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INTERPRETATION PROBLEMS RELATING THE SCOPE OF MEANING OF THE TERM “PERSON SINGLE-HANDEDLY RAISING CHILD” IN THE POLISH TAX LAW

Abstract. Until the end of 2021, in accordance with the Act on Personal Income Tax (PIT Act), persons single-handedly raising children benefited from joint taxation with a child, while as of the beginning of 2022, they are entitled to the tax relief of PLN 1500. After growing criticism of the recent amendment to the act, our government decided to return to the former legal status. The aforementioned tax advantage, while being of great practical importance, raised and will continue to raise several doubts after the amendment. One of the most important issues is the precise definition of who is a “single parent” – whether this criterion is met when a child lives with one parent, but contacts the other parent and spends time with him or her occasionally, or when divorced parents have joint custody of a child. The Polish Deal (*Polski Ład*) partially addresses these doubts, but obviously does not dispel all of them.

Keywords: person single-handedly raising children; single parent and legal guardian; tax relief for a single parent.

INTRODUCTION

The Polish personal income tax system provides for institutions that guarantee certain advantages linked to the family circumstances of the taxpayer.¹ Until the end of 2021, joint taxation with a child based on Article 6 section 4 of the Act on Personal Income Tax² offered some support for single parents.³

¹ As it is emphasized in the doctrine the implementation of the pro-family policy is associated with the limitation of the fiscal function and the implementation of the stimulus function at the same time – W. WÓJTOWICZ, P. SMOLEŃ, *Podatek dochodowy od osób fizycznych – prorodzinny czy neutralny?*, Warszawa: Dom Wydawniczy ABC 1999, p. 19.

² Act of 26 July 1991 on Personal Income Tax, Journal of Laws of 2021, item 1128, as amended; hereinafter referred to as “PIT Act”.

This was one of the few exceptions to the principle of individual annual tax settlement by a natural person. It is also a symptom of searching for payment capacity by referring to the family situation.⁴ For the main argument for use of the indicated institution can be considered a shift in the burden of supporting the children in single-parent families only for one person.⁵

Based on the Act of 29 October 2021 on amendments to the Act on Personal Income Tax Act, Act on Corporate Income Tax and certain other acts⁶, as of the beginning of 2022, this option was eliminated and replaced by a tax relief of PLN 1500 – regardless of the amount of income earned. After growing criticism of the recent amendment to the act, our government decided to delete new tax relief and return to the former legal status, although with minor modifications.

Joint taxation of a person single-handedly raising children with a child had generated a number of doubts compounded by inconsistent opinions in this respect expressed by administrative courts and tax authorities. Although the form of the advantage for single parents changed fundamentally, the amendment does not remove these doubts. This is due to the fact that some of the provisions of the repealed Article 6 section 4 are restored in Article 27ea and also in Article 6 section 4c-4f pursuant to the bill to amend an act.⁷ One of the most important issues is the correct definition of who a “single person” is. This is because only the correct answer to such a question allows deciding whether the condition of single parenthood is met when a child lives with one parent, but contacts the other parent and spends time with him or her occasionally, or when divorced parents have joint custody of a child during the tax year, i.e. when each of them individually looks after the child for a pre-agreed period, without the participation of the other parent.

³ In recent years, the level of taxpayers’ use of these preferences has been fairly stable and fluctuates around half a million taxpayers – see: P. SMOLEŃ, *Instrumenty polityki społecznej w konstrukcji podatku dochodowego od osób fizycznych. Próba weryfikacji wybranych rozwiązań*, „Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych” 2021, no. 8(300), p. 25.

⁴ A. MARIĄŃSKI, *(Nie)sprawiedliwy polski podatek dochodowy od osób fizycznych*, Warszawa: C.H. Beck 2021, p. 204.

⁵ Z. OFIARSKI, *Wybrane aspekty opodatkowania dochodów osób samotnie wychowujących dzieci*, [in:] *Księga Jubileuszowa Profesora Tadeusza Smoczyńskiego*, eds. M. Andrzejewski, L. Kociucki, M. Łączkowska, A. Schulz, Toruń: Dom Organizatora 2008, p. 560.

⁶ Journal of Laws of 2021, item 2105, hereinafter referred to as the Polish Deal or amendment to the PIT Act.

⁷ The bill amending the Personal Income Tax and other acts of 24.03.2022 (number UD 347) available at: <https://legislacja.rcl.gov.pl/projekt/12358002/katalog/12863959#12863959> [accessed: 13.03.2022].

1. PRINCIPLES OF TAXATION APPLYING TO A PERSON SINGLE-HANDEDLY RAISING CHILDREN

Nowadays, we are dealing with an exceptional situation – until 2022 there was a possibility of preferential settlement of a single parent, from 2022 there is a relief for a single parent, but from 2023 preferential settlement will probably return.

In accordance with Article 6 section 4 of the PIT Act binding until the end of 2021, tax on income of a parent or a legal guardian subject to tax obligation, who is an unmarried woman or man, a widow or widower, a divorcee, a person for whom the court adjudged separation in accordance with separate regulations, or a married person, whose spouse was deprived of parental rights or who is serving the imprisonment sentence, if during the tax year, this parent or legal guardian was raising children on his or her own, could be determined (...) upon a request expressed in the annual tax return, in the double amount of tax calculated on half of the income of a single parent (...), although income subject to lump-sum tax in keeping with the principles specified in this Act is not included in this total income.

The aforementioned principles of taxation were similar to the rules of preferential taxation of spouses. Both institutions reflected the exceptional approach of the tax legislator towards issues related to the preferences for married spouses and parents who, for various reasons, do not have the support of the other parent of the child and bear the burden of child care fully on their own. As emphasised in the doctrine, the legal structure of taxation of persons' single-handedly rising children income is based on the use of the income splitting.⁸ This means the tax is set in double the amount of half of the income of a single parent.⁹ Unfortunately, the above mechanism for determining the amount of tax is applied regardless of the actual number of children brought up.¹⁰ This means that the adopted solution only partially corresponds to the important idea of individualising the amount of the tax burden. This is because it does not take into account the difference between the expenses incurred by a single parent with one child and a single parent

⁸ R. ZIELIŃSKI, *Personalizacja w systemie obciążeń dochodów osób fizycznych w Polsce*, Warszawa: Wolters Kluwer 2019, p. 136.

⁹ The aforementioned preferential taxation is still available for the purposes of tax settlement for 2021.

¹⁰ R. ZIELIŃSKI, *Instrumenty personalizacji podatkowej w konstrukcji podatku dochodowego od osób fizycznych*, „Annales Universitatis Mariae Curie-Skłodowska. Sectio H. Oeconomia” 2016, vol. 50, no. 1, p. 708.

with a greater number of children. Meanwhile, the aim of these legal regulations should be the implementation of the constitutional principle of family protection, and in particular the economic protection of an incomplete family, which, due to its difficult financial and social situation, should benefit from special assistance from public authorities.

The Polish Deal has completely changed the principles of taxation applying to a person single-handedly raising children.¹¹ This is because preferential joint taxation with a child was replaced by a tax relief for a person single-handedly raising children,¹² introduced in Article 27ea PIT Act. In accordance with this provision, the taxpayer may deduct the amount of PLN 1,500 from tax.

Before 2022, in 2022 and probably still since the amendment to the Polish Deal will come into force there are three basic conditions of aforementioned tax preference.

Firstly, this person shall be:

- a) an unmarried woman or man, a widow or widower, a divorcee;
- b) a person for whom the court adjudged separation in accordance with separate regulations;
- c) a married person, whose spouse was deprived of parental rights or is serving the imprisonment sentence.

Secondly, this person on his or her own shall take care of:

- a) minor children;
- b) adult children who, in accordance with separate regulations, receive the attendance benefit (allowance) or social pension;
- c) adult children, up to 25 years of age, studying at schools referred to in national or foreign regulations governing the educational system or higher education system if during the tax year.

Thirdly, this person:

- a) shall be subject to unlimited tax obligation, referred to in Article 3 section 1; or
- b) shall be subject to limited tax obligation, referred to in Article 3 section 2a; provided that:
 - has his or her place of residence for tax purposes in a member state of the European Union other than the Republic of Poland or in another country

¹¹ T. SMOLAREK, *Polski Ład: Zmiany w zasadach wspólnego rozliczenia małżonków oraz osób samotnie wychowujących dzieci*, LEX/el. 2021, thesis 3.

¹² Tax deduction under Art. 27ea fulfils the criteria set out in Art. 3 point 6 of the Tax Ordinance, which allows to assume that it is a tax relief.

of the European Economic Area, or Swiss Confederation, whereas Article 6 section 12 shall apply respectively; and

– earned revenue subject to taxation in the territory of the Republic of Poland in the amount of at least 75% of the total revenue earned in a given tax year, while provisions of Article 6 sections 11 and 13 shall apply respectively; and

– documented his or her place of residence for tax purposes with a certificate of residence, while provisions of Article 45 section 7a, second sentence, shall apply respectively.

As of the beginning of 2022, joint settlement with a child was eliminated and replaced with a tax relief of PLN 1500. When justifying this amendment, the legislator indicated that retaining the current regulation with the simultaneous increase of the tax-free amount would favour single parents over married parents. Consequently, the interpretation that the amendment is intended to be an attempt to encourage taxpayers to formalize relationships or remain married is justified.¹³

Several critical opinions were expressed on the amendment, indicating that the new tax relief will not compensate for joint settlement with a child. In this context, it is worth noting that the fixed amount of the tax relief set forth in the Act means that the higher the income of a person single-handedly raising children, the lower the benefit vs. the previously applicable rules. In response to numerous complaints from single parents, the Commissioner for Human Rights objected to the new regulations and expressed the expectation that the institution of joint settlement of a person single-handedly raising children with a child would be restored soon.¹⁴

In March 2022 the Prime Minister announced many changes in Polish Deal. One of the most important is undoubtedly the restoration of joint taxation of person single-handedly raising children with a child. According to the proposed amendment to Polish Deal the single parent income tax may be set at double amount of tax calculated on half of the income of a person single-handedly raising children. This preference would replace “single parent relief,” however it is difficult to predict how the works on the amendment will proceed.

¹³ W. MOCZYDŁOWSKA, *Nowa ulga dla samotnych rodziców mniej korzystna*, <https://www.prawo.pl/podatki/nowa-ulga-dla-samotnych-rodzicow-w-polskim-ladzie,513058.html> [accessed: 13.03.2022].

¹⁴ W. MOCZYDŁOWSKA, *RPO interweniuje: Rodzice samotnie wychowujący dzieci tracą na Polskim Ładzie*, <https://www.prawo.pl/podatki/rodzice-samotnie-wychowujacy-dzieci-a-polski-lad-apel-rpo,512962.html> [accessed: 13.03.2022].

2. NOTION OF A “SINGLE PARENT OR LEGAL GUARDIAN”

As indicated above, in the PIT Act, the legislator introduced the definition of a “single parent or legal guardian.” In accordance with Article 27ea section 1 point 1 (in force in 2022), a parent can benefit from the tax relief – as until the end of 2021 and most likely from mid-2022 – if he or she is an unmarried woman or man, a widow or widower, a divorcee, a person for whom the court adjudged separation in accordance with separate regulations, or a married person, whose spouse was deprived of parental rights or who is serving the imprisonment sentence.¹⁵

In the light of the foregoing first of all it is justified to verify whether the condition related to the taxpayer’s marital status is met. However, the legislator has introduced another obligatory condition – the parent must raise the child “on his or her own.”¹⁶ Consequently, the text of the aforementioned provision allows assuming that when assessing who a single parent is, the taxpayer meeting the legal criteria related to marital status should be verified first, and then whether factual requirements are met.¹⁷ The assessment of the above-mentioned second condition causes the most difficulties. Does single parenthood mean that the other parent does not participate in any way in the child’s life? The answer to this question is not at all obvious. To this end, it is necessary to refer to judicial decisions and opinions of tax authorities, which often differ from each other.¹⁸

As indicated in the ruling of the Supreme Administrative Court of 31 May 2011,¹⁹ bringing up a child can be defined as the process of forming the child’s personality by developing his or her independence, responsibility, intellectual predispositions and practical skills, view of the world and the sys-

¹⁵ See: D. DĄBROWSKA, *Opodatkowanie dochodów samotnie wychowujących dzieci*, LEX, thesis 2.

¹⁶ See: R. KOWALSKI, *Komentarz do art. 6 u.p.d.o.f. [in:] PIT. Komentarz do wybranych przepisów*, LEX/el. 2020.

¹⁷ It is worth emphasizing that the legislator, even indirectly, did not use the criterion of parental authority as decisive about the possibility of taxation in this way – see: K. ŚWIĘCH, *Zasady opodatkowania osób samotnie wychowujących dzieci i ich ewolucja*, [in:] *Prawo finansowe po transformacji ustrojowej. Międzynarodowe i europejskie prawo podatkowe, Zjazd Katedr Prawa Finansowego i Podatkowego*, eds. I. Mirek, T. Nowak, Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2013, pp. 459-467.

¹⁸ It should be emphasised that the following judgments and rulings were issued in the previous legal state, but due to the same definition of a “single parent” they remain valid in the context of the assessment of currently applicable regulations.

¹⁹ II FSK 30/10, LEX no. 844681

tem of values and emotional attitudes. A single parent bringing up a child on his or her own is without doubt one of the parents or a legal guardian with whom the child actually lives, who takes care of the child's daily existence and health, who personally or with the help of a trusted person accompanies the child to and from school, who is interested in the child's progress in school (participates in parent-teacher meetings), the child's physical and intellectual development (sports clubs, music lessons, etc.).

A court decision on the custody of the child may be essential for the purposes of assessment whether a parent raises a child on his or her own. In this respect, the court can propose various solutions, e.g. it may entrust the exercise of parental authority to both parents, while determining the place of residence of the child with one of the parents and deciding on the contacts between the children and the other parent. The court may also decide on the so-called joint custody of a child, when the child spends equal or close to equal amount of time with both parents. At the same time – the child care rules do not need to be always formalised.

The evaluation of the actual status is required in each case, when assessing whether a single parent brings up a child on his or her own. On this basis, two positions can be observed in judicial decisions and individual advance tax rulings. The first point of view indicates that even if both parents (or legal guardian) have custody of the child, it is possible to consider the parent as a “single” parent. The second point of view indicates that in the situation of raising a child by both of them, even in the absence of cooperation between them – neither of them can be considered a single parent. As an example of the first of the above positions can be indicated the individual advance tax ruling of 17 January 2020.²⁰ The Director of the National Revenue Information assessed the following situation: after the divorce, the father maintains contact with the children in accordance with the terms of the divorce decree, pays child support on a regular basis and buys small gifts or items of current use for children from time to time. Due to the fact that the father meets the children once a week for a few hours and every second weekend, the father does not help the children with their daily homework and learning, does not attend meetings at school/kindergarten, is not involved in the children's social life and does not go to the doctor with them and takes care of them during their illness from time to time. The mother takes care of providing clothes and shoes in appropriate sizes, as well as does laundry and irons clothes. Mother's duties also include providing

²⁰ 0113-KDIPT2-2.4011.648.2019.2.SR

school supplies, books and sports equipment on an ongoing basis. She also takes care of meeting the cultural needs of children and their physical development. Taking into account the aforementioned facts, the authority concluded that in the event that neither of the parents is deprived of parental authority, the parent, who actually brings up the child during the tax year, i.e. takes care of the child on a full-time basis, constantly cares about the child's material well-being and emotional development, shall be entitled to the tax advantage in question. At the same time, the other parent does not need to completely give up the participation in the child's care and upbringing. Where the child, living with one parent, remains under this parent's continuous daily care, and the other parent is obliged to pay child support and take care of the child on an ad hoc basis, the parent, with whom the child lives and who fulfils all the duties ensuring that the child is brought up in a manner ensuring its proper development, shall be entitled to the status of a single parent. Maintaining contact between the child and the other parent does not deprive the first parent (with whom the child lives) of the right to the advantage available to single parents.²¹

As emphasized in the doctrine,²² the intention of the legislator was to equate the taxation of the income of spouses with their children and the income of those parents who raised their children alone. However, over the alleged intention of the legislator, even reproduced from documents, one should clearly put constitutional values. Pursuant to Art. 71 sec. 1 sentence 1 of the Constitution of the Republic of Poland²³ "The state in its social and

²¹ The similar position was presented in the Ruling of the NSA of 6 May 2021, II FSK 412/19, LEX no. 3184617, ruling of the WSA in Lodz of 6 May 2021, I SA/Łd 170/21, LEX no. 3177425; ruling of the WSA in Szczecin z 14 April 2021, I SA/Sz 198/21, LEX no. 3171745; ruling of the WSA in Gdansk of 12 January 2021, I SA/Gd 785/20, LEX no. 3105882; ruling of the WSA in Poznan of 17 December 2020, I SA/Po 452/20, LEX no. 3115242; ruling of the WSA in Gliwice of 21 October 2020, I SA/Gl 465/20, LEX no. 3080493; ruling of the WSA in Lodz of 15 September 2020, I SA/Łd 360/20, LEX no. 3057613; ruling of the NSA of 20 May 2020, II FSK 383/20, Central Database of Administrative Court Rulings; ruling of the WSA in Opole of 15 May 2019, I SA/Op 112/19, LEX no. 2681559; ruling of the WSA in Wroclaw of 16 February 2018, I SA/Wr 1234/17, LEX no. 2450454; individual advance tax ruling of 30 July 2021, 0113-KDIPT2-2.4011.478.2021.2.AKU; individual advance tax ruling of 29 December 2020, 0113-KDIPT3.4011.156.2019.8.PPK.

²² E. DROZDOWSKI, *Preferencyjne opodatkowanie rodzica samotnie wychowującego dziecko w ramach opieki naprzemiennnej. Glosa do wyroku WSA z dnia 16 lutego 2018 r., I SA/Wr 1234/17, „Orzecznictwo Sądów Polskich” 2020, no. 6, p. 55.*

²³ Constitution of the Republic of Poland (Journal of Laws of 1997 No. 483, item 78), hereinafter referred: the Constitution of the Republic of Poland.

economic policy takes into account the good of the family.”²⁴ The state cannot create norms that make tax preferences conditional on the exclusion of one of the parents from care.²⁵ The protection of the fiscal interests of the state cannot be confronted with the welfare of children, whose interest is to provide them with the fullest possible contact, care and upbringing by both parents.

According to opposite position to that presented above the fact that two people are raising the same child excludes the possibility that either of these people is raising the child alone.²⁶ Judicial decisions repeatedly emphasise that the condition for taking advantage of the tax credit is not only having a specific marital status, but also bringing up a child independently, without the support of other people.²⁷ Moreover, as emphasised in the rulings of the Supreme Administrative Court, the justification for introducing the tax credit (teleological interpretation) clearly indicates that the legislator addressed it only to parents who are responsible for meeting the child’s daily needs, rather than every parent who has parental authority and is single, but does not take care of the child on a full-time basis (on his or her own). In other words, not every person, who has children and his or her marital status is as

²⁴ A. KRZYWOŃ, *Podatki i inne daniny publiczne w Konstytucji Rzeczypospolitej Polskiej*, Warszawa: Wydawnictwo Sejmowe 2011, p. 72; K. ŚWIĘCH, *Pozycja rodziny w polskim prawie podatkowym*, Warszawa: Wolters Kluwer 2013.

²⁵ I. SZCZEPAŃSKA, *Rozwiązania o charakterze prorodzinnym w polskiej konstrukcji podatku dochodowego od osób fizycznych nieprowadzących działalności gospodarczej*, „Ius Novum” 2013, no. 2, p. 161; J. KULICKI, *Opinia na temat zgodności z konstytucyjną zasadą równości i zasadą ochrony małżeństwa i rodziny zasad opodatkowania osób samotnie wychowujących dzieci, określonych w art. 6 ust. 4–5 ustawy o podatku dochodowym od osób fizycznych*, „Zeszyty Prawnicze Biura Analiz Sejmowych” 2011, no. 1(29), p. 158; J. KULICKI, *Systemy opodatkowania dochodów rodziny w Polsce w latach 1918–2011*, „Analizy BAS” 2011, no. 4, p. 18.

²⁶ Ruling of the WSA in Poznan of 6 May 2021., I SA/Po 86/21, LEX no. 3185105; ruling of the WSA in Łódź of 22 October 2019 I SA/Łd 475/19, LEX no. 2737788; ruling of the WSA in Warszawa of 15 January 2014, III SA/Wa 1445/13, LEX no. 1576387; individual advance tax ruling of 21 March 2022, 0113-KDIPT2-2.4011.102.2022.1.ST; individual advance tax ruling of 24 February 2022, 0115-KDIT2.4011.901.2021.1.RS; individual advance tax ruling of 21 February 2022, 0113-KDIPT2-2.4011.1149.2021.2.ACZ; individual advance tax ruling of 12 August 2021, 0115-KDWT.4011.160.2021.2.JŁ; individual advance tax ruling of 13 March 2019, 0112-KDIL3-2.4011.70.2019.1.AK; individual advance tax ruling of 6 December 2019, 0114-KDIP3-3.4011.490.2019.1.JK3.

²⁷ Ruling of the NSA of 5 November 2012, II FSK 664/11, LEX no. 1291609; ruling of the NSA of 15 November 2012, II FSK 663/11, LEX no. 1226988; ruling of the NSA of 11 January 2012, II FSK 1228/10, LEX no. 1109716; ruling of the WSA in Wrocław of 7 August 2013, I SA/Wr 191/13, LEX no. 1379456.

specified in the provision in question, is a single parent.²⁸ Consequently, parents in an informal relationship, who take care of a child together cannot be considered as “single parents.”²⁹

As emphasised in the doctrine and judicial decisions, bringing up children completely on one’s own is impossible.³⁰ A single parent is unable not to use the support of family members (who are not partners) to raise their children. Therefore, it seems that the notion of a single parent bringing up a child on his or her own should be understood to mean a person who does not live in a common household with a person who could be considered his or her life partner.³¹ In the Polish Deal, the legislator endeavours to partially eliminate the aforementioned dilemmas. This is because new Article 27ea section 3 stipulates that a person, who brings up at least one child together with another parent or a legal guardian, shall not be entitled to the tax relief for single parents. This refers for example to a parent having two children with different partners, where both parents together take care of one of the children. Moreover, the tax credit for single parents shall not be available to a person who submitted the application referred to in Article 6 section 2 or Article 6a section 1. Consequently, the person, who applied for joint taxation with a spouse or deceased spouse, cannot benefit from the tax advantage. At the same time, it is worth noting that even without this reservation, in the event of joint taxation with a spouse, the taxpayer would not meet the condition related to marital status, as being married is the necessary condition. By introducing changes to the Polish Deal, the government intends to leave most of the indicated conditions.

The aforesaid situations significantly limit the possibilities of considering a parent as “single.” The legislator’s intentions underlying the amendment

²⁸ Ruling of the NSA of 20 October 2006, II FSK 1266/05, LEX no. 293237; ruling of the NSA of 24 November 2006, II FSK 1452/05, Central Database of Administrative Court Rulings; ruling of the NSA of 30 November 2006, II FSK 644/06, Central Database of Administrative Court Rulings; ruling of the NSA of 30 November 2006, II FSK 1549/05, LEX no. 283887; ruling of the NSA of 30 November 2006, II FSK 1534/05, Central Database of Administrative Court Rulings; ruling of the NSA of 30 November 2006, II FSK 1548/05, Central Database of Administrative Court Rulings; ruling of the NSA of 6 May 2008, II FSK 617/07, LEX no. 468917; ruling of the NSA of 6 May 2008, II FSK 371/07, LEX no. 469252; ruling of the NSA of 30 June 2009, II FSK 279/08, LEX no. 563456; ruling of the NSA of 27 January 2011, II FSK 2474/10, LEX no. 952762.

²⁹ Ruling of the NSA of 14 June 2018, II FSK 1642/16, LEX no. 2509153.

³⁰ E. DROZDOWSKI, *Preferencyjne opodatkowanie rodzica samotnie wychowującego dziecko*, p. 55.

³¹ See: A BARTOSIEWICZ, R. KUBACKI, *Komentarz do art. 6 u.p.d.o.f.*, [in:] *PIT. Komentarz*, LEX, thesis 16; ruling of the WSA in Gdańsk of 7 July 2015, I SA/Gd 711/15, LEX no. 1790479.

can be explained based on two restrictions of the possibility to benefit from the tax credit described above. In the opinion of the legislator, where a parent has a partner/married spouse (other than the child's parent), he or she cannot be considered "single." Consequently, in this case, it does not matter whether the married spouse/partner helps with the care or takes care of the child.

3. CHANGES IN THE SINGLE PARENT TAXATION RULES SINCE 2022

Changes in the single parent taxation rules resulting from the Polish Deal are a response to opinions expressed in court rulings, according to which, when divorced parents jointly take care of their children, each of them shall be entitled to preferential taxation of income in accordance with the rules provided for single parents. As a result, the courts concluded that each parent was entitled to double the tax on half of their income.³²

The legislator directly justified the changes introduced from 2022³³ with the need to eliminate interpretational doubts that appeared after the judgment of the Supreme Administrative Court of 5 April 2017 (II FSK 573/15), and which lead to abuses in the application of this preference.³⁴ It should therefore be noted that the conclusions of the above-mentioned judgment of the Court are not identical with the intention of the legislator.

The doctrine pointed to the existence of a legal loophole in this respect.³⁵ It was indicated that the existence of the abovementioned tax preference may result in the use of this particular tax technique by persons who should not use it for factual reasons.³⁶ The presented solution was to adopt a regulation analogous to the application of family relief, a proportional reduction in the income of a single parent. The more accurate solution was the introduction

³² Ruling of the NSA of 5 April 2017, II FSK 573/15, LEX no. 2261656, ruling of the WSA in Wrocław of 16 February 2018, I SA/Wr 1234/17, LEX no. 2450454, ruling of WSA in Poznań of 28 August 2019, I SA/Po 347/19, LEX no. 2717823, ruling of the WSA in Warsaw of 12 September 2019, III SA/Wa 2835/16, LEX no. 2393288.

³³ Justification of amendments to the Act on Personal Income Tax Act, Act on Corporate Income Tax and certain other acts (form 1532).

³⁴ In this judgment, the Court made a precedent-setting decision, recognizing that in a situation where divorced parents take turns bringing up their common children, each of them is entitled to tax income on preferential terms provided for single parents. Consequently, each parent has the right to tax double the amount of half of their income.

³⁵ ŚWIECH, *Pozycja rodziny w polskim prawie podatkowym*.

³⁶ *Ibidem*.

of an additional criterion indicating which of the parents should be considered as a single parent. In this case, the place of residence of the child with the parent should be decisive.³⁷ In the absence of such a place, each parent should be allowed to reduce their income in a proportionate manner. Interestingly – especially in reference to the Polish Deal – it was underlined that the mere sanctioning of restricting the use of this technique of tax calculation, e.g. by indicating that only one parent has the possibility of joint taxation with the child, would lead to unequal treatment of taxpayers.³⁸

Section 2 added in Article 27ea by the Polish Deal, partially repeated in the draft of amendment of the Polish Deal, is an attempt to reduce doubts in this respect. This is because it stipulates that only one of the parents or legal guardians shall be entitled to the tax relief. If the taxpayers are unable to reach an agreement, the taxpayer with whom the child lives – has his or her place of residence within the meaning of the Act of 23 April 1964 – Civil Code³⁹ – shall be entitled to the tax relief. This provision explicitly excludes the possibility of both parents benefiting from the tax credit, e.g. in a situation where there is no cooperation between them in the joint upbringing of a child. Consequently, even if the parents do not communicate with each other about the child's upbringing and feel that they do not have any support in the upbringing process, the legislator excludes the possibility of recognizing them as a "single" parent, and, as a result, both parents will not be able to benefit from the tax credit in the settlement for the year 2022. In such a case, regardless of the parents' feelings and actual division of childcare, an objective criterion – the child's place of residence – will decide. In this respect, the legislator directly refers to the definition included in the Civil Code. In accordance with Article 25 of the Civil Code, the place of residence of the natural person is the place where the person is staying with the intention of permanent residence. The place of residence is considered one of the elements differentiating (in space) a natural person.⁴⁰ It should be emphasized that the place of residence cannot be considered equivalent to a specific address.⁴¹

Pursuant to Article 26 of the Civil Code, the place of residence of the child under parental authority shall be the place of residence of the parents

³⁷ ŚWIĘCH, *Zasady opodatkowania osób samotnie wychowujących dzieci i ich ewolucja*.

³⁸ Ibidem.

³⁹ Journal of Laws of 2020, items 1740.

⁴⁰ Z. RADWAŃSKI, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa: C.H. Beck 2013, p. 146.

⁴¹ See: M. DOMAŃSKI, *Orzekanie o pieczy naprzemiennej w wyrokach rozwodowych*, Warszawa: Instytut Sprawiedliwości 2015, p. 82.

or of those of the parent who is exclusively entitled to parental authority.⁴² If both parents, having separate places of residence, are equally entitled to parental authority, the place of residence of the child is with the parent with whom the child permanently resides.⁴³ If the child does not permanently reside with either of the parents, his or her place of residence shall be determined by the guardianship court.⁴⁴

In the context of the tax relief for a single parent, determining the place of residence of the child will be of decisive importance if both parents are entitled to parental authority. Especially, if both parents care for the child to a similar extent, live in the same locality and no court decision has been issued directly indicating the parent with whom the child lives. This is the case, for example, when the parents are not married and do not live together, but both take care of the child.

In accordance with Article 28 of the Civil Code, a person has only one place of residence. As emphasised in judicial decisions, in the divorce decree, it is impossible to indicate two places of residence, even if the court expressly awarded joint custody.⁴⁵ As is pointed out in the doctrine, there is no uniform practice in judicial decisions as to indicating the place of residence of the child in the decree.⁴⁶ A common solution is to indicate that the child's place of residence is "with the mother" or "with the father." It can be assumed that in such a case it would be reasonable to accept that the parent indicated in such a way by the court will be able to benefit from the tax credit for the single parent, even in the case of joint custody. But what will happen if the court in the divorce decree indicates a locality as the child's place of residence, in a situation where both parents live in the same locality? In such a case, the criterion used by the legislator in Article 27 ea section 2 may prove insufficient. The guardianship court is competent to determine the place of residence, not the address of the child, so referring to the court in this regard is also not a solution. In the case of joint custody, also a criterion based on the factual status – the place where the child stays more often –

⁴² R. STRUGAŁA, *Komentarz do art. 26*, [in:] *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, LEGALIS, thesis: 6.

⁴³ M. SOKOŁOWSKI, *Komentarz do art. 26*, [in:] *Kodeks cywilny. Komentarz*, ed. M. Gutowski, LEGALIS, thesis 4.

⁴⁴ J. M. ŁUKASIEWICZ, *Obowiązek alimentacyjny przy pieczy naprzemiennnej*, „Monitor Prawniczy” 2018, No. 7, p. 348.

⁴⁵ Ruling of WSA in Kraków of 2 March 2017, III SA/Kr 1728/16, Legalis.

⁴⁶ M. DOMAŃSKI, *Orzekanie o pieczy naprzemiennnej w wyrokach rozwodowych*, „Prawo w działaniu. Sprawy cywilne” 2016, vol. 25, p. 97.

may be inadequate. Adopting the model of symmetric joint custody implies the acceptance of the fact that the child will have two equal life centres and, thus, two actual places of residence. In the current form, regulations do not provide an explicit answer in this respect.

Due to the above doubts related to the criterion of the place of residence, a departure from this idea in the draft amendments to the Polish Deal should be positively accepted. However, the draft amendment to the Polish Deal deprives the single parent of preferences in the case of joint custody, when both parents were granted child-raising benefit within the meaning of the Act on State Aid in Raising Children.⁴⁷

CONCLUSION

The institution of tax relief and joint taxation with the child for a person single-handedly raising children is undoubtedly an expression of the concern of the legislator introducing special privileges for people who do not have support from the other parent of the child. The purpose of the above-mentioned tax preference is to enable people, who were responsible for the child's care and upbringing on their own during the tax, to benefit from the tax advantage. This goal is consistent with a pro-family policy of the State, which is implemented in many ways under tax law (including the so-called child relief, exemptions from inheritance and gift tax). It must be emphasised that fairness of taxation does not mean that all entities should pay the same amount of tax, but that they should bear an equal burden in relation to their payment capacity.⁴⁸

In accordance with Article 71 section 1 of the Constitution of the Republic of Poland, the State, in its social and economic policy, shall take into account the good of the family. Families in a difficult financial and social situation, especially those with many children and incomplete ones, deserve special assistance from public authorities. In the changing social reality, it is necessary to take into account the special protection of and the State's assistance to such families.

The best interests of the child as the supreme value, should guide the resolution of doubts that arise in the context of the tax regulations in question. The new regulations have eliminated the possibility of recognizing as "single"

⁴⁷ Journal of Laws of 2019 No. 2407, as amended.

⁴⁸ A. GOMUŁOWICZ, *Problemy teorii opodatkowania w Polsce*, „Głosa” 1996, no. 4, p. 3.

people who bring up at least one of their children with their parent, also in the case when this person is not the mother or father of the child to whom the tax preference refers.

The New Deal explicitly ruled out the practice of both parents benefiting from the tax advantage, as it introduced the principle that only one parent is entitled thereto. In accordance with the legislator's intentions, the aforementioned condition was aimed at restoring the original meaning of the tax relief for this group and eliminating the abuse of the institution by both unmarried parents having joint custody of children. The media confusion that arose in connection with the changes introduced in the Polish Deal in the field of preferential taxation of a person single-handedly raising children proves the importance of this topic. It is an issue of great social relevance. For this reason, it deserves a clear, stable and precise regulation in the Act.

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PROBLEMY INTERPRETACYJNE DOTYCZĄCE ZAKRESU ZNACZENIOWEGO
POJĘCIA „OSOBA SAMOTNIE WYCHOWUJĄCA DZIECKO”
W POLSKIM PRAWIE PODATKOWYM

Streszczenie

Preferencyjne zasady opodatkowania osoby samotnie wychowującej dziecko stanowią wyraz szczególnej troski i wsparcia ustawodawcy dla osób, które nie mogą liczyć na pomoc drugiego rodzica dziecka. Do końca 2021 roku ustawa PIT gwarantowała możliwość wspólnego rozliczenia się z dzieckiem. Polski Ład wprowadził w tym zakresie niezwykle istotną zmianę – mianowicie dotychczasowe zasady korzystnego rozliczenia podatkowego zastąpiono ulgą w wysokości 1500 zł. Pod wpływem lawiny krytyki rząd podjął próbę wyeliminowania z ustawy nowej ulgi na rzecz powrotu możliwości wspólnego rozliczenia się osoby samotnie wychowującej dziecko z dzieckiem. Rozważania dotyczą w pierwszej kolejności przesłanek skorzystania z preferencji, rozbieżności interpretacyjnych pojawiających się w związku z kwalifikacją danej osoby jako „samotnego rodzica” oraz oceny czy zmiany wprowadzone od 2022 roku oraz proponowane zmiany w Polskim Ładzie zminimalizują wątpliwości istniejące dotychczas na gruncie omawianej instytucji.

Słowa kluczowe: osoba samotnie wychowująca dziecko; samotny rodzic lub opiekun prawny; ulga dla osoby samotnie wychowującej dziecko.