CURRENT ISSUES RELATED TO THE TAXATION OF TRANSACTIONS WITH FARMLAND LOCATED OUTSIDE THE BUILT-UP AREA

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Abstract

Law No. 17/2014 on the regulations regarding the sale and purchase of agricultural land outside buildable areas and for the amendment of Law No. 268/2001 on the privatisation of companies administering the State's publicly and privately owned agricultural land and for the creation of the Agency for the State's Domain ("Law 17")[3], as amended by way of Law no. 175/2020 for the amendment and completion of Law 17 ("Law 175") generated uncertainty on the agricultural real estate market.

Keywords*: farmland located outside buildable area, taxation of real estate transactions, pre-emption right, agricultural land.*

JEL Classification: K11, K34

1. Introduction

Although more than a year has passed since the provisions of Law 175 became applicable and despite of the numerous requests for clarification of the issues that triggered a deadlock on the agricultural real estate market addressed by the factors involved in the implementation of this law, the legislative bodies did not proceed to the adoption of normative acts that would shed light on the process of interpretation and application of Law 175.

The lack of clarity of Law 175 has meanwhile produced its effects also on the transactions with farmland located outside the buildable areas that fall under the provisions of art. 4^2 para. (1) of Law 17.

2. What types of transactions are covered by art. 4^2 para. (1) of Law 17?

According to art. 4^2 para. (1) of Law 17: „*Farmland located outside buildable areas may be sold before the eight anniversary of their acquisition subject to payment of an 80% tax on the difference between the sale price and the purchase price, based on the grid of notaries applicable to that period.*"

Thus, from the wording of art. 4^2 para. (1) above it results that this tax is due only in situations where farmland located outside the built-up area was acquired by the current owner by way of purchase and not by other means of acquisition provided by law. Consequently, if the agricultural land located outside the built-up area has been acquired by the seller by way of barter, donation, inheritance, acquisitive prescription, it may be alienated at any time, even by way of sale, without no obligation for the owner to pay the tax provided by art. 4^2 para. (1) of Law 17.

Similarly, where the current owner has acquired the agricultural land located outside the built-up area by way of purchase, it will be able to alienate the land at any time by any form of transfer of private ownership right, except for sale, without being obliged to pay the tax mentioned above. In any form of transfer, the parties need to confirm and declare that they agree with the processing of their

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[3] Law 17 primarily regulates the right of pre-emption of certain categories of persons to the sale of agricultural land located outside buildable areas. For details on the right of pre-emption regulated by Law 17, please refer to Simona Chirică, *The Pre-emption Right Regarding the Transactions of Agricultural Lands Located Outside the Built-Up Areas*, „Perspectives of Business Law Journal", Vol. 4, Issue 1, 2015, p. 135-144, respectively MSc. Moog, Kristina and Prof dr. Enno Bahrs,"Rechtliche und monetäre Bedeutung von dinglichen (gesetzlichen) Vorkaufsrechten an landwirtschaftlichen Nutzflächen aus Sicht von berechtigten Landwirten." *Berichte über Landwirtschaft-Zeitschrift für Agrarpolitik und Landwirtschaft* (2021), ISSN 2196-5099, Deutschland, 2021, https://www.buel.bmel.de/index.php/buel/article/view/314.

personal data by notaries public[4].

3. The calculation of the tax applicable in the case of transactions regulated by art. 4^2 para. (1) of Law 17

In the case of transactions with agricultural lands located outside buildable areas falling under the provisions of art. 4^2 para. (1) of Law 17, the seller has the legal obligation to pay an 80% tax on the difference between the sale price and the purchase price, based on the grid of notaries applicable to that period[5].

Given that the wording of this article is not very clear, in practice there are different views on the calculation of the above tax. Thus, certain notaries public consider that this tax applies either on the difference between the actual sale price charged by the current owner of the land and the purchase price paid by the latter when acquiring the land, disregarding the phrase "*based on notary grid applicable to that period*", or on the difference between the actual sale price charged by the current landowner and the purchase price set by the notary grid for that land at the moment of purchase (which may be even lower than the purchase price paid by the current owner for the respective land).

Following the criticisms regarding the lack of clarity of the provisions of Law 17 [including of art. 4^2 para. (1)], an exception of unconstitutionality was raised with respect to this article, the Constitutional Court being notified on the ground that the ambiguity of the provisions lies (also) in the fact that in the same sentence are found both the notion of "*sale and purchase price*", as well as references to their value established by the "*notarial grid applicable to the respective period*".

However, as the authors of the exception of unconstitutionality claim, these notions have a different meaning, namely the expressions "*sale price*" and „*purchase price*" of the land have a clear legal meaning established by civil law rules and consistent case law, and "*notarial grid*" (a/n the notion referred to in art. 111 of the Fiscal Code is, in fact, "*market study*") contains figures representing "*minimum values recorded on the market*" at different moments in time.

In consideration of these criticisms, the Constitutional Court ruled by Decision no. 586/2020 that the phrase "*the difference between the sale price and the purchase price, based on the grid of notaries from the respective period*" does not bring ambiguity on art. 4^2 par. (1) of Law 17, as "*it refers to the difference between the value of farmland located outside built-up area provided by the market study from the date of purchase and that from the date of sale, and not to that between the value of farmland established based on the sale-purchase agreements at the time of acquisition/ alienation*". In other words, when calculating the 80% tax there should be no use of two different reference values, but the respective tax will be calculated by reference to the difference between the value of farmland located outside buildable area established by the notarial grid from the date of sale and the value from the notarial grid from the date of purchase.

In our view, the interpretation of the Constitutional Court is correct, in the sense that the 80% tax applies on the difference between the sale price and the purchase price, both established on the basis of the notarial grid from the periods when the acquisition, respectively the sale took place. Thus, the correct calculation of the difference on which the tax applies supposes that both the purchase price and the selling price are determined by reference to the prices specified in the notarial grid in place at the time of each transaction. As an additional argument, it would be illogical for the difference to be calculated between the actual sale price collected by the owner and the purchase price applicable to the same land according to the notarial grid at the date of purchase of the land.

Consequently, by referring to the price established on the basis of the notarial grid "*from the respective period*" according to art. 4^2 para. (1) of Law 17, the legislator's intention was for the 80% tax to be applied on the difference between the sale price established on the basis of the notarial grid

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[4] Simona Chirică, *The main novelties and implications of the new general data protection regulation*, „Perspectives of Business Law Journal", Volume 6, Issue 1, December 2017, p. 159-176.

[5] For details about international double taxation, please see Simona Chirică, *International Double Taxation Avoidance (Domestic Legal Regulations and Fiscal Conventions Concluded by Romania)*, „Theoretical and Applied Economics", Volume XVII (2010), No. 9(550), p. 53-66.

at the time of sale and the purchase price established on the basis of the notarial grid on the date of purchase of the farmland. This is because the real intention of the legislator was to discourage the "price manipulation" of farmland located outside buildable areas and to this end it has introduced as a reference for calculating this difference the values provided by the notarial grids applicable at the date of closing of each transaction. We appreciate that the clarifications given by the Constitutional Court in this matter are valuable.

By reference to the provisions of art. 12 para. (1) lit. d) of the Methodological Norms regarding the exercise by the Ministry of Agriculture and Rural Development of the attributions incumbent on it for the application of Title I of Law 17 and of art. 16 of Law 17, the sanction applicable in case of non-compliance with the requirement to pay the 80% tax is the absolute nullity of the sale agreement, since the non-payment of the tax represents a non-fulfilment of the pre-emption procedure regulated by Law 17.

Another reason that contributed to the current deadlock on the agricultural real estate market is the lack of rules for the application of Law 17 on calculation and collection of the tax mentioned above.

4. Conclusion

We are of the opinion that the collection of a tax of 80% on the difference between the grid value of the property at the date of its sale and the value at the date of its purchase is a measure that does not necessarily lead to the achievement of the purpose pursued by the legislator. Thus, the bona fide owner of the farmland located outside the built-up area, faced with the dilemma of selling the land and paying this tax which may be more onerous versus keeping the land in its patrimony and identifying other ways of exploiting the asset, prefers to choose the second option even if it does not have in all cases the necessary resources to cultivate and exploit that agricultural land[6]. Consequently, the legislator's desire to ensure, among other things, the sustainable development of agriculture by introducing this ban can no longer be achieved. Moreover, this blockage of transactions with farmland located outside the built-up area that fall under the provisions of art. 4^2 para. (1) of Law 17 also affects other areas, such as the development of renewable energy projects, projects whose erection and operation / exploitation does not necessarily involve changing the designation of the land (at least not for the entire surface of the land). *De lege ferenda* it is required that such projects to be expressly excluded from the scope of the law. Currently, in consideration of the legal provisions in force, such transactions cannot be concluded, on the one hand, due to the lack of clarity of the legislation and, on the other hand, due to the fact that the law does not stipulate how the 80% tax is calculated and collected.

Given the current deadlock of transactions with farmland located outside the city limits, it is crucial for the legislative bodies to adopt methodological norms to set the mechanism for establishing and collecting this tax, of course in close discussions with the business environment and all decision makers.

The owners of farmland located outside buildable areas, acquired by purchase, are able to alienate their lands, at any time, without being obliged to pay the above tax, by way of barter, donation, contribution in kind, transfer in lieu of payment or any other form of transfer, except for sale.

[6] We consider that an alternative for the exploitation of these lands would be their lease, respectively the establishment of superficies rights in case there is an intention to build constructions necessary / useful for a more efficient exploitation (i.e. farms, silos, warehouses, etc.). The superficies right involves the construction of a building based on a construction agreement. For more details on superficies rights and recent issues related to construction agreements, please see Simona Chirică, *Regulation regarding the reception of the construction works and the* corresponding *installations in Romania,* „Juridical Tribune – Tribuna Juridica", volume 7, issue 2, December 2017, p. 27-39; Simona Chirică, Cristiana Mic-Soare, *Superficies in the form of the right to superpose,* „Juridical Tribune – Tribuna Juridica", volume 5, issue 1, June 2015, p. 49-59, respectively Simona Chirică**,** *Some legal considerations on the relationship between the constructor and the beneficiary of the construction in the context of the Covid-19 pandemic,* „Perspective of Law and Public Administration", volume 10, issue 1, March 2021, 232-240.

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