

АДМІНІСТРАТИВНЕ І ФІНАНСОВЕ ПРАВО

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SUBJECTIVITY OF LAND COMMUNITIES IN POLISH TAX LAW

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The subject of this work is the problem of taxation of land communities and companies supervising them, for which there are numerous doubts as regards recognizing them as taxpayers of individual taxes. The author has determined that both land communities and the companies managing real property of the community are not the taxpayers of Polish income tax, turnover tax and property tax. This applies both to the common actions carried out within the framework of the land community relating to property (e.g. give to use agricultural land or forest) and unusual actions (like to obtain compensation for expropriation land or forest).

As a taxpayer the author determined natural persons who are shareholders in the community and that involve numerous practical problems. It has been also established in the work that the problems related to tax subjectivity of the land community derive from ignoring in the legislative process findings of the tax law theory relating to legal subjectivity. In turn, improvement of the current state requires amendment of existing legislation.

Keywords: taxpayer, income tax, real estate tax, rural tax, forest tax

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The problem of tax subjectivity in Polish tax law is related to the limits in which the legislator can, i.a., select entities and then subject of taxation. The impassable legal boundary in this range are of course the regulations of the Constitution of the Republic of Poland of April 2, 1997 [11] (including the obligation to maintain the principle of correct legislation. Although the above theorem seems to be a truism, frequent lack of deeper reflection of the legislator on the creation of subsequent tax regulations in connection with the need of taking into account the diversity of entities is puzzling. A good example illustrating the above problem is the taxation of land communities and companies managing them, for which there are numerous doubts as regards recognizing them as taxpayers of individual taxes. Importantly, these entities in Polish law are at the same time a relic of social relations of the nineteenth century connected with the elimination of feudal property in the east of Poland in the territories of Russian and Austrian annexation. In turn, the current regulation of the legal status of land communities was established in the 1960s. It is also characteristic that regarding the form, these entities did not undergo any significant changes in the reform of the political system in the 1990's. Despite the emergence of new institutions in both private and public law (in particular administrative and financial law), the communities and companies supervising them survived, generating at the same time numerous normative problems in both theory and practice. The more bothering is the problem of their subjectivity in contemporary taxes

connected with the dilemma, whether the taxpayer is the community, its members or the company appointed to exercise the management of the community. This justifies the research on this issue, including the need for analysis of courts judicature. It should be noted that the aforementioned issues are also important in practice, because the number of land communities as of January 1, 2016 amounted 5 100 registered entities with a surface area of approx. 107 thou. ha of agricultural land. At the same time, from 1 January 2016, an attempt was made to regulate (voluntary) the status of community ownership by transforming communities into co-ownership within the meaning of civil law [12].

At the beginning of the analysis it should be presented the essence of land communities. Historically, land communities were limited property rights, constituting a legal form of joint use by authorized farmers of properties owned by other persons, private or public [9, p. 63]. Applicable regulations of the Article 1 paragraph 1 of the Act of June 29, 1963 on the Management of Land Communities [13], as land communities indicate agricultural and forest properties as well as water areas associated with the appropriation of users of these properties in the 19th century, this applies to those properties that remained in common use of all peasants of the village (settlement). The property of such include, i. a., lands granted as a result of enfranchisement of peasants and townsmen – farmers for common ownership, joint ownership or common use, a certain group or some inhabitants of one or several villages and separated by the title of remuneration for abolished easements, resulting from the landowners of the peasants and burghers-farmers, for common ownership, joint ownership or joint use of the municipality, towns or the general entitled to perform the easement; received by a group of inhabitants of one or several villages for common ownership and for joint use by way of privileges and donations or acquired for such purpose. The essence of a land community is the possibility of its members using property, albeit of a different way from the exercise of ownership by co-owners [1, p. 663]. Based on Article 6 paragraph 1 of the Act on the Development of Land Communities, entitled to participate in the land community are natural or legal persons having farms, if in the last year before the date of entry into force of the Act on the Development of Land Communities actually benefited from this community. Analogical regulation applies to forests and forest lands, but the obligatory period of using the real estate entitling to participate in the community is 5 years before the day of entry the Act into force.

In accordance with the Article 14 paragraph 1 of the Act on the Development of Land Communities, persons entitled to participate in a community of land should establish a company for the management of the community and for the proper management of land included in this community. Establishment of the company takes place by way of a resolution adopted by a majority of votes entitled to participate in the community in the presence of at least half of them. The company is a legal person and acts on the basis of the statute. The members of this company are persons entitled to participate in the land community. At the same time, it should be emphasized that in a large number of cases, no companies were appointed to manage, which currently causes in practice numerous problems related to their functioning. Supervision over the company's activities is carried out by the commune head (mayor, president of the city). In courts judicature it is recognized that a company for the management of a community is not an organizational structure of this community, because the company does not represent the community and is a separate legal entity that acts in its own right and has its own bodies [20]. The company is also not the owner of the land of the community, but only manages it. Real estate, however, remains in the possession of members of the community (the community itself as a specific kind of co-ownership is not an entity that can be assigned a legal title to the land).

The above-complicated civilian essence of the land community causes, that each time, also in connection with the tax entity on the basis of individual taxes, problems arise, whether in specific cases the taxpayer is a land community, members of the community (natural persons) entitled to participate on a joint-ownership basis, or the Company managing the community.

It also seems necessary to present tax subjectivity in theory of law. In the Polish doctrine, M. Kalinowski created the model of the taxpayer, distinguishing the normative elements that make up this model [5, p. 92 and n.]. In science, the taxpayer is commonly defined by indicating that it is a person (individual) on whose right is an obligation to make (pay) a tax benefit [2, p. 165; 7, p. 158; 10, p. 144]. Also in accordance with the Article 7 § 1 of the Act of August 29, 1997 Tax Ordinance [14] the taxpayer is a natural person, a legal person and an organizational unit without legal personality, subject to the power of tax acts to tax liability. In turn, the tax obligation defines Article 4 of the Tax Ordinance, according to which this duty is the unspecified obligation of forced financial benefit resulting from tax acts in connection with the occurrence of an event specified in these acts. Emphasizing the obligation resulting from the set benefits of a public institution, the starting point for the theoretical construction of the taxpayer is therefore always under the provisions of the Act to pay. The doctrine stresses that in creating tax entities, a rational legislator should take into account the assumptions on which the proper functioning of legal regulations depends [5, p. 105]. In particular, it should first be pointed out that when establishing a given taxpayer unit, the legislator should take into account the content of the entire tax law norm, in particular the scope of its hypothesis, which consists of the tax state of affairs [8, p. 134]. It is particularly important to consider the relationship between the taxpayer and the subject of taxation. The object of taxation is the factual or legal act regarding the object indicated in the act, with the occurrence of which the legal norm relates to the arising of the obligation to provide tax [10, p. 146]. In order for the entity established by the legislator to be a taxable entity, it is necessary for the entity to be in the actual or legal situation defined in the norm [5, p. 120].

Due to the fact that the starting point for the taxpayer's concept is the obligation to pay tax, the essential element of the tax entity's construction is also the (potential) existence of the taxpayer's assets. Separation of assets is necessary because it allows to determine the source from which the payment of tax will take place, enabling the implementation of tax liability [5, p. 97].

Another feature of the theoretical model of the taxpayer distinguished in the doctrine is the ability to own and exercise taxpayers' rights and obligations. In the foreground, the obligations imposed on the taxpayer come to the fore, with the tax obligation being the basic obligation. Referring to the possibility of attributing rights and obligations to the taxpayer, in theory it is stated that it is not apparent from the very designation of a given entity in the hypothesis of the standard as a taxpayer that he becomes the subject of all rights and obligations set out in the norm [5, p. 99]. In the presented theoretical concept of the taxpayer, the possibility of constructing a general model of a tax entity in which the tax rights and obligations might be presumed, was excluded. For the proper functioning of the regulations of tax law, it is therefore necessary to determine in the specific law provisions, who, to what extent and in what way is to perform the rights and obligations relating to the specific tax, which is particularly important in the situation of entities with no counterparts in other than the tax law areas of law [5, p. 103].

From the theoretical model of the taxpayer presented above, it follows that a rational legislator, when selecting a specific unit for a taxpayer, should take into account at least three important assumptions: the selected entity should be able to find itself in a situation

resulting in the payment of tax, should dispose of a fortune and it should be possible to have and exercise the rights and obligations imposed on the taxpayer. The most important is the fact that the presented normative model of the taxpayer shows a special relationship between the entity and the object of taxation. Since both the subject and the object of the tax are based on the attribution of tax liability, it should be recognized that these categories are closely related [4, p. 232; 6, p. 88–89]. In conclusion this part, which individuals are taxpayers is related not to the isolation of a specific entity from the tax state of fact, but to whether a specific situation giving rise to tax liability can be linked to it [5, p. 133 and 236].

The next issue is to present subjectivity of land community in income tax. According to the Article 1 paragraph 1 and 2 of the Act of February 15, 1992 on Corporate Income Tax [15] corporate income tax payers are legal persons, capital companies in the organization and organizational units without legal personality, with the exception of enterprises in succession and companies without legal personality. The subject of taxation in the income tax from legal persons, should be also indicated, which according to the Article 7 paragraph 1 of the Corporate Income Tax Act, is income regardless of the type of income sources from which this income was achieved; in some cases, the object of taxation is in turn revenue.

There is no doubt that the land community is not a legal person and cannot be attributed to the status of an organizational unit without legal personality. The taxpayer of the corporate income tax may be the Company for the management of the community. This Company, although having legal personality, is not the owner of the property (real estate constituting the land community), but it has only management functions. As this property is the property of persons entitled to participate in the community (natural persons), any revenues resulting from acts concerning real estate (e. g. funds obtained from leasing or sale of land, compensation for land takeover, etc.) will not affect the company. This means that the income will be related to natural persons - shareholders of the community. These people, in turn, based on the Article 1 paragraph 1 of the Act of July 26, 1991 on Personal Income Tax [16] are taxpayers of personal income tax. In the case described, the object of taxation therefore determines the lack of subjectivity of both the company and the land community over which the management is exercised. The separate issues, non being a subject of analysis in this work is a type of source revenue which the achieved benefit is classed to.

The biggest doubt raises the problem of land community assessment as a taxpayer in value added tax (VAT). In accordance with the Article 15 paragraph 1 of the Act of 11 March 2004 on the Goods and Services Tax [17] taxpayers are legal persons, organizational units without legal personality and individuals, running their own economic activity, whatever the purpose or result of that activity is. Economic activity includes any activity of producers, traders or service providers, including the entities raising natural resources and farmers, as well as the activities of persons exercising freelance professions. The economic activity includes also actions consisting of use of goods or intangible or legal values in continuous manner for business purposes. On the basis of the Article 5 paragraph 1 point 1 of the Goods and Services Tax Act, subject to taxing shall be i. a. remitted supply of goods and remitted provision of services. In accordance with the Article 7 paragraph 1 point 1 of the of the Goods and Services Tax Act by the supply of goods it is understood the transfer of right to dispose of property as the owner. In turn, according to Article 8, paragraph 1, point 1 of the Goods and Service Act, the provision of services is any service for the benefit of a natural person, legal person or organizational unit without legal personality, which does not constitute

supplying of goods. In connection with the wording of the provisions concerning the objective and subjective scope of goods and services tax the doubt arises about whether in connection with activities related to the real estate community, taxpayers of this tax is the Company or the community or possibly persons entitled to participate in the community.

The first question which arises is whether the land community can be categorized as an organizational unit without legal personality. According to aforementioned reasons concerning the essence of the land community, the answer is negative. The subject of tax on goods and services can be only those entities which carry out activities within the scope of the subject matter of tax (mainly these are various kind of civil law transactions). In case of the community, activities connected with for example, the lease of land (provision of services), or sale of goods (supply of goods) require legal capacity, which the community does not have. It is not in principle organizational unit – the subject. There is no, in turn, express provision recognizing the land community as a taxpayer, which would allow artificial assignment of taxable operations to this entity [so in terms of civil law partnership. – 5, p. 239]. Therefore, the problem of determining whether associated with the community action (which is the supply of goods or provision of services) is the act performed by the shareholders of the community (natural persons) or by the company arises to be solved. As relevant to the resolution of this problem according to the judgments of the European Court of Justice (ECJ) of 15 September 2011 [19] it shall be indicated that whether the given entity with respect to a particular activity works as VAT taxpayer requires an assessment of each case relating to factual circumstances of the particular case. The ECJ held that the activities associated with normal exercising of the ownership right cannot be only their nature regarded as economic activities, and the number and range of sales transactions made is not decisive. In particular, it is necessary to establish that regarding this activity the person performed as a taxpayer i.e. person involving means similar to those used by the merchant, not as the person performing the right of ownership in relation to that land.

By analyzing the company's status as only the manager of Community's land, it should be noted, that it represents the community as an administrator (the manager) of its assets and it does not have any income of it. That income is the exclusive property of individuals (natural persons) shareholders of the community. In practice, it is assumed, however, that legitimacy to act in legal transactions has the company to manage the community and to manage properly the land belonging to this community. The courts accept that, insofar as the ground community is a set of real estate (agricultural, forestry and water reservoirs), involving some entitlements of specific persons, the company, which includes all entitled to use this community is a legal institution legitimated to act in legal transactions, in matters related to managing and running of the community's land, with full consequences, also in terms of tax effects. So, if the permission to act out belongs to the statutory bodies of the company, the-for example- lease of the community's land and delivery of wood, are made by the company and in relation to this, it is the taxpayer of the goods and services tax. The company acts for another entity, but on its own behalf, which does not exclude the status of a taxpayer [22].

The abovementioned position even that in some extent resolves the practical problems related to determine the taxpayer and to that extent it may be assessed as compatible with the principle of the universality of the goods and services tax, is from a theoretical point of view, wrong. It cannot be held, that a company set up for the management of the community land despite that has legal personality runs economic activity within the meaning of the Goods and Services Tax Act. This is not, in fact, the company which makes taxed activities. The taxpayers are natural persons entitled to

participate in the community. The status of entities engaged in activities related to the subject of taxation can be assigned in fact to them. In this place the practical problem arises associated with a large number of shareholders in a typical community, and that in the event they are considered as entrepreneurs within the meaning of the Goods and Services Tax Act, it will be necessary to maintain their obligation to register and other instrumental duties (filing the declaration, issue an invoice, etc.). There is no doubt that aforementioned circumstances in the event of recognizing the shareholders of the community as a taxpayer might completely paralyze the possibility of making taxable activities. It seems that *de lege ferenda* would be necessary, therefore, clear indication of the community in the regulations of the Goods and Services Tax Act as a taxpayer in order to bind that entity to the subject of taxation.

The next problem is subjectivity of land community in property taxes. The Polish system of property taxes consist of three taxes taxing estates: real estate tax, agricultural tax and forestry tax. In respect of real property taxes the problem arises, whether the taxpayer of property tax, agricultural and forestry tax from the land of the community is the Company set up to manage these communities, or the taxpayers are members of the Community (as the co-owners). It should be rejected from the aforementioned possibility of being a taxpayer by the community on its own.

In accordance with the Article 3 paragraph 1 point 1 of the Agricultural Tax Act, the taxpayer of this tax are i. a. legal persons and natural persons who are the owners of agricultural land. In turn, in accordance with the Article 3 paragraph 1 point 1 of the Local Taxes and Fees Act taxpayers of property tax are natural persons, legal persons, organizational units, including companies without legal personality that are property owners or their parts or construction works or their parts. Taxpayers of the forestry tax in accordance with the Article 2 paragraph 1 of the Act of 30 October 2002 on Forestry Tax [18] are legal persons, organizational units, including companies without legal personality, that own forest, self-contained holders of forest or forest holder of perpetual usufruct or forest, holders of forests owned by the State Treasury or local government units. In the event of co-ownership of real estate, agricultural land and forest they represent a separate subject of taxation and the tax obligation is jointly and severally on all co-owners (*vide*: Article 3, paragraph 5 of the Agricultural Tax Act, Article 3, paragraph 4 of the Local Taxes and Fees Act, Article 2 paragraph 4 of the Forestry Tax Act).

It must be held that the way in which is made assessment of tax subjectivity of the companies for development of the communities under the laws governing real estate tax and agricultural tax in case law of administrative courts [21] is wrong. In particular, the courts when determining tax personality limit themselves in the course of interpretation of the original content of the Article 3 paragraphs 1 of the Agricultural Tax Act and Article 3 paragraphs 1 of Local Taxes and Fees Act, which indicate the possible taxpayers of property tax and agricultural tax and the courts are in the opinion that the inclusion legal persons there is sufficient to recognize the company as a taxpayer of the land it manages. I cannot agree with the aforementioned view, and it should be considered as a valid position according to which, the natural persons who are the participants of the land community are the taxpayers of estate tax, agricultural tax and forestry tax, and in order to justify the position it is necessary to refer to theoretical recognition of tax subjectivity.

At the same time the most important is that from a normative model of the taxpayer derives a special relationship linking the entity and the subject of taxation. Because both the subject and the object of the tax are based on the assigned tax liability, it should be considered that these categories are closely linked. Which entities are taxpayers is

associated not with isolating a specific entity from tax factual situation, as this had been done in the appealed court verdict but with that, whether special situation emerging tax obligation can be assigned with that. In case of a company created solely to manage the land community and properly manage land forming part of the community there is no connection with the subject of taxation (i.e., the property of the land). So, for determination of taxpayer only the legal status of the company as a legal person is therefore irrelevant. The company in connection with the management of the land may, at most, specify each other solely as the land «holder", which does not have the status of property taxes taxpayer. Another issue affecting the subjectivity, which should be considered is whether the extracted property can be attributed to the company, which has the right to dispose and in the, for example, situation of enforcement proceedings, it will be carried out from the capital of that company. Because the company is not the owner of the land, it does not have the separated assets, which it could dispose and thereby be liable – for example – for tax liabilities of property taxes. Also in doctrine, it is considered that in case of the land communities tax obligation in the agricultural tax is on all co-owners of the land. The only exception from applying of the Article 3, paragraph 5 of the Agricultural Tax Act in theory indicates a situation in which only one from the co-owners of the community uses the land in its entirety. It is stressed at the same time, that the land of the community is used as a rule by several co-owners, which causes that the obligation to pay agricultural tax is on everyone, even those who does not use land at all [3, p. 399–400].

In conclusion, the interpretation of the rules of substantive law in terms of subjectivity cannot ignore the essential aspect of tax subjectivity in real estate, agriculture and forestry tax, which is the relationship with the subject to taxation.

In general summary the analysis of existing regulations in the field of the recognition of land community for the taxpayer of income tax, goods and services tax and property taxes leads to an undisputed conclusion that land community itself is not a taxpayer of any from these taxes. This applies both to the common actions carried out within the framework of the community relating to property (e.g. give to use) and unusual actions (to obtain compensation for expropriation). At the same time from performed considerations it arises that the taxpayer of any of these taxes is not also a company set up to manage the real estate community. Although there is lack of a homogenous judicature of administrative courts, referring to the theory of tax law it should be stated, that the company cannot be bound to the taxed activities. Taking into consideration the other current problems of interpretation concerning the subjectivity in individual taxes (as example should be given taxation of civil law partnership, budget facilities and non-public health care facilities), the quality of tax legislation, which the legislator forms ignoring the doctrine about subjectivity should be evaluate critically. This causes disputes related to the evaluation of the various entities, as taxpayers of specific taxes. From the point of view of both taxpayers and tax authorities it creates a state of uncertainty, that the easiest way to remove would be amendment of legal provisions. The possible amendment does not require radical changes with regard to the substance of the tax itself. In turn, the range of issues that the aforementioned amendment should concern of indicates current case-law of the administrative courts.

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СУБ'ЄКТНІСТЬ ЗЕМЕЛЬНИХ ГРОМАД У ПОЛЬСЬКОМУ ПОДАТКОВОМУ ЗАКОНОДАВСТВІ

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Предметом цієї статті є проблема оподаткування земельних громад та компаній, що контролюють їхню діяльність, оскільки є низка сумнівів щодо їх визнання платниками індивідуальних податків. Ці суб'єкти у польському законодавстві є залишками соціальних відносин XIX століття, пов'язаних зі скасуванням феодальної власності у Східній Польщі на землях, анексованих російською та австрійською державами. Своєю чергою, чинне законодавство про правовий статус земельних громад було прийняте у 1960 роках. Також важливо зазначити, що відносно форми ці суб'єкти не змінювалися під час реформи політичної системи 1990 років. Незважаючи на появу нових інституцій у приватному та публічному праві (зокрема в адміністративному та фінансовому праві) земельні громади та компанії, що контролюють їхню діяльність залишилися, чим спричинили велику кількість проблем у теорії та на практиці. Потрібно зазначити, що ці проблеми також є важливими на практиці, тому що кількість зареєстрованих земельних громад досягла 5 100, а площа земель 107 тис. гектарів. Тому юридичний аналіз земельних громад у польському податковому законодавстві у контексті структури оподаткування є виправданим. У процесі проведення такого аналізу важливо використати теоретичну модель платника податків, розрізняючи нормативні елементи, що складають цю модель, яку розробив професор М. Каліновські. З теоретичної моделі платника податків випливає, що раціональний законодавець при виборі певного виду платника податків повинен брати до уваги щонайменше три важливі аспекти: платник податків має знати, як правильно сплачувати податок, мати можливість здійснити оплату та мати можливість здійснювати права та обов'язки платника податків.

Беручи до уваги вказані вище теоретичні узагальнення та чинне законодавство, автор дійшов висновку, що земельні громади та компанії, що контролюють їхню діяльність не є платниками податку на доходи фізичних осіб, податку з обороту та податку на майно. Автор визначив поняття фізичних осіб, які є учасниками земельної громади, та охопив низку практичних проблем. Також було встановлено, що проблеми, які стосуються суб'єктності земельної громади походять від ігнорування результатів теоретичних досліджень щодо юридичної правосуб'єктності. При цьому для розв'язання вказаних проблем, потрібні зміни у чинному законодавстві.

Ключові слова: платник податків, податок на прибуток, податок на нерухомість, сільський податок, лісове оподаткування.

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