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## LEGAL AND ADMINISTRATIVE ELEMENTS OF THE CONSTRUCTION OF TAX EXEMPTIONS AND ALLOWANCES IN THE CONTEXT OF GRANTING PUBLIC SUPPORT

## PRAWNE I ADMINISTRACYJNE ELEMENTY KONSTRUKCJI ULG I ZWOLNIEŃ PODATKOWYCH W KONTEKŚCIE UDZIELANIA POMOCY PUBLICZNEJ

## ABSTRACT

Among the forms of public assistance of a passive nature are tax concessions and exemptions. A given form of aid can be of liquidity support, rescue and restructuring and pro-development nature for the enterprise. This form of assistance is reflected in the reduction of revenues to the state and local government budgets. Tax credits, used as investment incentives for entrepreneurs, can affect the growth of production, and in the case of new investments, the creation of new jobs or the retention of existing ones. The article presents the provisions of the tax law on real estate tax in correlation with the law on state aid, in the context of an assessment of – to what extent on the grounds of real estate tax it is possible to operate reliefs and exemptions that constitute state aid for entrepreneurs. The legal problems of providing state aid and the issues of tax procedures in the field of tax reliefs and exemptions and the calculation of the net value of state aid are presented.

## STRESZCZENIE

Wśród form pomocy publicznej o charakterze biernym są ulgi i zwolnienia podatkowe. Dana forma pomocy może mieć dla przedsiębiorstwa charakter wsparcia płynności finansowej, ratunkowy, osłonowy, restrukturyzacyjny oraz prorozwojowy. Taka forma pomocy ma odzwierciedlenie w zmniejszeniu wpływów do budżetu państwa i budżetu jednostek samorządu terytorialnego. Ulgi podatkowe, stosowane jako zachęty inwestycyjne dla przedsiębiorców, mogą wpływać na wzrost produkcji, a w przypadku nowych inwestycji na utworzenie nowych lub utrzymanie istniejących miejsc pracy. Artykuł przedstawia przepisy prawa podatkowego w zakresie podatku od nieruchomości w korelacji z ustawą o pomocy publicznej, w kontekście oceny tego – na ile na gruncie podatku od nieruchomości możliwym jest funkcjonowanie ulg i zwolnień stanowiących pomoc publiczną dla przedsiębiorców. Zaprezentowano problemy prawne udzielania pomocy publicznej oraz kwestie procedur podatkowych w zakresie ulg i zwolnień podatkowych oraz kalkulowania wartości netto pomocy publicznej.

**KEYWORDS:** *tax proceedings, administrative proceedings, Tax Ordinance, state support law, tax credits and exemptions, tax management, local development, state support management*

**SŁOWA KLUCZOWE:** *postępowanie podatkowe, postępowanie administracyjne, Ordynacja podatkowa, ustawa o pomocy publicznej, ulgi i zwolnienia podatkowe, zarządzanie podatkami, rozwój lokalny, zarządzanie pomocą publiczną*

## INTRODUCTION

The basis of a market economy is fair and unrestricted competition, which may be restricted by public authorities in the form of providing public aid to entrepreneurs in cases specified by law, but also in justified cases. State aid rules occupy a significant place in European Union law and in the law of the Member States. As far as Polish law is concerned, guarantees of the principle of free competition were expressed relatively early in the provisions on public procurement. Despite the importance of the issue of public procurement, the protection of free competition becomes much more visible when the state authorities undertake financial interventionism, as a result of which some entrepreneurs are favored over others. The principles of free competition generally exclude the possibility of state interference in the activities of entrepreneurs, as each interference constitutes a threat to the functioning of market mechanisms. Hence the need to introduce into Polish law provisions regulating the granting of public aid to entrepreneurs (Wołowiec, 2022).

Until 2001, the basic rules for Poland regarding public aid for entrepreneurs were expressed only in the provision of Article 63(1) point *iii* of the Europe Agreement (Journal of Laws of 1994, No. 11, item 38 as amended), according to which the Republic of Poland undertook to eliminate all public aid for entrepreneurs if it distorts competition or threatens to distort competition. The above obligation was implemented by the Act of June 30, 2000 on the conditions of admissibility and supervision of public aid for entrepreneurs (Journal of Laws No. 60, item 704; amended from 2001, No. 125, item 1363 – replaced on October 6, 2002 by a new act with the same title) (Artyukhova, Tiutiunyk, Bogacki, Wołowiec, Dluhopolskyi, Kovalenko, 2022).

As is the case in the law of the European Union and the law of the Member States, also in our Act of 27 July 2002 on the conditions of admissibility and supervision of public aid for entrepreneurs (Journal of Laws of September 5, 2002, No. 141, item 1177), one of the forms of granting public aid turns out to be the so-called tax subsidies. Tax law provides for a number of differences in the taxpayer's situation, both objective, subjective and mixed (Ambroziak, Pamuła-Wróbel, Zenc, 2020). For this reason, determining whether a given instrument of state influence is public aid for entrepreneurs comes down first to

answering the question whether it is selective or selective in nature. Selectivity understood in this way may result either from the legal provisions themselves (*ex lege*) or be the result of the exercise of discretionary power by authorized bodies examining applications from individual entrepreneurs (administrative discretion) (Modzelewska-Wąchał, Pełka, Stasiak 2001, Nykiel-Mateo, 2009). It will therefore be possible to talk about two groups of tax subsidies. The first type are various general tax exemptions and reliefs, which result directly from the provisions of substantive tax law (*ex lege*). The second type of tax subsidies are profits included in the provisions of formal tax law, granting taxpayers (and therefore also entrepreneurs) the right to apply for the cessation of collection, postponement of the payment deadline, or spreading the repayment of the tax debt into installments, or waiving arrears or interest – which correspond to competences of tax authorities under the Act of August 29, 1997 – Tax Ordinance (Journal of Laws No. 137, item 926; as amended).

## REASERCH METHODOLOGY

Research in the social sciences, is inspired by numerous and diverse needs. Therefore, we will reduce the existing needs to two main types, to which certain types of research correspond. The first is combined with needs of a theoretical or cognitive nature, that is, it includes all those needs that are associated with the development of a particular science. The second is combined with the various needs of practice. Legal and administrative sciences, as well as management and quality sciences, use typical methods found in the social sciences and humanities, i.e.: the study of documents (legal acts and judgments of administrative courts), comparative methods (expert opinions, legal opinions, analyses resulting from linguistic, grammatical and historical interpretation) and case studies. The result of cognitive research is new assertions or theories. Induction was used as the main research method. It involves drawing general conclusions or establishing regularities on the basis of analysis of empirically established phenomena and processes (Borysiak, Wołowiec, Gliszczyński, Brych, Dłuhopolskyi, 2022).

## TAX SUPPORT – RELIEFS AND EXEMPTIONS AS PUBLIC SUBSIDIES

When talking about tax subsidies, we must not forget that all cases of formulating tax reliefs and exemptions are an exception to the principle of universality of tax under Art. 84 of the Constitution of the Republic of Poland (Journal of Laws No. 78, item 483). Every relief and exemption, and not only those addressed to entrepreneurs, should be treated as an exception to the principle of universality of the tax. It is also worth emphasizing that the legislation of European Union countries refrains from formulating general reliefs and exemptions for entrepreneurs in substantive tax law (7). However, the possibility of conducting tax policy is left to the tax authorities deciding on individual applications of entrepreneurs (Ambroziak, Pamuła-Wróbel, Zenc 2020, Wójtowicz-Dawid, 2020).

The practice of Polish real estate tax proves that local tax law provisions containing entrepreneur-oriented reliefs and exemptions are adopted by municipal decision-making bodies. It also points to numerous cases of tax authorities using their powers under the Tax Ordinance Act. The law also includes specific instruments for granting public aid to entrepreneurs, an example of which is the Act of 30 August 2002 on the restructuring of certain public receivables from entrepreneurs (9), which, although of an incidental nature, creates the possibility of also including restructuring of receivables of entrepreneurs under corporate tax. real estate (Wołowiec, 2016).

Answering the question: to what extent the real estate tax structure can become a public aid tool for entrepreneurs depends on determining the scope of competences of municipal councils to decide on this structure. It cannot be forgotten that the provision of Art. 217 of the Constitution of the Republic of Poland and the already mentioned Art. 6 of the Tax Ordinance Act require the inclusion of the essential components of the tax structure (i.e. arrangements about the entity, subject, tax base and rate) directly in the tax act (i.e. in the act in the strict sense). This excludes the possibility of sub-delegating the ability to decide on the structural framework of the tax to lower legislators, and therefore, the possibility of delegating such powers to municipal councils becomes excluded (Wołowiec 2020, Skica, Wołowiec 2012, Wołowiec, Cienkowski, 2016).

The Act of 12 January 1991 on local taxes and fees (10) (U.P.L.) provides for only two competences of the commune council in the scope of deciding on real estate tax. The commune council pursuant to Article 5(1) and (2) of the Act may reduce the statutory tax rate on a specific type of real estate, not lower than 50% of the base rate, and by applying the provision of Article 7(2) of the Act. may establish other than those in Art. 7 section 1 of the Act tax exemptions – including those addressed to entrepreneurs (Wolowiec, Skrzypek-Ahmed, Gliszczynski, 2021).

It is worth emphasizing here that the resolutions of the municipal council adopted in this regard are normative (general) acts, which may give rise to further legal problems in the case of exemptions excluding tax liability. Unless the provision of Art. 5 of the Act does not raise any problems as a tool for implementing a tax policy friendly to a specific group of entrepreneurs (e.g. rates lower than the maximum for real estate occupied for new investments), however, the issue of formulating entrepreneur-oriented tax exemptions under Art. 7 section 2 of the Act on taxes and local fees (Bogacki, Wołowiec, 2021).

## **CLASSIFICATION OF TAX EXEMPTIONS AND ALLOWANCES**

The analysis of the functions, features of tax structures and the very nature of tax reliefs and exemptions (preferences) allows us to notice that these are forms of reduction of individual elements of tax techniques, or the amount of tax itself, and therefore are an element dependent on other tax components (Nykiel 2003, Głuchowski, 2002). In legislation, in the doctrinal aspect, we meet tax exemptions, tax deductions and tax payment allowances. In the normative aspect, reliefs are exemptions, deductions, reductions and abatements specified in the tax law, resulting in a reduction in the amount of the tax base or the amount of tax. The normative treatment of preferences emphasizes the effect of the effect to which the application of a particular relief is supposed to lead. The absence of an effect (economic or social) indicates the ineffectiveness of a particular form of preference. Tax credits and exemptions differ in both their design and the purposes imposed on them. Tax exemptions are defined as exclusions from the

subjective scope in a given tax of a certain category of subjects or the subject of a given tax of a certain category of factual or legal situations (Wołowiec, 2021).

Tax relief means either excluding from the tax base or not deducting certain amounts from it, or reducing the tax itself. Reducing tax as a result of reliefs consists of reducing the tax base, reducing tax rates (including the application of a 0% rate), and reducing the amount of tax (tax deduction). Reducing the tax base may consist of excluding (not including in the tax base) a certain amount related to the subject of taxation. Unlike in the case of exemption, in the case of relief, the exclusion applies only to a certain amount specified by the law, and not to a whole category of factual or legal conditions (Levy, 1960).

In addition to reliefs that are elements of tax construction, there are reliefs in tax systems that are not elements of the construction of any taxes. We refer to them as tax payment concessions. Reliefs of this type can be divided into payment facilities that do not reduce the amount of tax paid (payment in installments, deferral of the due date in the form of a decision of the tax authority or transfer of property and property rights in exchange for tax arrears) and reductions in the amount of tax paid and exemptions from tax payment (remission in whole or in part of an overdue tax in the form of a decision of the tax authority or abandonment of tax collection in the form of a decree of the Minister of Finance).

In relation to legal solutions in the field of tax law, the doctrine quite commonly accepts the view that taxes and the entire tax system should be neutral. This means that taxes should be constructed in such a way that they in no way impede the existence and functioning of taxpayers, but also so that they do not contain any preferences for selected groups of taxpayers. Advocating tax neutrality, does not prejudice a negative attitude towards influencing through tax preferences the realization of non-fiscal objectives important to the state. The use of various tax preferences can be a consequence of taking into account tax equality viewed subjectively. This is because such equality requires noticing the different material, family or social situation of the taxpayer (Gajl, 1992).

Tax preferences are a substitute for budget expenditures and can be an alternative to direct transfers from the municipal budget. As a rule, tax preferences are scattered in various tax laws (resolutions), are often hidden, difficult to see and their global (total) value is not known (Ministerstwo Finansów, 2010). This state of affairs disturbs the transparency of the financial management of

the municipality and creates the risk of improper allocation and distribution of public funds. Knowledge of the nature and specifics of tax preferences is important for the proper formation of the goals and directions of fiscal policy of both the state and local government units. Fiscal policy makes it possible, on the one hand, to make the proper allocation and redistribution of public funds in the course of the budget debate, and on the other hand, it is an instrument for assessing the effectiveness of individual preferences and the tax system as a whole (Borysiak, Skowron, Brych, Manzhula, Dluhopolskyi, Sak-Skowron, Wołowiec, 2022). A prerequisite for determining the value of tax preferences is to identify them. Not all tax solutions that in the legal sense constitute tax benefits (exemptions, deductions, etc.) are actual tax preferences. Some of them only serve to rationalize the tax system, reduce the cost of tax collection, or are the result of international or Community obligations, and as such are considered the so-called tax standard (scope of taxation). Only those solutions that represent a typical deviation from the accepted standard of taxation can be considered tax preferences (Preferencje podatkowe, 2010).

## LAW ON PUBLIC SUPORT

The Act of July 27, 2002 on the conditions of admissibility and supervision of public support for entrepreneurs establishes basic principles of legal transactions similar to the principles of the Act repealed therein. State aid will be defined as providing financial benefits to the entrepreneur, qualified by law. In terms of the definition of an entrepreneur, the Act refers to the Business Activity Law Act, and at the same time limits the full freedom to grant support to public entrepreneurs. Providing an entrepreneur with a financial benefit will constitute public aid if it meets all three characteristics. Firstly, this contribution is made directly from national public funds or from such funds transferred to other entities, or reduces or may reduce these funds. Secondly: it concerns the entrepreneur's business activity. Thirdly: it violates or threatens to violate competition by favoring certain entrepreneurs or the production of certain goods. State aid may take the following forms, which are *exemplary* forms of aid in the Act: a subsidy, a tax relief or exemption or cessation of collection,



deferment of payment or division into installments of tax payments or tax arrears, and write-off of tax arrears or late payment interest (Wołowiec, 2022).

In substantive law acts, the above-mentioned forms of granting assistance may take the form of a *decision* (e.g. to postpone the deadline for payment of tax liabilities under the Tax Ordinance Act) or an *agreement* (e.g. to sell public property or grant a loan or guarantee). In some cases, however, the provisions of specific acts that are the source for a given aid may be applied directly, i.e. the aid (as a benefit) takes place without issuing a decision or concluding an agreement. Then, the provisions of the normative act become the sole basis for granting aid (so-called automatic support). The real estate tax exemption resulting from the resolution of the commune council should, in principle, be an expression of automatic aid, because the competences of commune councils under Article 7(2) of the Act on taxes and local fees exclude the possibility of formulating in resolutions the structure of tax exemptions triggered by an administrative decision (the decision must be directly based on a statutory provision) (Bogacki, Wołowiec, 2021).

## CONCLUSIONS

Summarizing the above, it should be stated that just as it is not correct to say that the Law on State Support should not be applied to tax subsidies at all, it would not be entirely correct to say that it should be applied directly, because then some provisions of the tax law could not be applied in their literal content at all. Therefore, it is reasonable to conclude that the Law on State Support in contact with the provisions of the tax law should be applied in such a way that the norms read from the law do not interfere with either the content of the Law on State Support as seen systemically, or with the letter of the provisions of the tax laws. Thus, norms from the Law on State Support will be an *addition* to the norms of the tax laws, not some *implicit* modification of them. A special type of tax relief in the real estate tax may be the relief resulting from the previously cited Act of August 30, 2002 on the restructuring of certain public receivables from entrepreneurs (Journal of Laws No. 155, item.1287). These provisions constitute *lex specialis* in relation

to the provisions of the Act – Tax Ordinance. The legal solutions contained in the Restructuring Act create the possibility of putting entrepreneurs in debt on account of tax liabilities constituting the income of the budget of a local government unit, and therefore may also apply to arrears in real estate tax. In order for the Restructuring Act to be effective on the territory of a municipality with regard to tax on entrepreneurs, the municipal council, within 30 days of the date of entry into force of the Act, could adopt a relevant resolution (classified as local law) pursuant to the provision of Article 7 of the Restructuring Act. Arrears known as of June 30, 2002 and not paid by the entrepreneur within the time limits assigned by law may be subject to the restructuring procedure thus understood. According to Article 6 (2) of the a.r., the so-called disputed receivables subject to proceedings in extraordinary modes (i.e., resumption of proceedings, annulment, amendment or expiration of a tax decision issued against an individual) are also subject to restructuring. Restructuring proceedings with respect to real estate tax are triggered by an entrepreneur's application, which the entrepreneur must submit to the mayor within 45 days from the date of entry into force of the law. The restructuring program is developed by the entrepreneur applying for debt relief. Upon receipt of the application, the authority initiates restructuring proceedings by issuing a decision. The 45-day period for the authority to issue a decision on the terms of restructuring runs from that date. During this period, the tax authority assesses to what extent the entrepreneur's action adopted in the program gives the entrepreneur a chance to regain a lasting ability to compete in the market. In the decision on restructuring conditions, the tax authority determines the total amount of receivables subject to restructuring, the types and amounts of individual receivables and the period to which they relate, as well as the amount of the restructuring fee. Completion of the restructuring shall take place one year from the date of delivery of the decision on restructuring conditions. Within a period of 6 months from the date of entry into force of the Act, the entrepreneur is obliged to settle the arrears not covered by restructuring, known as of June 30, 2002, or at least to obtain a division of them into installments or a deferral of the deadline for their payment. If this deadline is met then no interest on arrears and no deferral fee are charged. Failure by the entrepreneur to meet the deadline for payment

results in payment of the arrears with interest on arrears and a grace fee. The restructuring fee paid, on the other hand, is included in the sum of receivables subject to restructuring. After one year from the date of delivery of the decision on the conditions for restructuring, the authority issues a positive decision (on the cancellation of the receivables subject to restructuring) or a negative decision (on the cancellation of restructuring proceedings, if the conditions for restructuring have not been met). The positive decision states the cancellation of receivables subject to restructuring, together with interest and a prolongation fee (Wołowiec, Skrzypek-Ahmed, Gliszczyński, 2021).

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