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POSSIBILITY TO TERMINATE THE CONTRACT OF THE RENT-FREE USE OF ARABLE LAND WITHOUT THE NOTICE PERIOD DUE TO FAILURE TO SETTLE THE TAX OBLIGATION

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ABSTRACT

The study discusses the issue of a contract of the rent-free use of agricultural land (Article 708 of the Civil Code 1964). Particular attention has been paid to the possibility of terminating the contract without notice period due to failure to settle the tax obligation. The admission of the provisions on the failure in paying rent to the contract for the rent-free use of arable land means that the lack of payment of taxes or other burdens related to the ownership of real estate, which is the equivalent of not paying the rent in the lease contract, authorizes the termination of this contract. The author shares the view formulated in the decisions of the Supreme Court that Article 703 of the Civil Code (1964) is a provision of a relatively binding nature. As a consequence, adopting the above position leads to the conclusion that the contract may be terminated even without the notice period if the parties to the contract have differently regulated the effects of delay in payment of these benefits than is stipulated in Article 703 (1964).

Key words: lease contract, arable property, rent-free use of arable land, termination of the contract, arable tax

INTRODUCTION

The issue of rent-free contracts for arable land in exchange for settling tax, based on public law related to ownership, has been the subject of discussions in Polish literature and the Supreme Court judicature for a long time. Judicial practice abounds in numerous disputes arising from the performance of such a contract, and in particular the possibility of termination due to failure to transfer the equivalent of tax set by public law resting on the estate owner to the property owner or – under his authorization and on his behalf – to the tax authority. Therefore, I attempt to take a closer look at the institution of the rent-free use of arable land and deriving benefits from the property, using judicial doctrine and practice.

It is worth noting that this type of contract does not specify the lease rent, which means that the legal relationship that arose between the parties based on such a contract is called "rent-free use of arable land" (Lichorowicz 2004, Suchoń 2019). Furthermore, this contract is also commonly referred to as a rent-free lease. However, it must be noticed that the last term, although legible, is not correct. As rightly empha-

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sized in the literature, the agreement on rent-free use regulated in Article 708 of the Civil Code (1964) is not a lease, because it does not meet the basic *essentiale negotii* of a lease which is the determination of rent, but only applies the provisions on lease to it accordingly (Szachułowicz 2003). The doctrine also proposed to define this contract as "rent-free taking advantage of property" (Szachułowicz 2003). I think, however, that the trend in literature in which the term "rent-free use" is used in reference to the contract discussed in Article 708 of the Civil Code (1964) seems more convincing. It is widely accepted that a contract of rent-free use can be concluded in any form (Szachułowicz 2009). Although the contract referred to in Article 708 of the Civil Code (1964) is similar to a lease contract, the most important difference between these contracts is that those who use arable land are not obliged to pay rent, but they are obliged to bear taxes and other burdens related to the ownership of real estate. This is a situation in which a non-contractual user, like a leaseholder, has the right to use the property and derive benefits from it, but is not obliged to pay the rent. Consequently, the question arises that dodging tax settling by the user of the arable property may constitute the basis on the part of the person who gave the arable property into use to terminate the contract. The explanation of this interesting legal thread fundamentally determines the resolution of the discussed issue arising in the context of this institution.

MATERIALS AND METHODS

When developing the issue, I used the dogmatic method to assess the case law of the Supreme Court and civil law doctrine in the analyzed area. First of all, in the presented study I would like to draw attention to a more detailed problem related to the proper application of the provisions on lease to the contract of rent-free use of arable land. As already indicated, it is a bilaterally binding agreement and shows similarity to the lease contract. The special nature of the legal construction of the contract of the rent-free use of arable land adopted by the Civil Code means that Article 708 of the Civil Code (1964) does not regulate in detail the rights and obligations of the parties to the contract and refers in these matters to the lease provisions.

Moving on to the short remarks regarding the regulations of rent-free use, it should be pointed out, right at the beginning, that the duty of a person taking a property in rent-free use is to bear taxes and other burdens related to the ownership or possession of land. In reference to arable real estate, it is primarily about paying property tax and arable tax. Taxes are usually paid on behalf of the person who gave access to the land to another person to use and derive benefits from it. As already mentioned, the reference to the lease provisions is not a precise method of regulating the rent-free use agreement. As a result, it is, therefore, not surprising that the legal regulation of the rent-free use of arable land raises many doubts in doctrine and case-law.

One more point deserves clarifying here. The provision of Article 708 of the Civil Code (1964) refers to the concept of "arable property", whereas lease regulations do not contain a definition of this term. Hence, I believe that it is appropriate to refer to Article 461 of the Civil Code (1964), according to which arable real estate (arable land) is real estate that is or can be used for agricultural production activities in the field of plant and animal production, not excluding horticultural, fruit and fish production. Therefore, the purpose criterion does not imply the need to actually conduct business activity on the property for the purpose indicated above, the mere possibility of such use of the property is sufficient. For these reasons, it concerns all agricultural properties, including those intended for non-agricultural purposes in the land use planning. The content of the land register and land use planning may be helpful to determine the purpose of the property as arable and, as a consequence, its qualification in the light of Article 461 of the Civil Code (1964). However, they are not decisive for the qualification of real estate as arable real estate.

Since Article 708 of the Civil Code (1964) requires that the relevant provisions on lease are to be applied to the rent-free use contract, there raises the fundamental question whether the contract referred

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to in Article 708 of the Civil Code (1964) is covered by Article 703 of the Civil Code (1964), which sets out the consequences of not complying with the obligation to pay the rent. It is a practical issue whether the person taking arable property for rent-free use paying taxes related to arable property in arrears may constitute ground, on the basis of an analogy, as in the lease contract, to terminate the contract without preserving the notice period. In the case law of common courts and the Supreme Court, there has been a tendency to recognize that Article 703 of the Civil Code (1964) also applies to the contract referred to in Article 708 of the Civil Code (1964). Therefore, in the event of failure to transfer to the person who gave the land for use or – by his authorization and on his behalf – to the tax authority the tax equivalent may constitute a basis for termination of the contract of rent-free use of arable land. I believe that one should opt for the existence of such entitlement for a person who recedes arable land for rent-free use. Comparing this view to the lease contract, where we are dealing with arrears in the payment of lease rent, dodging in settling taxes by the leaseholder, in identical manner, affects the interest of the person who gave the land for use. In my opinion, one cannot demand from this person, that they will tolerate failure in settling this obligation by the person taking arable property in rent-free use. Admittedly, there may be a court claim for overdue tax benefits, which the user should meet voluntarily and within the agreed time limit, but there are no grounds to apply in reference to such person the restriction in the form of termination of the contract. The presented study is devoted to assessing the legitimacy of such a position according to law as it exists.

DISCUSSION AND CONCLUSIONS

Lease contract in the Polish legal system has been regulated in Articles 693–709 of the Civil Code. In accordance with Article 693 § 1 of the Civil Code (1964) through the lease contract, the lessor undertakes to give the lessee the benefit to use the property and receive benefits from it for a definite or indefinite period of time, and the lessee undertakes to pay the agreed rent to the lessor. According to this definition, the lease is a consensual, bilateral and payable contract. The payment of the lease is an important structural property of this obligatory relationship, distinguishing it from lending but also from use, which may be of a charge-free nature. Determining the rent is *essentiale negotii* of the lease contract and at the same time has legal effect in the form of payment of the contract. Therefore, the parties must specify the rent that the lessee is to provide to the lessor.

Article 693 § 2 of the Civil Code (1964) suggests that rent may be settled in money or other benefits, including a fraction of benefits. Studies indicate that the rent can also take the form of services for the lessor. The amount of rent may be determined by the parties freely in a manner that best pursues their interests. It is important that they see it as a benefit that brings them specific financial benefits.

As it results directly from the content of Article 1 of the Arable Tax Act of July 15, 1984 (1984), land classified in the land and building register as arable land is subject to arable tax, with the exception of land used for non-agricultural economic activity. For this reason, the taxpayers of the arable tax are entities specified in Article 3 of the Arable Tax Act (1984). It follows from this provision that the tax liability provided for by this Act is, as a rule, binding on the owner or sole holder of arable land, its perpetual usufructuary or dependent holder of land owned by the State Treasury or local government unit. Therefore, the lessee is a taxpayer of the arable tax in the situation regulated Article 3 Clause 3 of the Arable Tax Act (1984), that is when the farm land is rented in whole or in part on the basis of an agreement concluded in accordance with the provisions on farmers' social insurance or provisions regarding obtaining structural pensions.

It should be emphasized that the parties to the lease contract can freely regulate the legal relationship between them, but of course they cannot contractually decide that the tax obligation imposed by law on one of them will be transferred to the other. This obligation can be considered as fulfilled only if the money

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provision constituting its content is fulfilled by the person who the act makes responsible for. It is worth noting that for the competent public administration body, the entity from which it accepts tax benefits, a party in tax proceedings is a person to whom the Act imposes tax obligation, and not a person who has declared in a civil law agreement concluded with a taxpayer, that they will pay tax. The current practice of using the lease contract indicates that it is quite common for the parties to agree in the contracts that the lessee will also settle tax obligations, and then these obligations, depending on the content of the contract, may be performed either by refunding tax obligation money to the lessor, who settles public-law receivables themselves, or the lessee is obliged to pay public-law receivables directly, without the mediation of the land owner.

The latter type of contractual provision in relation to taxes imposed by law on landowners can only mean a commitment to perform the service on behalf of the owner. Such contractual arrangements of the parties settling tax obligations were noted in the case law of common courts and the Supreme Court. For instance, as the most characteristic, approving these pragmatic arrangements of the parties to the tax settlement agreement, one can cite the Supreme Court's view expressed in the judgments of 2010. Generally speaking, it can be stated that paying to the lessor the equivalent of its tax obligations by the leaseholder, either directly to the lessor or on his behalf – for the benefit of the taxpayer, is a measurable economic advantage.

Back to the mainstream considerations, it should be noted that in the case law of the Supreme Court, the view that contracts of rent-free use of arable land are often included in the category of unnamed contracts should be considered shaped. Undoubtedly, these contracts' design is closer to the lease than any other contract. Putting things for free use with the right to derive benefits from them undoubtedly does not have the features of a lease contract, but obtaining by the person giving access to use of the property the equivalent of public law obligations – regardless of whether it is paid to them directly or on their behalf on the account of a public law entity authorized to collect the obligation – is economically some form of payment for giving things into use. For this reason, the name "charge-free rent", commonly used to describe a contract regulated in Article 708 of the Civil Code (1964) is not precise. It should not be forgotten that failure to comply with this obligation gives the lessor the same negative consequences as those being a result of failure to pay the rent. To sum up, it should be considered that the failure in fulfilling the obligation to pay taxes when performing the contract of rent-free use of arable land (Article 708 of the Civil Code, 1964) has the same negative consequences as the non-fulfillment of the payment of rent in the lease contract (Article 693 § 2 of the Civil Code 1964). The position presented was confirmed in the decisions of the Supreme Court in 2010, in which it stated that Article 703 of the Civil Code (1964) applies accordingly to contracts concluded on the basis of Article 708 of the Civil Code (1964).

There is one more doubt related to the possibility of including in the contract of rent-free use of arable land regulations regarding the termination of the contract in a different manner than it results from the content of Article 703 of the Civil Code (1964), i.e. without prior statutory obligation to give notice period and give an additional three-month period to pay the overdue tax charges. It follows from the content of this provision that if the lessee is in default of payment of rent for at least two full payment periods, and when the rent is paid annually, if delay in payment of more than three months is allowed, the lessor may terminate the lease without meeting the notice period. However, the lessor should warn the lessee by giving them an additional three-month period to pay the overdue rent. Although the provision cites only delay in payment of the rent, it should be remembered that the failure to perform the obligation to pay taxes when performing the rent-free land use contract has the same negative consequences as the failure in settling rent in the lease contract. These benefits have the same purpose. First of all, one should answer the question whether the regulation of termination of the

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contract contained in Article 703 of the Civil Code (1964) has the character of an absolutely mandatory legal norm, or the provision of Article 703 of the Civil Code (1964) is relatively binding. Adoption of the first position would mean that the termination of the contract without notice period is effective only after prior notification of this intention and granting an additional three-month deadline to pay the arrears. On the other hand, accepting a second position, referring to the nature of a relatively binding legal norm, would mean that the parties to the contract may differently regulate the effects of delay in payment, and hence the provision of Article 703 of the Civil Code (1964) would apply only if the parties to the contract did not include any other provisions in this regard. When answering this question, it should be pointed out that only in the older case law of the Supreme Court it was pointed out that this provision is mandatory (sentences of the Supreme Court of 2010). At present, there prevails a different view, accepting the position that this is a supplementary provision that applies only in the absence of a different regulation in the contract, and the parties may even exclude the lessor's obligation to grant the lessee an additional period to pay the rent (judgment of 2012, resolution of 2012, resolution of 2015). Therefore, contractual modification of the conditions for delay, notice periods of termination of the lease contract and setting a longer, but shorter than 3-month period of additional payment of overdue fees is acceptable. Position on relatively applicable Article 703 of the Civil Code (1964) is based on the correct assumption that the provisions of the Civil Code in the section devoted to obligations are usually supplementary, so priority should always be given to the will of the parties that shape the contract, unless the provision clearly excludes this possibility. Article 3531 of the Civil Code (1964), constituting the freedom of contract, opens the third book of the Civil Code regarding obligations, which undoubtedly can be seen as crucial in the interpretation of further provisions. Since Article 703 of the Civil Code (1964) should apply to the contracts on the rent-free use of arable land, in such a situation there are grounds to terminate the contract also without observing the statutory notice periods.

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