

## **EXISTENCE OF A LEGAL ENTITY ATTRIBUTE OF A CIVIL LAW PARTNERSHIP UNDER THE REAL PROPERTY TAX PROVISIONS**

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## **1. INTRODUCTION**

The question whether it is possible to assume that the civil law partnership (hereinafter: the CLP) can be considered as a taxpayer of the real property tax in Poland currently invokes many disputes. The problem which arises at this point is significant in the field of judicial interpretation, as well as plays a primary role in respect of the process of application of the law.

In order to answer this question properly, it seems necessary to proceed in two main steps. First, it is indispensable to research the law on this point, particularly with regard to the relevant provision of the Polish Civil Code (hereinafter: C.C.), so that to clearly identify the legal nature of the CLP, particularly with respect to its aim and functions. Once this basic issue are clarified, it is essential to outline the place and legal status of the CLP in the Polish tax law system, particularly focusing on the real property tax provisions. In order to revise this second questionable point properly, some general remarks about subjectivity in tax law should be outlined.

With regard to the introductory remarks, the CLP is constructed in the Polish legal system a type of an agreement, on the basis of which the partners declare to reach the same business goal through recognized manner, especially through material contribution (art. 860 § 1 C.C). The civil law partnership agreement must be done in writing. The contribution of each

partner means sharing with ownership or other rights or rendering services. There is no minimal start up capital. For the partnership's obligations the partners bear liability with the common partnership's assets, as well as with the private material assets of each partner. Each partner is entitled to represent the partnership and to draw obligations. The CLP is mainly established for the purpose of conducting business on a smaller scale.

In the light of the aforesaid, it must be strictly pointed out that the obligations of the CLP accrue to the name of the partners as to its individual members and not to the partnership itself. Explaining the nature of the institution in more depth it must be stated, that is under Polish civil law the CLP is treated as kind of agreement rather than a company in a strict sense. In other words, a civil law partnership agreement constitutes a subtype of contracts under the law of obligations and under no circumstances can be considered as a kind of commercial company.

The CLP is established pursuant to the general principles of the Civil Law and it is the partners, not the partnership itself, who are the operator. Each partner is liable for the debts and obligations of the partnership without limitation to the extent of his or her entire property. That means that the CLP cannot bear any civil law liability. The CLP under Polish C.C. cannot be the possessor of any rights, including the right of ownership and any duties can be delegated to the partnership.

In Polish civil law the CLP does possess neither a legal personality nor a legal entity attribute. In other words, it is not considered as a subject of civil law. This issue which used to be questionable and not clearly consistent in a doctrine, at present seems to be certain. Normative changes which have been introduced successfully since 1.1.2001, has limited grounds to formulate the thesis about a legal subjectivity of the CLP<sup>1</sup>. Notwithstanding, there are some voices that it will be useful or even essential to give the CLP a legal subjectivity, civil law ability or legal personality *de lege ferenda*<sup>2</sup>.

At this point I would like to attempt to define the place and legal status of the CLP in the Polish tax law system. It must be pointed out that in the doctrine of the Polish tax law the commonly held view is not to consider the CLP as a subject of the law under the Polish real property tax provisions<sup>3</sup>. In other words, it cannot be obliged to pay the real property tax and as the taxpayers are only considered partners of the CLP. Nonetheless, the basic outline of the argument suggests the CLP can be likely considered as a subject of the real property law. This controversial approach appeared in the

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<sup>1</sup> A. Herbert [in:] *System prawa prywatnego. Prawo spółek osobowych. Tom 16*, [ed.] A. Szajkowski, Warszawa 2008, p. 563.

<sup>2</sup> *Ibidem*.

<sup>3</sup> Resolution of the Mayor of the City Ustka of 16.05.2007, (file No. Fn 3110/01/26/07).

latest judgments of the Supreme Administrative Court of the Republic of Poland (hereinafter: the SAC). To exemplify, in the judgment of 31.03.2005<sup>4</sup> and consecutive judgment of 25.04.2008<sup>5</sup> SAC held, that art. 3 par. 1 point 4 letter a of the Local Taxes and Fees Act<sup>6</sup> (ustawa o podatkach i opłatach lokalnych, hereinafter: the LTF) requires to treat CLP is a taxpayer of the real property tax and not its partner.

This point of view is, however, very disputable. It reveals rather the attempt to provide the CLP with the legal entity in a future than its current legal status.

It must be mentioned, that such an approach in the field of tax law is justified by the idea, that potential acquirement of the legal entity attribute definitely corresponds with the tax justice principle. The CLP is namely similar to another simple partnerships in Polish legal systems, particularly to the registered partnership and limited liability partnership, which bear the status of legal entities. The CLP resembles in some way other simple commercial law partnerships on account of the fact, that it is mainly established to conduct business on a smaller scale. From the point of view of justice it is necessary to treat similar persons and similar situations in the similar way.

However, after revising law in this jurisdiction, the main thesis must be drawn up that under current Polish legal system CLP cannot be considered as a subject of a real property tax and as a taxpayers shall be regarded only the partners of CLP. This attitude represented by the jurisdiction of the SAC, based upon a mistaken understanding of the tax subjectivity rules might give rise to a serious and dangerous misleading effect. Therefore, the abovementioned judgments, which reveal incorrect reasoning of the court in question at stake, cannot be treated as justified and are stably criticised by the doctrine. It would be desirable to adopt more consistent approach to consider that the CLP is not a subject of a tax law.

## **2. REMARKS ON THE SUBJECTIVITY IN THE FIELD OF THE TAX LAW IN GENERAL**

In determining that CLP is currently not constructed as a legal entity in the field of the real property tax some general remarks on the issue of subjectivity in tax law must be taken into account. First and foremost, it must be underlined that in case of taxation as well as in another branches of law, the attribute of a legal personality and legal entity is of normative character. It means that in order to consider a unit as a subject of law, it has

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<sup>4</sup> Judgment of the SAC of 31 March 2005, (file No. FSK 567/04).

<sup>5</sup> Judgment of the SAC of 25 April 2008, (file No. II FSK 228/07).

<sup>6</sup> Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych, Dz.U. z 2001 r. Nr. 9, poz. 84 with amendments.

to exist a legal norm which stipulates that effect. In this sense subjects of law do not possess the characteristic of real beings, but the normative ones. The tax-legal entity attribute can be only granted by the relevant legal basis. Only the specific legal provision can indicate that a unit can be considered as a taxpayer or a subject of law<sup>7</sup>.

On the basis of aforementioned considerations the definition of the tax-legal entity can be formulated. Tax-legal entity can be defined as “the normative quality attributed by the tax law provisions in such way that these provisions adjudicate particular legal abilities, that is abilities to possess rights and duties stipulated by the tax law provisions, and the ability to execute them, where through a subject can enter into specific tax-legal relationships, authorising or obliging to particular observance within a field of tax law”<sup>8</sup>. The existence tax-legal entity attribute is strictly related with the rights conferred by the law to the unit, as well as with the duties delegated to it. This set of rights and duties is focused in this purely normative construction of a taxpayer.

From the normative character of the legal subjectivity appears, that the legislator has a power to institute as a taxpayer every single object. Thus, the catalogue of potential taxpayers is in practice unlimited and its shape is depended upon the will of the legislator<sup>9</sup>. The preceding reflections clearly show that the tax legislation can give the taxpayer status not only to the natural persons or legal persons, but also to the other units who do not possess legal personality or even legal entity. Furthermore, in the light of the tax-legal regulations also a status of a taxpayer was attached to the unclaimed possession. So, if all this is true, it must be pointed out that the issue of existence of the legal entity in the field of tax law is entirely indifferent from the subjectivity in civil law. Since the legal entity is of normative nature, the tax legislator can apply this attribute to the specific categories of objects, not excepting to that units, which are not considered as a subject of a civil law. In other words, it is enough that only tax legislation provides the CLP with a legal subjectivity to consider it as a subject of law, irrespective of its status in other fields of law.

Abovementioned considerations are additionally supported by universally accepted principle of the autonomy of tax law. This issue considers the tax law, which was separated in last few years from a financial law, as an independent branch. In particular, the independence from civil law is emphasised. As a result, tax law does not have to adopt in identical way

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<sup>7</sup> See more widely: M. Kalinowski, *Podmiotowość podatkowopravna* [in:] *Prawo podatkowe. Teoria. Instytucje. Funkcjonowanie*, [ed.] B. Brzeziński, Toruń 2009, s. 51-52.

<sup>8</sup> *Ibidem*.

<sup>9</sup> K. Helinak, P. Majka, *Glosa do wyroku NSA z dnia 31 marca 2005, FSK 567/04*, *Przegląd Orzecznictwa Podatkowego* 3/2007, p. 214.

every notions, concepts or institutions and construed them in the same way as in civil law. This approach supports the concept that the lack of a legal entity attribute in a field of a civil law does not have to lead automatically to the same result in a field of tax law. Consequently, the CLP under Polish law can be considered as a taxpayer.

This approach is also justified in the field of art. 7 of the Tax Ordinance, which provides the general definition of a taxpayer. Pursuant to art. 7 paragraph 1 of the Tax Ordinance, a “taxpayer” is a natural person, a legal person or any other organisational unit which does not possess legal personality, which are by virtue of tax statutes subjected to the tax liability. Furthermore, in compliance with the second paragraph of art. 7 of a Tax Ordinance, the tax statutes can give a taxpayer status to another abovementioned subjects of law. Thus, in answer to the question, whether one can be considered as a taxpayer is essential to study the content of specific tax provisions regulating every single tax. If a tax Act expressly states that a unit under some circumstances can be treated as a subject of law, it means that it possesses a tax-legal entity attribute. The crucial issue at this point is, whether a unit is subjected to the tax liability. The definition of the tax liability is provided by the art. 5 of the Tax Ordinance. Pursuant to this provision, tax liability must be regarded as an unspecified duty, resulting from tax Acts, to make a compulsory pecuniary performance in relation to the occurrence of an event specified by such Acts. To simplify, if under specific tax statute a unit is subjected to the tax liability, i.e. it has to pay tax in the interest of a public law association, it means that this unit is considered as a legal entity in the light of this specific tax. At this point it must be pointed out that Polish tax law, in opposition to the civil law, does not provide the institution of legal entity in general and there is lack of universal presumption to be a taxpayer which is applicable to all taxes. Just the opposite, the catalogue of the taxpayers the legislator stipulates separately to every single tax. This result outflows from the fact that legal norms confers specific rights and delegate specific duties to the particular units and that rights and duties differs under every single tax provisions. In effect, in a field of tax law there is no universal category of tax ability in general which might resemble a legal ability in a civil law. Thus, the tax law subjectivity must be derived from particular tax statutes which stipulate the subject of the tax and the rights and duties of the taxpayers in concreto. To sum up, the legal status of the CLP under tax law provisions is not regulated consistently and tax-legal ability is determined by relevant provisions of specific tax statutes, which stipulate the rules of taxation, in compliance with the subject of tax<sup>10</sup>.

The issue of tax subjectivity is namely strictly connected with the subject of tax. The notion “subject of tax” can be defined as “factual or legal situation,

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<sup>10</sup> Judgment of the Voivodship Administrative Court in Lublin of 16.11.1998, (file No. I Sa/Lu 837/97, unpublished).

upon the appearance of which the law joins the obligation to pay tax”<sup>11</sup>. Thus, as a taxpayer can be regarded only a unit, which is subjected to the obligation to pay tax upon existence of the factual or legal situation, which is precisely stipulated in a tax statute. In this sense, tax-legal subjectivity can only be vested in that situation, classified in shape of subject of tax<sup>12</sup>.

Eventually, it is worth mentioning that tax-legal attribute analysis could prove useful from the functional perspective. Regarding this issue, it must be clearly stated that realization of a fiscal function is a major and natural objective of the tax law is. For this reason, and in order to bear liability, a taxpayer ought to possess assets. Assets are the factor which guarantee that the tax liability is possible to be fulfilled. Otherwise, if an object does not possess any assets, there is no possibility to comply with the obligation to pay tax. To sum up, in order to be considered as a taxpayer a unit should possess assets, so that to be able to pay taxes and bear tax-legal liability<sup>13</sup>.

### **3. SUBJECTS OF THE REAL PROPERTY TAX. THE ISSUE OF A LEGAL ENTITY ATTRIBUTE OF THE CLP**

In the light of the aforesaid, tax-legal subjectivity can be analyzed only pursuant to specific regulations of a concrete tax statute. In order to ascertain whether the treatment the CLP as a taxpayer of a real property tax is *legis latae* justified, relevant provisions of the LTF must be taken into consideration. Pursuant to its art. 3 par.1 the taxpayers are:

- natural persons,
- legal persons,
- organizational units, including partnerships without legal personality

who:

- are the owners of real properties or building constructions,
- are the autonomous possessors of real properties or building constructions,
- exercise the right of perpetual usufruct

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<sup>11</sup> K. Ostrowski, *Prawo finansowe, zarys ogólny*, Warszawa 1970, p. 146.

<sup>12</sup> M. Kalinowski, *op.cit.*, p. 63.

<sup>13</sup> *Ibidem*, p. 63-64.

- are the possessors of a real property or a building construction which are in the ownership of a State or units of territorial self governments (under certain conditions).

The issue of the legal subjectivity of natural persons and legal persons with regard to the real property tax do not arise any doubts. It is namely undisputable that they possess the competence to be considered as a subject of rights and duties ensuing from the legal ability. Consequently, they will be considered as a taxpayer if they exercise the right of ownership of a real property, the right of perpetual usufruct or if they possess a real property.

The question is, however, much more problematic in case of determination a legal subjectivity of organizational units without legal personality. Undisputedly, to this group belongs also the CLP. At this point it arises a question, whether the CLP can be considered as a legal entity under the real property tax provisions. As it was stated before, the CLP under Polish civil law is only considered as an obligational relationship and not a subject of rights and duties<sup>14</sup>. Therefore, all rights and duties resultive from the CLPs actions are vested in the partners of the CLP.

The crucial issue in case of the adjustment, whether the CLP can be treated as a legal entity and simultaneously as a taxpayer of a real property tax is the remark that actually the CLP cannot lawfully acquire in its own name and in its own account any rights, as well as incur any liabilities. After transposition this fact into the tax law background it must be stated that for the CPL it is not possible to act in the character of the owner of the property, possessor of the property or exercise the right of perpetual usufruct. In case of the CPL, it does not exist such event, in connection with relevant provisions of the LTF stipulate the effect of tax liability. From this point of view, the CLP can never be considered as a legal entity under the real property tax provisions, on account of the fact that it does not exist such situation, in which the CLP can exercise the right of ownership, right of perpetual usufruct or possess a real property. Thus, as a taxpayers of the real property tax are only considered the partners of the CLP as joint owners<sup>15</sup>.

The approach of lack of the legal entity of the CLP is strenghten by the fact, that the CLP, as was stated before, does not possess its own assets. This outflows from the fundamental obligation of the partners of the partnership to bring into the CLP a contribution. Nevertheless, the contributions can be both of capital and non-capital nature. It is obvious that only the capital contributions have an ability to generate assets, whereas cognitable is such a

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<sup>14</sup> See more widely: Judgment of the Supreme Court of 3.06.2008, (file No. II OSK 600/07).

<sup>15</sup> See more widely: M. Kalinowski, *Podmiotowość podatkowa a Ordynacja podatkowa, wybrane zagadnienia*, [in:] *Ordynacja podatkowa. Studia*. [ed.] B. Brzeziński and C. Kosikowski, Łódź-Toruń 2009, p. 93-96.

situation in which all of the partners bring into the partnership only non-capital contributions. Therefore, it exists a possibility that the partnership is deprived of assets at all. This situation is, however, not very convenient to the creditors. In order to prevent them, the CLP is able to function without assets, notwithstanding all assets cumulatively accrue to the partners, who also bear liability. As it was stated before, the argument that the CLP does not possess any assets also support the view that the CLP cannot be considered as a taxpayer under real property tax provisions.

Consequently, on those grounds it is impossible to maintain that the CLP has a legal entity attribute in the real property tax.

#### **4. CONCLUSION**

To conclude, firmly accept the view that the CLP cannot be treated as a subject of law under the real property tax provisions.

As it was mentioned before, legal personality, both in civil law and tax law, is a normative category and only the legislator has a right to foreclose whether an organisational unit can be treated as a legal person or possess a legal entity attribute. It was stated that tax legislator cannot be limited in this field, so from the theoretical point of view the CLP can be admitted by the tax law legislator to be a legal entity.

Nevertheless, in order to determine tax-legal subjectivity, one should invoke to the particular provisions of tax Acts, on account of the fact that there is no possibility to expand on the issue of tax subjectivity to each taxes in general. Therefore, it is essential consider, whether the CLP is able to occur in a factual or legal situation which entails the rising of tax liability. As it was stated before, the CLP cannot be found in such situation in which it is the owner or possessor of a real property or it is able to exercise the right of perpetual usufruct. For that reason the CLP cannot be treated as a subject of law in the real property tax provisions.

#### **Literature:**

- Author, M. et al: Name, Town: publisher, year of publishing, number of pages, ISBN

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