II FSK 1009/11), in the case of actual loss (*damnum emergens*) the damages function as restitution, intended to restore the balance of the claimant's asset position upset by the injury. From the point of view of the injured party's assets, no surplus is created; only the detriment to the assets caused by the injury is made up. It is obvious that the accrual to the injured party on this basis is not taxable. The situation is different in the event of lost benefits. If the taxpayer had achieved the benefits, they generally would have been taxable. Extending the tax exemption to damages received for *lucrum cessans* would result in privi-

leging of taxpayers obtaining income in this form over other taxpayers, and thus would conflict with the constitutional principle of universality and equality of taxation.

In summary, there is currently a substantial risk of a finding by the tax authorities, as well as the administrative courts, that even though under the civil law interest on damages depends on the grounds for the principal claim, it nonetheless constitutes a separate subject of taxation under the Personal Income Tax Act. This means that so long as interest is not expressly mentioned in Art. 21 of the PIT Act as a category of income enjoying a tax exemption, it may not be found to be tax-exempt, even if the principal amount is tax-exempt.

This tax issue affects not only interest on damages awarded in reprivatisation cases, but is of vital importance in other matters, such as expropriation.

Zombie tax: Revival of tax obligations on inheritance and gifts

Tomasz Krzywański

Benjamin Franklin said nothing is certain but death and taxes. For heirs, the latter can be a consequence of the former. Lawmakers have made certain that the passage of time does not discharge tax obligations connected with an inheritance even decades into the past. Tax obligations can be revived as a result of certain events provided by law.

Like many other countries, Poland has an inheritance and gift tax. The obligation to pay the tax rests on the acquirer of title to property ("ownership or property rights"), including heirs, devisees (for ordinary or specific bequests by will), those entitled to receive a forced share of an estate, recipients of gifts, and other persons identified in the Inheritance and Gift Tax Act of 28 July 1983.

What consequences arise out of the accrual of a tax obligation?

From the perspective of taxpayers, it is key to properly determine the time when the tax obligation accrues, i.e. the event that entails a compulsory monetary obligation, although it is still inchoate at this point (and may later be transformed into an individualised tax obligation directed to a specific taxpayer). It is from this point that the one-month period for filing a tax return begins to run. Then, on the basis of the tax return, the tax authority will issue a decision establishing the amount of the tax obligation. Taxpayers who are included in the 1st tax group—spouse, children, parents or siblings—will be exempt from the tax entirely if they notify the tax office of the fact of acquiring the property within 6 months after the date when the tax obligation accrues. In the case of inheritance, this will be 6 months from the date when the ruling of the court confirming the inheritance

becomes legally final, or the date when the deed certifying the inheritance or the European Certificate of Succession is registered.

Significantly, the time when the tax obligation accrues is also vital for determining whether claims for unpaid tax have become time-barred. The tax authority has five years (from the date when the tax obligation accrues) to issue and serve a decision setting the amount of the tax obligation. After that deadline the taxpayer is no longer obligated to pay the tax established in the decision.

How to determine the time when the tax obligation accrues?

Art. 6(1) of the Inheritance and Gift Tax Act enumerates various events resulting in accrual of the tax obligation. For example, for heirs the obligation accrues upon acceptance of the inheritance; for those entitled to a forced share, when their claim is satisfied; and for recipients of gifts, when the donor makes a declaration in the form of a notarial deed (then all the tax formalities are performed via the notary). If the gift agreement is not concluded in the form of a notarial deed, the obligation accrues when the promised gift is made by the donor.

But Art. 6(4) of the act provides that if the acquisition was not notified to the competent tax office for taxation but is later confirmed by a document, the tax obligation accrues at the time the document is prepared. Documents confirming acquisition include more specifically legally final rulings by courts confirming acquisition of an inheritance and registered notarial deeds certifying inheritance. They may also include legally final rulings of courts referring, for example, to performance of a gift agreement or satisfaction of a claim to a forced share of an estate.

In other words, this provision may cause the "revival" of a tax obligation even many years after the original tax obligation became time-barred.

Example: *Anna acquired the estate left by her husband Jan in 1990, but no inheritance proceeding has ever been conducted. Because of planned development on the inherited real estate and the need to update the land and mortgage register, Anna is considering filing an application for a declaration confirming acquisition of the estate. Even though it has been 26 years since Jan died, a tax obligation will accrue when the order of the court confirming acquisition of the estate becomes legally final. Anna will have to file a tax return within one month after the ruling becomes legally final, and then pay the tax indicated in the decision establishing the amount of the tax obligation.*

Significantly, Art. 6(4) of the act, indicated above, provides that in the event of failure to declare the inheritance for taxation, the tax obligation also accrues upon the heir's reliance on the fact of acquisition by the heir before a tax authority or tax audit authority. This is what occurs in a situation where the heir plans to sell the inherited real estate. Then, to conclude the sale agreement in the form of a notarial deed, it is necessary to present a certificate issued by the head of the tax office confirming that the acquisition is exempt from tax, or the tax that was due was paid, or there was a tax obligation but it expired because it became time-barred. To obtain such a certificate, it is necessary to indicate the basis for acquisition of the property, which automatically results in revival of the tax obligation.

Example: *The court issued an order confirming that Ewa acquired an inheritance from Marek and the order became legally final in 2009. At that time Ewa did not declare or pay the inheritance and gift*

tax. Now Ewa plans to sell the inherited real estate, and consequently has applied to the head of the tax office for the relevant certificate. Even though more than 5 years has passed since the court ruling from 2009 became legally final, and the right of the tax authority to issue a decision setting the amount of the tax has become time-barred, the tax obligation itself is "revived" by Ewa's reliance on the fact of acquisition. Therefore Ewa will again be required to file a tax return and pay the tax as a result of the issuance of the decision establishing the amount of the tax obligation.

It should be noted that if Ewa had not applied to the tax authority for the certificate, this obligation would probably not have been revived for her (unless a tax audit was conducted). It would pass to her heirs, however, and could give rise to a tax obligation if they wanted to sell the inherited real estate.

Estate inherited before 1 January 2007

The current wording of Art. 6(4) of the Inheritance and Gift Tax Act was adopted under an amendment to the act which entered into force at the beginning of 2007. Under the previous wording, the "revival" of the tax obligation as a result of reliance on the fact of acquisition before a tax authority or tax audit authority applied only to gifts. From 1 January 2007 this provision was extended to any other type of acquisition of property.

In light of this change, the interim regulations included in the act introducing this change (Act of 16 November 2006 Amending the Inheritance and Gift Tax Act and the Civil-Law Transactions Tax Act) are of crucial relevance. Art. 3(1) of the amending act provides that as a rule, acquisition of ownership of property which occurred before the effective date of the amendment is governed by the provisions of the Inheritance and Gift Tax Act in the wording in force prior to the effective date of the amendment.

However, the Inheritance and Gift Tax Act does not define when "acquisition" of property rights occurs; it defines only the time when the tax obligation arises. Under Art. 925 of the Civil Code, an heir acquires an inheritance upon opening of the estate, i.e. upon the decedent's death. Therefore, if the estate was opened prior to 1 January 2007, the provisions of the Inheritance and Gift Tax Act in the wording in force at that time will apply.

Example: *Kazimierz died in 1985 and his estate was inherited by his two sons. They did not report the acquisition of the estate to the tax authorities in 1985 or in 2008 when they conducted the inheritance proceeding. Now they plan to sell the inherited real estate, so they apply to the tax office for issuance of the relevant certificate. The head of the tax office issues a certificate stating that the tax obligation has expired. The tax obligation is not "revived" because the pre-2007 wording of the Inheritance and Gift Tax Act applies.*

It should also be borne in mind that in the case of inheritances acquired prior to 1 January 2007, the exemption for family members cannot be exercised because it was only introduced in the amendment that went into effect on that date. The mere fact of acquisition of property is what is relevant for assessing the possibility of applying the exemption. In the case of inheritance, this refers to the date of the decedent's death. However, in this case the time of accrual of the tax obligation or its revival will be irrelevant. Thus if the decedent died prior to 1 January 2007 but the confirmation of acquisition of the estate occurred after the date, then the heir will be required to pay the tax.

Taxation of old inheritances: A huge dilemma

Tomasz Piejak, Tomasz Krzywański

There is divergence in the case law on whether the percentage rate that should be applied in setting the amount of inheritance tax is the rate in force on the date the tax obligation accrued or the date when the tax authority issues the decision setting the amount of the tax.

Old inheritances, i.e. those acquired years ago, often under tax regulations that are no longer in force, are generally subject to inheritance tax under the regulations in force when the tax obligation accrued. Determining which regulations are application is particularly important in reprivatisation cases which are now pending mainly with the legal successors of the former owners of real estate taken over in Poland after the Second World War by the State Treasury or local governmental units. In such cases, the estate included real property or various types of claims of significant value, and consequently, application of regulations other than those in force when the tax obligation accrued may create huge differences in the amount of tax to be paid.

Art. 15(3) of the Inheritance and Gift Tax Act of 28 July 1983 indicates that in determining the amount of tax, the amounts free from tax and the tax scales referred to in par. 1 of this article in force on the date when the tax obligation accrued should be applied, subject to par. 4, which provides for taxation of acquisition by way or gift or instruction by the donor at the sanction rate of 20%.

Under Art. 6 of the act, the tax obligation in the case of inheritance accrues upon acceptance of the inheritance, which under the Civil Code occurs either at the time the heir submits a statement on acceptance of the inheritance or six months after the heir learns of acquisition of the inheritance (i.e. learns of the decedent's death). If following submission of the statement on acceptance of the inheritance or expiration of the period for submitting the statement the inheritance was not reported to the competent tax office for taxation, the tax obligation accrues on the date of the document confirming acquisition of the inheritance. This document could be more specifically a legally final ruling of the court confirming acquisition of the inheritance or registered notarial deed certifying the inheritance. If the inheritance is not declared for taxation, the tax obligation also accrues at the time the heir relies on the fact of acquisition before a tax authority or tax audit authority.

Tax scale and percentage rate

Under Art. 15(1) of the Inheritance and Gift Tax Act, the tax is calculated on the basis of the surplus above the tax-free amount, according to the scales set forth in the following table, broken down by zloty amounts (tax thresholds) and percentage rates for specific tax groups.

Amount of surplus in PLN		Tax
above	up to	
for recipients in tax group 1		
	10,278	3%
10,278	20,556	PLN 308.30 + 5% of surplus above PLN 10,278
20,556		PLN 822.20 + 7% of surplus above PLN 20,556
for recipients in tax group 2		
	10,278	7%
10,278	20,556	PLN 719.50 + 9% of surplus above PLN 10,278
20,556		PLN 1,644.50 + 12% of surplus above PLN 20,556
for recipients in tax group 3		
	10,278	12%
10,278	20,556	PLN 1,233.40 + 16% of surplus above PLN 10,278
20,556		PLN 2,877.90 + 20% of surplus above PLN 20,556

Art. 15(3) of the act refers to the tax scales in force at the time of accrual of the tax obligation. But it is not plainly evident whether the concept of “tax scale” includes both the threshold amounts and the percentage rates included in the foregoing table. Resolving this dilemma is of key importance. The answer will determine which regulations the tax authority applies in issuing the decision establishing the amount of the tax to be paid.

Some of the rulings from the administrative courts present the view that the tax scale provided in Art. 15(1) comprises two separate elements:

- Threshold amounts
- Percentage rates applicable to amounts above each threshold.

These courts also indicate that the regulations in force on the date of accrual of the tax obligation apply only with respect to the threshold amounts. The percentage rates should be applied in the amount in force on the date when the tax is assessed by the tax authority—the date when the head of the tax office issues the decision setting the amount of the tax. In other words, some of the administrative courts take the view that the reference in Art. 15(3) of the act to the regulations in force on the date when the tax obligation accrues does not include the percentage rates specified in par. 1 of this article. The principal argument by the courts for this position is based on the view that the decisions establishing the inheritance tax obligation are constitutive in nature. This means that it is the tax authority, in its decision, which determines the amount of tax to be paid. Thus, in the view of these courts, the tax authority is required to decide the matter on the basis of the regulations in force on the date the tax is assessed (the date of issuance of the decision).

But opposing views are also encountered in the case law. Some of the administrative courts take the position that Art. 15(3) of the act does not permit the table to be divided into two elements governed by different legal regimes in force at different periods. According to these courts, the table as a whole

should be treated as the tax scale. The function of Art. 15(1) of the act, as a whole, is calculation of the tax. To calculate the tax, it is necessary to apply both elements of the tax scale, that is, the amount of the surplus tax base over the amount free from tax (threshold amounts) and the percentage rates. The technical inconsistency of the disputed conception is also pointed out, as in reality it leads to application in its entirety of the law in force on the date the tax is assessed (the date of issuance of the decision). Mere application of the thresholds, in the view of some of the courts, contributes nothing to calculation of the tax. The correctness of the second position is also indicated by the understanding of the concept of "tax scale" in the literature, where it is taken to mean the juxtaposition of percentage rates with successive thresholds of taxation.

Summary

This discrepancy in the case law has yet to be patched up. According to legal commentators, a linguistic analysis of Art. 15(3) of the act leads to the conclusions that the concept of tax scale covers both the amount of the surplus tax base over the amount free from tax (threshold amounts) and the percentage rates. This view is also supported by the latest cases from the administrative courts, under which the phrase used in Art. 15(3) "subject to par. 4," referring to taxation of acquisition by way of gift or instruction of the donor at the sanction rate of 20%, means that par. 3 essentially covers percentage rates, as par. 4 refers to a different, sanction percentage rate. The view that when setting the amount of the tax on inheritances acquired years ago, the regulations in force on the date the tax obligation accrued should be used, seems more persuasive.

Tax costs on inheritance of a landmark

Aldona Leszczyńska-Mikulska, Jagoda Dobrucka

The Inheritance and Gift Tax Act provides special exemptions for persons who inherit landmarks but are not eligible for the exemption for inheritance from family members. But not every heir of an old building or a fine piece of Chippendale or Biedermeier furniture will be exempt from the tax.

REAL ESTATE

Acquisition of landmark real estate through inheritance may be exempt from inheritance tax. Under Art. 4(1)(9)(d) of the Inheritance and Gift Act, acquisition through inheritance or a specific bequest of landmark real estate listed in the landmarks register by persons in the 1st or 2nd tax group is exempt from the tax if the acquirer secures and conserves the property in accordance with applicable regulations. But there are doubts raised about almost all aspects of this rule, except the defi-

nition of the set of persons who may enjoy the exemption.

Under Art. 14(3) of the act, the 1st tax group includes the decedent's spouse, descendants, ancestors, stepchildren, son- or daughter-in-law, siblings, stepparents and parents-in-law. The 2nd tax group includes descendants of siblings, siblings of parents, ancestors and spouses of stepchildren, spouses of siblings, siblings of spouses, spouses of spouses' siblings, and spouses of other descendants. Other heirs fall within the 3rd tax group and are not covered by the exemption. The rest of the grounds provided by Art. 4(1)(9)(d) generate greater doubts.

Are properties listed only in the conservator's record covered by the exemption?

The line of decisions concerning listing of the property in the landmarks register as a condition for exemption from the inheritance tax is consistent. The exemption applies only to inheritance of landmark real estate listed as of the date of acquisition of the inheritance in the landmarks register created by the province landmarks conservator, and not merely mentioned in the conservator's record (Supreme Administrative Court judgment of 14 July 1992, Case SA/Kr 830/92). Moreover, the property itself must be listed in the register; listing of the urban planning and architectural formation of which the property is an element is insufficient (Supreme Administrative Court judgment of 27 January 1994, Case SA/Po 1559/93).

Enigmatic conditions for exemption

Acquisition of real estate listed in the landmarks register will be exempt from inheritance tax if the acquirer secures and conserves the property in accordance with applicable regulations.

Unfortunately, no consistent position has been developed in the case law of the administrative courts or in the legal literature on what actions the heir of landmark real estate must take to show for tax purposes that he is securing and conserving the property in accordance with applicable regulations.

In some judgments concerning this issue, the administrative courts refer to Art. 5 of the Act on Protection and Care of Landmarks of 23 July 2003. Under that act, care of a landmark by the owner or possessor consists more specifically of ensuring conditions for scientific research and documentation of the landmark; conducting conservation, restoration and construction work on the landmark; securing and maintaining the landmark and its surroundings in the best possible condition; use of the landmark in a manner ensuring ongoing maintenance of its value; and promoting and spreading knowledge of the landmark and its historical and cultural importance. Under Art. 28 of that act, the owner or possessor of a landmark listed in the landmarks register or mentioned in the province landmarks record shall promptly (within one month of the occurrence or learning of the occurrence) notify the province landmarks conservator of damage, destruction, loss, theft or endangerment of the landmark, change in the location where a movable landmark is stored, or change in the legal status of the landmark. Therefore, in order to enjoy the exemption, the heir should be in a position to demonstrate that the heir himself (or together with other co-owners) has taken measures qualifying as maintaining or conserving the substance of the landmark (Province Administrative Court in Kraków judgment of 27 April 2011, Case I SA/Kr 256/11). It is not entirely clear whether such

actions must take financial form, such as covering the costs of renovation out of the owner's own funds, or any behaviour by the heir seeking to ensure protection and conservation of the landmark will suffice, such as efforts to obtain funds from other sources to renovate the building or prevent devastation of the landmark (Province Administrative Court in Kraków judgment of 4 April 2012, Case I SA/Kr 126/12).

The Supreme Administrative Court stressed in the judgment of 4 June 2013 (Case II FSK 1990/11) that a taxpayer seeking exemption from inheritance and gift tax under Art. 4(1)(9)(d) of the Inheritance and Gift Tax Act must demonstrate and present evidence showing that he has taken ongoing and systematic actions to secure and conserve the landmark, because the purpose of the tax exemption is to help the owner maintain the landmark property.

An apparently simple solution would be for the heirs to apply to the province landmarks conservator for a certificate stating that the building is being maintained in accordance with conservation requirements and recommendations. It is also important to cooperate closely with the conservator during any renovation work. Any work conducted by the owner independently (without the consent of the conservator) that interferes with the substance of a landmark building may prevent the owner from obtaining a certificate of maintaining the building in compliance with conservation requirements and recommendations. Moreover, even if the conservator does certify that independent construction or renovation work has not interfered with the substance of the landmark, and the property is being maintained in a good technical condition, the tax authority may not recognise the certificate as meeting the standard of "securing and conserving the property in accordance with applicable regulations." At least that was what the Province Administrative Court in Kraków ruled in Case I SA/Kr 256/11.

However, it can sometimes be very complicated or practically impossible to obtain an exemption under Art. 4(1)(9) of the Inheritance and Gift Tax Act. This applies particularly to a situation where because of the brief period between accrual of the tax obligation (e.g. acceptance of the inheritance) and the filing of the tax return (one month) the heirs do not have any practical ability to properly document that they are securing and conserving the property in accordance with applicable regulations. Sometimes the heirs only enter into possession of landmark real estate many years after acquisition or acceptance of the inheritance, and thus have not had any influence over the renovation or modernisation of the property. Therefore, heirs of real estate should if possible consider the tax consequences of inheritance of landmark property before accepting the inheritance, in order to increase their chances of enjoying the exemption from inheritance tax.

MOVABLES

Under Art. 4(1)(9)(c) of the act, there is an exemption from inheritance and gift tax for acquisition by inheritance or a specific bequest of movable landmarks and collections listed in the landmarks register, as well as landmarks lent to a museum for research or exhibition purposes for a period of no less than 2 years. Thus the tax exemption for inheritance of landmark movables does not raise doubts if they are listed in the landmarks register. Unlike in the case of real estate, it is not necessary for the person to fall into the 1st or 2nd tax group to qualify for the exemption. But what if the movable is not listed in the

landmarks register, and lending it to a museum for a period of at least 2 years is not possible? Heirs from the 1st or 2nd tax group who inherit along with a home landmark furniture or other items constituting furnishings of the premises do not need to pay inheritance tax. If the furnishings of the home include landmark furniture, the rule concerning inheritance of movables and collections referred to above will apply. Even if furniture is merely stored in a home and is not being used as home furnishings, it should be covered by the exemption under Art. 4(1)(9)(a) of the act, according to the Province Administrative Court in Warsaw judgment of 3 September 2008 (Case VIII SA/Wa 153/08).

The case law and legal literature continue to provide clarification of the conditions for the tax exemption on inherited landmarks. The judgments issued so far on landmark movables display a trend toward resolving doubts in the taxpayer's favour, while the tax exemption for landmark real estate continues to be interpreted very narrowly.

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