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TAX GROUPS IN GIFT AND INHERITANCE TAX

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Summary. This article is aimed at dividing the taxpayers of gift and inheritance tax into tax groups. The Author focuses on the circumstances which are the most problematic for interpretation when establishing the correct tax group, the taxpayer belongs to, i.e. in adoption, legal separation, affinity following divorce or annulment of marriage or gifts for the partner of a daughter (son) before and after their marriage.

Key words: tax group, tax, inheritance, gift

1. INTRODUCTORY ISSUES

Gift tax and inheritance tax[1] is a wealth tax regulated by the Act on gift tax and inheritance tax,[2] constituting the income of a commune budget, imposed by a tax decision of the locally competent head of tax office. Thus, it is the tax body who is responsible for the proper calculation of this public levy, based on a tax declaration which, in general, every taxpayer is obliged to submit within a month from the date the tax obligation has arisen.

One of the legal institutions complicating the GIT calculation procedure is the tax group. The correct assignment of the taxpayer to one of the three groups constitutes a foundation for GIT tax law construction. According to Art. 14, sect. 1 GIT Act, the GIT amount depends on the tax group the acquirer of goods has been assigned to. The tax group the acquirer has been assigned to also relates to other significant elements constructing GIT which affect the final amount of tax obligation in this public levy (the amount free of tax pursuant to Art. 9 GIT Act, the catalogue of exclusions applicable pursuant to Art. 4 GIT Act, possibility to apply housing tax relief regulated in Art. 16 GIT Act and the level of tax rate specified in Art. 15 GIT Act). Therefore, the closer the relationship between the acquirer and the transferor, the lower the tax, which encourages transfer of goods between closest family members. The *ratio legis* of establishing tax groups should be sought in this relationship.

The aim of this paper is to present a number of less obvious legal solutions (correlations) which may pose problems with interpretation. The discussion has been based primarily on the analysis of the legal acts, case law and the views of

[1] Henceforth cited as: GIT.
[2] Act of 28 July 1983 on gift tax and inheritance tax, Journal of Laws of 2019, item 1813 [henceforth cited as: GIT Act].

the legal scholars and commentators. The publication refers to the legal status en force as of 12 March 2020.

2. TAX GROUPS CATALOGUE

The group assignment criterion consists in the personal relation of the donor and the donatory or the testator and legatee of the property. Pursuant to Art. 14, sect. 1 at the end of the GIT Act, the GIT amount depends on the tax group the acquirer belongs to, thus the terms specified in Art. 14, sect. 3 GIT Act, defining the character of the personal relation, refer to the acquirer. The particular tax groups comprise the following: 1) Group I: spouse, descendants, ascendants, stepson, son-in-law, daughter-in-law, siblings, stepfather, stepmother and parents-in-law; 2) Group II: the descendants of siblings, siblings of parents, descendants and spouses of stepchildren, spouses of siblings and siblings of spouses, spouses of siblings of spouses, spouses of other descendants; 3) Group III: other acquirers.

When establishing the personal relation in each factual state, a question should be answered: "Who the acquirer is to the transferor"? For example, in the case of a gift by a mother to a daughter, we are dealing with a descendant, as the daughter (descendant) is the acquirer of the goods. Observing the aforementioned rule is crucially important, as the legislator, when establishing the personal relations qualifying an acquirer for a particular tax group, abandoned an absolutely symmetrical regulation of this issue, which has been manifested, above all, in the factual circumstances with the siblings of ascendants of a degree higher than the first, i.e. siblings of grandparents, great-grandparents, etc. Depending on the direction of the transfer of property in such circumstances, we will either have tax group II (the acquirer is any descendant sibling) or tax group III (the acquirer is a sibling of ascendant other than a parent). The differences in assignment to a tax group in such factual circumstances results from the fact that only the siblings of the parents have been assigned to tax group II and not, as it would result from a "mirror reflection", siblings of any ascendant.

It is worth noticing that all the descendants of siblings – namely their children, grandchildren, great grandchildren, etc., have been included in group II, whereas a spouse of any descendant of siblings belongs to tax group III. An unusual situation occurs within these correlations, when an offspring of a person assigned to group III belongs to group II, as they simultaneously are the further descendant of siblings.

On the grounds of Art. 14 GIT Act, it should be noted that the tax position of the sons and daughters-in-law is better than the position of the spouses further than the own children of the descendants. The Supreme Administrative Court, in its decision of 7 April 2000,[3] noted that the phrase "spouses of the descendants," specified in Art. 14, sect. 3, point 2 GIT Act, does not refer to the spouses of des-

[3] I SA/Gd 79/98, LEX no. 44324.

cendants of siblings, as it refers to spouses other than a son and daughter in law specified in Art. 14, sect. 3, point 1 GIT Act. Sons and daughters-in-law have been included in tax group I, whereas the spouses of other descendants to a tax group II.

3. GENERAL TAX EXEMPTION FOR THE CLOSEST RELATIVES

Since 1 January 2007, the legislator has also provided for granting general tax exclusion for a spouse, descendants, ascendants, son-in-law, siblings, stepfather and stepmother. The exclusion includes acquisition after 31 December 2006 [Kuśmierczyk 2019, 49–51] of all goods, regardless of their value and manner of acquisition – apart from usucaption – by the aforementioned persons from 1 January 2016 onwards [Borszowski, Musiał, et al. 2018]. Having looked at the subjective scope of the discussed tax preference, it turns out that the said scope consists of the persons included in tax group I, excluding parents in law, sons-in-law and daughters-in-law.

Granting the discussed tax exclusion to a taxpayer is subject to the taxpayer meeting the condition of reporting the acquisition whereas in the case of cash donations, also the condition of documenting the acquisition of the funds.

The condition of reporting the acquisition is deemed fulfilled if the person indicated in Art. 4a GIT Act reports to the head of the tax office the acquisition of the ownership of the thing or property right within 6 months from the date when tax obligation has arisen in the event of acquisition by: bequest, further legacy, testamentary instruction, legitimate portion, debt specific bequest, acquisition of rights to savings deposits, acquisition of investment fund units, donation, donor's instruction, gratuitous cancellation of joint property, gratuitous servitude, free annuity and gratuitous use.

In the case of inheritance being a legal title resulting in acquisition of a thing or property right, the submission term is 6 months from the date when the court judgment confirming the acquisition of inheritance becomes final [ibid.].

It is also necessary, in the case of acquisition by inheritance, to properly interpret the will of the legislator in relation to the event from which the term for reporting the acquisition should be counted. As the Voivodship Administrative Court in Gorzów Wielkopolski underlined in the judgement of 29 April 2015,[4] "the provision of Art. 4a GIT Act uses the notion of inheritance «acquisition» which should not be interpreted broadly, concluding that the legislator was not concerned with the acquisition of the inheritance in general, but with the acquisition of specific items and property rights, which are generally determined by a division of the estate [...]." Similarly, the Voivodship Administrative Court in Szczecin in the judgement of 25 May 2017[5] declared that it should not be assumed

[4] I SA/Gd 677/14, LEX no. 1937067.
[5] I SA/Sz 1285/16, LEX no. 2310420.

that the validity of the decision on the distribution of the estate will constitute the initial moment.

The consequence of failure to meet the deadline for reporting the acquisition of goods is the loss of the right to a tax exemption and taxation of the acquisition of these goods according to the rules applicable to taxpayers included in tax group I.

The reporting conditions requires the taxpayer to hold confirmation of transferring the funds to their bank account or to their other account in a bank or savings and credit union or a confirmation of postal order. This condition is updated when the value of the funds acquired by means of a gift from the same person in total within 5 years preceding the year when the last acquisition occurred, added to the value of the recently acquired funds, exceeds the amount of PLN 9,637.

Pursuant to judgement by the Supreme Administrative Court of 19 December 2019,[6] "the words used in Art. 4a, sect. 1, point 2 of the GIT Act: «recording – in the event where the object of acquisition by a gift or order from a donor is financial means [...] – their receipt by proof of transfer to the buyer's bank account» should be understood in such a way, that such proof confirms making a payment or transfer of funds which are the subject of a legal act of donation (Art. 888, para. 1 of the Civil Code), by the donor to the donee's account, and not a payment or transfer of the donee to their own benefit, on behalf of the done."

4. ADOPTION IN THE CONTEXT OF A TAX GROUP

Pursuant of Art. 14, sect. 4 GIT Act, the status of parents and foster parents, as well as, respectively, the descendants and foster children and their descendants has been made equal on the grounds of GIT All the aforementioned personal relations qualify to tax group I. As A. Mariański has noted, the discussed parity of the tax statuses refers to both full (Art. 121 of the Family and Guardianship Code[7]) and incomplete adoption (Art. 124 FGC) [Mariański 2010]. There is no doubt regarding the status of the persons bound by full adoption, as the legislator provides for the definition of full adoption in Art. 14, sect. 4 GIT Act, namely the extension of the legal effects of adoption to the descendants of the adoptee (Art. 121, para. 4 FGC). Moreover, it is the most extensive type of adoption from the legal point of view. It should also be noted that the effects of adoption, whether full or incomplete, do not extend to any other relative of the adoptee, thus the secondary relatives of the adoptee and the adoptee's ascendants remain, in principle, "strangers" to the adopter, and, to use statutory terminology, other acquirers (tax group III).

[6] II FSK 293/18, LEX no. 2768154.

[7] Act of 25 February1964, the Family and Guardianship Code, Journal of Laws of 2019, item 2086 as amended [henceforth cited as: FGC].

The view that parity of the statuses also refers to incomplete adoption may be justified with one of the basic rules of legal interpretation, perfectly represented by the Roman *lege non distinguente nec rostrum est distinguere*.[8]

It seems, although not without doubt, that the tax legislator does not decide which tax group to include the adoptee in with reference to the relatives of the adopter and *vice versa*, since Art. 14, para. 4 GIT Act only refers to the relation between the adopter and the adoptee (and, possibly, the adoptee's descendants). There is no clear statement in Art. 14, para. 4 GIT Act, whether to treat the adopter as a parent on the grounds of every personal relation they occur in (and not only in relation to the adoptee and their descendants). On the other hand, the legislator does not use the construct, for example, "adopters are also considered parents of the adoptees, within the meaning of the Act."

The richness and complexity of Polish language makes it difficult to interpret unanimously in linguistic terms how far-reaching effects the legislator intended to achieve by the said provision of Art. 14, sect. 4 GIT Act. If the restrictive interpretation was to be adopted and the problem examined solely on the grounds of GIT Act, it would be legitimate to conclude that the relationship in question (on both sides) belongs to tax group III. This view (which had ultimately been rejected, as later discussed), would be supported by the generally autonomous character of tax law compared with other branches of law [Zirk–Sadowski 2004; Mastalski 2003; Gomułowicz and Małecki 2002]. In relation to GIT Act, its strong relation to the branch of the civil law must be highlighted – especially book four of the Act of 23 April 1964 – Civil Code[9] (Inheritance) and the Family and Guardianship Code. Hence, when interpreting Art. 14 GIT Act, the relevant provisions of the CC and FGC should not be ignored. According to the author, the legal norm crucial for solving the discussed issue is contained in Art. 121, para. 2 FGC, which states that "the adoptee acquires the rights and obligations of consanguinity in relation to the relatives of the adopter."

The author holds the view that the law also means the privileges resulting from assignment to tax group II or I (e.g. the tax-free amount resulting from such division). The consequence of embracing such a point of view is, therefore, an assumption that e.g. an adoptee who received a gift from the father of their adopter should be included in tax group I (descendant), and, after meeting the requirements of Art. 4a GIT Act should be covered by a general tax exemption. When drawing a general conclusion from the above, it should be assumed that an adoptee, being the acquirer of goods, should be treated in the same way as a biological descendant of the adopter in all situations, not only in relation with the adopter. On the other hand, in the opposite situation, i.e. when the adoptee acts as the transferor of the goods to the relatives of their adopter, it should be assumed that they will, in principle, be a different acquirer for the adoptee (tax group III).

[8] Latin "when the law does not make a distinction, it is not for us to distinguish."

[9] Act of 23 April 1964, the Civil Code, Journal of Laws of 2019, item 1145 as amended [henceforth cited as: CC].

5. TAX QUALIFICATION OF THE ACT SEVERAL ENTITIES ARE PARTIES TO

The fact that there is a need for an individual personal relation between an acquirer and a transferor means that on the grounds of GIT Act it is not possible to make simple tax settlement for e.g. gifts, which are characterised by multiplicity of legal entities on the side of the acquirers, transferors or on the side of both parties. Such a construction forces acceptance of certain fiction on the grounds of GIT Act – that there are numerous parallel gifts made between individual entities. For example, in the case of a gift made by mother-in-law (mother) and father-in-law (father) to a daughter and son-in-law, there are four gifts (mother – daughter, mother-in-law – son-in-law, father – daughter, father-in-law – son-in-law). In the absence of contractual provisions regarding the amount of individual financial gifts, it should be considered that they are equal – continuing the above example, if the amount of the gift made under this example was PLN 40 000, we are dealing with four gifts of PLN 10 000 each.

The adopted solution entails significant consequences. Firstly, it makes the donor specify in the donation agreement the share of individual donees, as long as the donor wished to differentiate between them. Secondly, in order to optimize the amount of tax it is worth considering making a gift only for the benefit of the closest relative, e.g. only for one's daughter, not one's daughter and her husband, since the daughter will be exempt from tax while the son-in-law will be taxed under tax group I regulations.

6. LEGAL SEPARATION OF SPOUSES AND A TAX GROUP

An important legal problem is the tax group which the separated spouses belong to. Two forms of separation (factual and formalised by a court decision) require separate analysis. The factual separation does not affect the personal relationship between the spouses and it should be considered that such spouses are still acquirers from the tax group I.

A much more complex issue is the tax group of the spouses – in relations between each other – who have been formally separated. The legal scholars and commentators, as well as case law, have expressed different views on this issue. Z. Ofiarski has expressed the view that the spouses with a court-ruled judicial separation remain relatives to each other within the tax group III, since, according to Art. 614, para. 1 FGC, a ruling of separation has the same effects as dissolution of marriage by divorce, unless the FGC provides otherwise [Ofiarski 2002]. J. Głuchowski and P. Smoleń, in turn, claim that "the legal tax consequences of divorce and separation cannot be considered identical. It seems justified to claim that during separation the spouses remain assigned to tax group I" [Głuchowski and Smoleń 2007, 301–24]. The same view was expressed by the Supreme Admi-

nistrative Court in the judgement of 23 April 2008,[10] namely: "the same rules for the taxation of gifts should apply to spouses who have been separated, as the ones adopted to spouses."

The Supreme Administrative Court in the judgement of 25 January 2007[11] states that "Art. 614 FGC refers to the effects on both the non-pecuniary sphere and the property, however not only in terms of family law, but also in the whole area of rights" [Gajda 2010]. In general, this statement is in line with the view expressed by Z. Ofiarski and the author also agrees with this view.

First of all, in justifying this position, a reference should be made to the judgement of the Supreme Administrative Court of 23 April 2008. According to the author, this judgement is too vivid an example of *contra legem* interpretation. Art. 614, para. 1 FGC clearly defines the legal effects of separation ruling (in principle making it equal with a divorce) and only the law can make any exception in this respect. The Act does not do so with regard to the tax situation under the GIT Act, hence it must be considered that under the GIT, the separated spouses are not spouses within the meaning of Art. 14, sect. 3, point 1 GIT Act and therefore, with respect to each other, they remain in tax group III, as this would be the case if they were divorced.

7. TAX GROUP FOLLOWING A DIVORCE OR ANNULMENT OF MARRIAGE

The legal norm which significantly affects the nature of the personal relationship between the seller and the acquirer of the goods is also provided for in Art. 618 FGC, pursuant to which "marriage results in an affinity between a spouse and relatives of another spouse. It continues despite the termination of the marriage." Thus, a divorce does not affect the tax situation between a divorcee and the relatives of their former spouse. It was clearly verbalised in the judgement by the Voivodship Administrative Court in Cracow of 23 October 2007,[12] where the court ruled that "even after termination of the marriage by divorce, the bond between one spouse and the relatives of the former spouse continues, which, on the grounds of inheritance and gift tax legislation, means that the spouse who purchases goods and property rights from or after the parents of their former spouse should be included in the tax group I."

Following a certain *argumentum a maiori ad minus*[13] reasoning, it should be concluded that a similar rule applies to the separated spouse. The above situation, where the marriage has "ceased" (e.g. as a result of a divorce, but also as a result of the death of one of the spouses), should be clearly distinguished from the situation in which individuals find themselves as a result of a marriage being annulled.

[10] II FSK 373/07, LEX no. 485167.
[11] II GSK 273/06, Legalis no. 109180.
[12] I SA/Kr 593/07, LEX no. 437769.
[13] The conclusion is that if a legal standard allows for more, it also allows for less.

The Supreme Administrative Court in the judgement of 16 September 2009[14] emphasised that "affinity ceases, effective *ex tunc*, as a result of annulment of marriage." Hence, it should be strongly argued that, in the case of marriage annulment, close personal bonds have never really occurred and, therefore, in principle, taxation provided for acquirers in tax group III will apply.

It should be assumed that in the situation of making a gift e.g. between a son-in-law and father-in-law in the circumstances of legally-binding annulment of marriage following that event, there is a basis for reopening tax proceedings on the grounds of Art. 240, para. 1, point 5 of the Act – Tax Ordinance[15]: "in a case which has been closed by a final decision, the proceedings shall be resumed if new facts or new evidence, relevant to the case, which were unknown to the authority which issued the decision, but existed on the day of issuing the decision, emerge." The purpose of the resumption of such proceedings should be to issue a new tax decision on the basis of the rules foreseen for acquirers included in tax group III.

8. COHABITATION IN VIEW OF TAX GROUPS

Loosening family ties and increasingly progressive liberalization of the law with regard to the manner of regulating cohabitation of two people (of the same or different sex) – civil unions – requires us to consider extension of the tax group I or II to include a cohabiting partner (life partner). Admittedly, this would require creating and defining a rather complex conceptual network; however, it would certainly allow for rationalization and modernisation, not to mention making the GIT rules fairer.

Nevertheless, it should be pointed out that there is no support for such legislative measures in the current case law, as evidenced, for example, by the judgement by the Supreme Administrative Court of 28 November 2016,[16] pursuant to which "a cohabiting partner may not demand being included in tax group I after her partner's death, regardless of the reason why the union had not been formalised." The author is far from putting a mark of equality between marriage and cohabitation (or any other looser form of relationship between two people), also in terms of taxation; it would seem reasonable, however, to reach a compromise by including cohabitation (life partners) in tax group II.

For reliability of the reflections it needs to be noted that the legislator in Art. 4, sect. 1, point 6 GIT Act provides for tax exemption of persons "truly cohabiting as spouses." It refers to acquisition by means of a gift of rights to a savings and credit account provided that the funds accumulated on this account are allocated for housing purposes. This, however, does not change the overall situation of cohabiting partners as persons included in tax group III.

[14] II FSK 438/08, LEX no. 596453.
[15] Act of 29 August 1997, the Tax Ordinance, Journal of Laws of 2019, item 900 as amended.
[16] II FSK 2835/14, LEX no. 2188408.

9. GIFTS FOR THE PARTNER OF A DAUGHTER (SON) BEFORE AND AFTER THEIR ENTERING INTO MARRIAGE

It is a common legal event to make gifts to the future son or daughter-in-law, i.e. financial gifts before and after the beneficiary marrying the benefactor's own (or adopted) son or daughter. In relation to their partner's parents, the fiancé or fiancée is an acquirer belonging to tax group III, thus covered by the lowest tax-free amount (PLN 4,902) and the highest tax rates.

Following entering into marriage, the relationship changes completely, as the beneficiary transforms from a fiancé (fiancée) into a son-in-law (daughter-in-law), therefore becoming a tax group I acquirer towards the father-in-law (mother-in-law). If the gifts before and after entering into marriage occur within the accumulation period, i.e. they had been made no later than 5 years before the year of the last acquisition, they are, despite the change of a tax group, subject to accumulation which consists in adding up the value of the acquired goods from the (future) father-in-law or mother-in-law, calculation of the tax on this sum and then deducting it from the tax incurred for the previous gifts. It often turns out that the tax for the last acquisitions is lower than the tax subject to deduction. In such a case, Art. 9, sect. 9 GIT Act applies, stating that the potential tax surplus is not subject to a credit to other taxes or a refund.

10. DONATION AGREEMENT BETWEEN A LEGAL PERSON AND NATURAL PERSON

The person who acquires the goods received from a legal person or an organizational unit without legal personality, as another acquirer (due to the absence of possibility to assign any personal relationship), is included in tax group III. Therefore, it should be emphasized that there is no doubt that the financial gifts listed in Art. 1 of the GIT Act made for the benefit of a natural person also by legal persons and organizational units without legal personality (due to the nature of these entities, the said gift will usually take the form of a donation) are subject of the GIT.

It needs to be noted here, that gifts made for the benefit of legal persons lie beyond the scope of application of the gift and inheritance act, since a legal person is not a gift and inheritance tax taxpayer (Art. 1, sect. 1 GIT Act). This, however, does not mean that acquisition of goods by means of a gift by a legal person (irrespective of who the gift comes from) is not taxable. Gifts received by a legal person are subject to corporate income tax.

CONCLUSIONS

This study attempts to present how changes in family relations affect the situation of a taxpayer in terms of GIT. Due to the significance of legal effects in rela-

tion to the tax group to which the acquirer of the goods subject to GIT belongs, determination of this group should take place directly upon establishing whether the given factual situation is subject to GIT Act. Therefore, it is incomprehensible that the regulation in question is only included in Art. 14 GIT Act. In view of GIT Act transparency and the importance of the discussed regulation for the entire tax law standard, it should be considered that the said regulation should be included at the beginning of the Act, immediately following the provisions relating to the personal and material scope of GIT.

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GRUPY PODATKOWE W PODATKU OD SPADKÓW I DAROWIZN

Streszczenie. Przedmiotem opracowania jest podział podatników w podatku od spadków i darowizn na grupy podatkowe. Autor skupia się na okolicznościach, które sprawiają największe problemy przy ustaleniu właściwej grupy podatkowej, do której należy podatnik, tj. m.in. przysposobienie, separacja małżonków, powinowactwo po ustaniu lub unieważnieniu małżeństwa, czy darowizny dla partnera córki (syna) przed i po zawarciu przez nich małżeństwa.

Słowa kluczowe: grupa podatkowa, podatek, spadek, darowizna

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