# ON THE PROBLEMS OF TAXATION OF GIFTS GIVEN BY SPOUSES

BY

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Characteristic of gifts is that the donor and the beneficiary are most often near relatives. This probably holds good even for gifts of less value such as anniversary presents to friends, fellow employees and so forth. The fiscal significance of the latter is, however, negligible. They normally never come under gift tax, and consequently will not be considered here.

The present author's study[1] of gift tax returns shows that only in 2 % of cases were the donor and the beneficiary unrelated. The study also shows that 75 % of gifts between relatives were gifts between parents and children. Hence it may be concluded that the main stress in the gift tax is on gifts between parents and children.

In Finland, inheritance and gift taxes are progressive.[2] Other things being equal, tax on several independent gifts from the same donor is lower than tax on one gift of the same total value. Correspondingly, tax on a *gift received by a child* is essentially lower when both parents are considered as donors, since the child is separately assessed on gifts received from each. The combined tax is essentially lower than if one of the parents gave a gift of corresponding value. The fiscal legal literature calls this *splitting of a gift*. It emerges from the study mentioned above that of the gifts from parents to children more than 26 % were "split".

[1] The study covers 1,764 gift tax cases settled in 1988 in the Tampere tax district. The results can be considered as quite generally applicable, since the average earnings of people living in Tampere do not essentially differ from the national average. See also Pertti Puronen, *Lahjaverotuksen ala* (On Gift Taxes), Tampere, 1990, pp.41 ff.

[2] In tax class I, which includes gifts received by children, the inheritance tax is determined on the basis of the following table:

| Value of taxable acquisition, FIM | Fixed tax at lowest limit of taxable acquisition, FIM | Tax % on exceeding amount |
|---|---|---|
| 15 000– 37,500 | 200 | 6 |
| 37,500– 75,000 | 1,550 | 8 |
| 75,000– 150,000 | 4,500 | 10 |
| 150,000– 300,000 | 12,050 | 11 |
| 300,000– 450,000 | 28,550 | 12 |
| 450,000– 750,000 | 46,000 | 12.5 |
| 750,000–1,050,000 | 84,050 | 13 |
| 1,050,000–2,100,000 | 123,050 | 13,5 |
| 2,100,000– | 264,800 | 14 |

However, splitting by the donor[3] is only possible when both spouses own the property to be donated. This naturally applies to other gifts, too: a spouse is only able to donate his or her own property. During the last few years, special attention has been paid to the question of *right donor*. In principle the problem remains the same regardless of the nature[4] of the gift.

In Finnish marriage legislation, *gifts between spouses* were earlier prohibited, and the prevailing interpretation was that such gifts were always invalid. This applied in gift taxation as well. The donation prohibition has, however, been annulled. Because of the considerable tax advantages to be gained from splitting the family property, donations between spouses are expected to become more usual.

This paper will concentrate on the problem of the right donor where both parents are acting as donors, although the property to be donated belongs to one of them only. The property may have been registered in the names of both spouses (legal title to real estate for example). What significance should the registration receive within gift taxation? The donors may prove that one of the spouses has indirectly, e.g. through housework, participated in the earning of the donated property. This will affect its ownership. The question of the attitude towards cases when a gratuitous transfer of property between spouses is clearly found is closely related with such ownership. Later on, the position on gift tax questions involved in donations between spouses will be considered, and the probable effects of the lifting of the prohibition on donation will be clarified from the point of view of gift taxation.

## 1. GIFTS FROM SPOUSES TO CHILDREN

The reason for a donation may differ from case to case. The information on value and kind of gift obtained from the study mentioned indicates

[3] Splitting can also be done by the recipients. This is to say, in many cases the gift can be shared between children and grandchildren to make the amount of taxes as favourable as possible. This is also very usual. Often the splitting is done by both donors and recipients in connection with the transaction itself. Thus, even the tax advantage is maximized. In practice, tax authorities have intervened in splitting only when one parent, acting as a donor, did not own the object before the donation.

[4] The Finnish Inheritance Tax Act (IHTA) includes a special norm broadening the concept of gift. According to the norm, as to donations under the market price, i.e. "gift" deals, the difference between the market value and the agreed remuneration is considered as a gift if the agreed remuneration is below 3/4 of the market value of the object or right to be donated (IHTA section 18 subsection 3). The norm is considered not absolute, however, but a strong presumption. Consequently, it is possible to disprove it.

that the reason is most often a plain desire to transfer spare capital from parents to children.

Considering Finnish income tax advantages (e.g. the progressive scale of income tax, separate assessment of spouses' capital income, capital income deduction and available portion of profit on sale determined by every taxpayer separately), to be gained by splitting the family property between family members, tax is more and more often the real motive for the donation.

### 1.2. *Who is to be regarded as a donor?*

*A donor can only be the owner of an object or a right.* Often in practice, however, who the "right donor" is, is not clear. Ordinarily the owner of an article of personal property is the person who has it in his or her possession. For the establishment of title to real estate and some other property, there are certain registration formalities. For taxation purposes, at least earlier, the principles of private law have generally been applied to the question of the "right" owner, using the private-law presumption of ownership together with what is termed the name principle[5].

The "right donor" has always been of great significance in taxation. Yet with a few exceptions, the matter was disregarded in Finnish legal writing until recently when it received much public attention following some Supreme Administrative Court cases.

Properly speaking, the starting point of the discussion was *Markku Pesonen's* paper[6] based on some Supreme Administrative Court decisions of 1987. Pesonen's contentions are consistent with the new way of interpretation appearing from the Supreme Administrative Court decisions. According to this interpretation, the question of who is the owner of the property (donor) at the moment of donation is not necessarily solved by recourse to the name principle alone.

Letter No 4926/32/88 of 19.5.1988 from the National Board of Taxes, headed "The donor in gift taxation" and enclosing Supreme Administrative Court decision 1987 B 628 also pays attention to the question of the "right donor". The letter first states that the decision

[5] On the presumption of ownership in Finnish private law see e.g. Aulis Aarnio–Markku Helin–Sami Mahkonen, *The Finnish Marriage Law*, Tampere, 1985, pp. 159 ff. and *Eva Gottberg-Talve*, Name Principle, Financing and Ownership, *Lakimies*, 1985, pp. 742–768.

[6] Taxation 1988, pp.72–75.

departs from prevailing gift taxation practice according to which the spouse in whose name the property is acquired is regarded as donor, unless otherwise shown. The factual circumstances may, however, differ from the registration of ownership when both spouses are regarded as donors, provided that both are regarded as donors when both are registered as transferors in the deed of transfer. Secondly, the Board requires the spouses to be able to prove their intention to acquire the property jointly, e.g. the fact that they participated jointly in financing the acquisition of the property is regarded as proof of intention. Consequently, the Board writes, both spouses must be either debtors or guarantors for any capital borrowed for the acquisition of the property. Also, the economic ability of both spouses to repay any borrowed capital must be taken into account. In other words, both should have had earned income or have been engaged in farm economy or business. Thirdly, the donated property must have been in the possession of both spouses. Finally, the donors are regarded as having donated property in the same proportion as they participated in financing its acquisition.

*Edward Andersson* emphasises that the question of the "right donor" is basically a private-legal question. Solving these often so difficult evidentiary questions of who is the owner of e.g. real estate or shares, is easier with private-legal methods (those of an estate administrator, an estate executor or, ultimately, of an ordinary court) than with taxation methods. Against this background Andersson finds the recent practice of the Supreme Administrative Court extremely liberal. He also wonders how little evidence is enough to prove that both spouses have been donors when the donated property has nevertheless been registered in the name of only one of them.

To sum up the contentions in the Finnish literature, within tax-legal decision-making, private-legal principles should be adopted, thus giving greater importance to the private-legal presumption of ownership with its name principle even within gift taxation. The recent decision policy of the Supreme Administration Court has met with criticism. Very little cause has been needed to disprove the presumption of ownership. Since this question is of great significance to gift taxes, the legal practice will be treated quite extensively in what follows (1.2). This is followed by examination of the present taxation practice (1.3).

### 1.2. *On the factual donor in the light of legal practice*

In earlier legal practice there is probably only one published Supreme Administrative Court decision regarding conflict between real owner-

ship and perceived ownership. The case concerned a sale of farmland between father and son, a sale that was regarded as a gift.

> Between 1960 and 1963 the son had built a threshing house, dwelling house and cowhouse by himself. Documents showed that he had paid part of the cost. As to property taxes, the father was always regarded as the taxpayer and the farm buildings were regarded as his property. No documents were drawn up between father and son to show that the buildings represented the son's property. In 1968 the father sold the farm to his son, the buildings built by the son being regarded as the father's property. Consequently, the selling price exceeded 3/4 of the current land value of the real estate. The gift tax was cancelled. Supreme Administrative Court decision, 13.10.1975 file copy No 3922. (Vote 3-2)

According to the case report, the amount of the costs met by the son was not specified in the deed with which the farm was transferred from father to son. The total cost was not reliably established, nor was there any mention of the buildings, or at least part of them, being the son's property. As to income and property tax, the buildings were regarded as the father's, since they belonged to the farm. As nothing else emerged from the decision text, it must be supposed that the father had yearly declared the buildings as if they belonged to his farm economy, i.e. as his own.

The Supreme Administrative Court majority based their contentions upon the idea that the buildings were the property of the son, since it was he who had built them using materials he had acquired. The Court minority, on the other hand, found that the building work meant that the son now possessed receivables corresponding to the materials and the work. "Considering the use of the buildings as well as other circumstances, they must be regarded as part of the father's farm economy. Consequently, the real estate deal included the buildings." The minority also emphasised that all the building materials the son had bought against vouchers were already approved by the Inheritance Tax Board as the son's expenses. Thus, the son had received a gift in connection with the real estate deal.

The idea of the parties' obvious intention, which was the ground for the solution, was, no doubt, at least reasonable. It was believable that the intention was for the buildings to be the son's property since he was the builder, although the land was the father's. The son stressed that the value of his work should be taken into account.

Further, what attitude should be taken towards the father's share in the matter, since the son did not, however, pay for *all* the building material? It was thus obvious that the father's share was a kind of "final

contributed capital" and not e.g. a loan. Hence this, too, as well as a corresponding part of the buildings, should have been taken into account in the final decision.

First, the majority of the Supreme Administrative Court evidently passed over the name principle, at least ostensibly, with very little proof. Unfortunately, it remains unclear whether the *inter partes* relation between father and son was of significance in the decision, or whether the decision was even based on that relation.

It is quite obvious, however, that the Supreme Administrative Court majority view represents a kind of equitable decision, and should perhaps receive but little value as a precedent, especially since it was not published in the Court reports. The decision is, however, symptomatic of the present situation.

Usually the question of the relation between registered and real property is considered when both spouses formally regard themselves as donors, even if the property is registered in the name of one of them. In the latest practice of the Supreme Administrative Court, this kind of situation usually occurs in connection with change-of-generation. The child who is to take over the farm pays at least the greater part of the selling price to his or her siblings. As far as the siblings are concerned, it is a question of a gift received from one or both parents. Four decisions of this kind will now be considered.

First, Supreme Administrative Court decision of 12.5.1987, file copy No 1741, concerned gift tax on what is termed siblings' inheritance in connection with a donation of property. The particular question was, who was to be regarded as the donor of the siblings' inheritance.

> A and his spouse B sold two farms to their son. The contract was confirmed on 20.7.1983. Under the contract the son had to pay a certain part of the selling price to his siblings as siblings' inheritance. According to the Inheritance Tax Board, A had donated the said siblings' inheritance alone. Each sibling was to pay gift tax. County administrative court: according to documents, the farms A and B sold on 20.7.1983 had earlier been acquired in the names of both spouses, although only A was registered in the contracts. Therefore the County Administrative Court held the siblings' inheritances to be gifts from both parents, half-and-half. The fact that A alone held the legal title to the property had no influence. Separate gifts should be separately taxed: still, this was not the case and therefore the Court cancelled the taxes and returned the matter to the Inheritance Tax Board. On the examiner's appeal, the Supreme Administrative Court cancelled the Country Administrative Court's decision and upheld the Inheritance Tax Board's decision.

The reason for the Supreme Administrative Court resolution was that according to the documents, A himself had bought the donated farms:

he alone held the title and thus he alone could sell them. As the examiner said, this sufficed to prove that A and B could not both be vendors. Even the borrowed capital was registered in A's name. That both spouses were registered as vendors in the subsequent contract was not of significance. The formal requirement for a real estate deal becomes valid even with the mere consent of the spouse.

According to the documents the spouses had always divided the agricultural income in half. It was also found that neither spouse worked outside the farm during the period of repayment: loans were repaid from farm proceeds.

The decision seems to be based on a strict interpretation of the name principle. Since the legal titles to both farms and the borrowed capital were registered in A's name, the substantiated considerable work contribution of the other spouse had no influence in the substantive decision.

In their appeal to the County Administrative Court, the parties maintained that when agreeing on real estate deals A did represent both spouses. A appealed against the application of the private-legal principle of fiduciary. In this case A should have had the burden of proof alone, but he presented no evidence in support of his claim.

To base the Supreme Administrative Court decision on the name principle may be a proof that applying the principle of fiduciary is not possible within fiscal law, at least in donation situations. Concerning application of the principle of fiduciary, it is better to separate its significance into the (*inter partes*) relations between the spouses, on the one hand, and the relations between the spouses and outsiders in donation situations etc., on the other. In this case, the assertion of the principle obviously had no fiscal influence. It can however be successful where, after donation, property is divided between spouses or between heirs and the widow, or in cases involving a possible gift tax.

Supreme Administrative Court decision of 20.10.1987, file copy No 4398, also concerned a siblings' inheritance deal, but there is a slight difference between the two cases. Besides the real estate, agricultural furnishings and fixtures were also involved.

> By contract dated 8.4.1984, E and his spouse K sold a farm to their son A and his wife B. The parents withheld a parcel of land. The selling price was FIM 475,000 and the sales terms were entered in the contract, in accordance with which A's siblings, i.e. C, D and F, received FIM 105,000 each as a part of the selling price. E had held title to the estate, together with which the agricultural machinery and fixtures were sold. The County Administrative Court: the appellants' father E had sole legal title to the estate, and since the appellants did not prove that both the farm and the agricultural machinery and fixtures were registered in the names of both spouses, not even a part of the siblings' inheritance could be regarded as received from

> their mother. The County Administrative Court dismissed the appeal. It could not accept that half of the title was received from the father and half from the mother. Supreme Administrative Court: no change. (Vote 3-1).

Both spouses were registered as vendors in the deed of transfer, although the legal title was, as mentioned, in the name of the father alone. On the other hand, there was no statement of how the father had obtained the farm; inheritance or purchase? Nor was it stated, if purchased, how far the acquisition was financed with borrowed capital and in whose name any loans were registered. The County Administrative Court decision refers, however, indirectly to the fact that the farm had been purchased.

Further, both spouses had worked the farm for nearly 40 years. In addition to this, the mother had been working outside of the farm for the last 20 years. According to the appellants, the mother's wages went to the management of the farm. At present she is receiving a farmers' pension. There was, however, no report on her earned income.

The treatment of the selling price of the agricultural machinery and fittings is worth special attention. On the basis of the legal title, it is not possible to establish e.g. the ownership of the machinery: neither can things be lumped together. It is obvious, however, that during the time of ownership the movables had been changed many times and the quantity had increased, just as the appellants submitted. At least as to the movables, the decision must be regarded as less successful. The crucial question in the decision concerning the real estate deal, on the other hand, was the presumption of ownership.

The County Administrative Court (and the Supreme Administrative Court) referred in their decision to the fact that it was not proved that the father had once acquired the farm in the names of both spouses. The appellants, however, never maintained this: i.e they did not refer to the principle of fiduciary. What they did maintain was that, in accordance with the evidence they presented, the mother must be regarded as a part-owner of the agricultural property and of the movables concerned.

One dissenting Justice found that as the mother had taken part in the maintenance and used her wages for this, a part of the funds belonged to her. Consequently, a part of the payment the appellants received in connection with the deal was remitted from the mother's capital. The dissenting Justice would have returned the matter to the Inheritance Tax Board.

A Supreme Administrative Court decision of 27.11.1987, file copy No 5275, deals likewise with a transfer of a farm and movables to a

descendant. Unlike the two previous cases, the presumption of ownership is not considered.

> A and his wife B sold both the farm and the machinery and fixtures to their son C. By the terms of the contract, the buyer was to remit FIM 50,000 to his brother D as a performance of the selling price. The title deeds were registered in A's name, except for a minor piece of real estate (X) of unreported value. The Inheritance Tax Board, and the County Administrative Court as the court of appeal, found that A alone was the donor. D appealed to the Supreme Administrative Court and claimed annulment of the County Administrative Court decision. He also claimed that the gift must be assessed half-and-half from both of the parents. The Supreme Administrative Court, referring to the documents stating the financial circumstances of the parents, found that D had received FIM 40,000 as sibling's inheritance from A and FIM 10,000 from B (Vote 2-2-1).

There was an obvious divergence of opinion within the Supreme Administrative Court. Two of the Justices found that one half of the gift was received from A and the other half from B. Dismissal of the appeal was supported by two of the Justices. In respect of the results of the vote, the statement issued by Justice S was the Court's final decision. It would have been much easier to take a stand on the decision if the Court had considered it necessary to provide a report on the financial circumstances. It is hard, indeed, to conclude otherwise than that the decision proves the divergence of opinion on the significance of the name principle among those making gift tax decisions. Views collide to such an extent that it is hardly a question of mere criticism on evidence.

Another Supreme Administrative Court decision, 1987 B 628, deals with the transfer of a farm, together with movables, to a descendent. Only one of the spouses was registered as having the legal title to the real estate. There was, however, one very interesting aspect in the case. By the terms of sale, both the parents were to receive a traditional life annuity.

> Despite the father's legal title to the real estate, the sibling's inheritance which the buyer's brother received in connection with the transfer was assessed as received from the father, but partly also from the mother since she had worked at the farm and had undertaken liability for its debts.

The documents stated that in the 1950's the home farm was bought from the husband's mother with a traditional life annuity contract. Some minor real estate was acquired later on. A report on certain loans for which both spouses were liable was submitted with the appeal. Both spouses had worked the farm for decades. The debts were repaid out of proceeds, with which the agricultural equipment was also acquired. It was also claimed that half the selling price, or at least a considerable part

of it, should be regarded as a gift from the mother. There was no report on the division of earned income. The County Administrative Court supposed that one third of the gift was received from the appellant's mother and rest from the father. There is no more detailed report on this supposed division, which the Supreme Administrative Court did not change.

Since this case is published in the Law Reports, it is obviously meant to be an example of the decision policy, where the attitude taken departs from the two Supreme Administrative Court decisions discussed above. In the latter case the name principle was not adopted.

In all probability the mother's undertaking of the liability for the farm's debts was of great significance. However, the present author regards this mainly as technical and would not consider it as grounds of especial value for deviating from the name principle. On the other hand, it is of great importance that part of the price of the home farm consisted of the traditional life annuity contract withheld by the seller. To fulfil such a life annuity contract, the housewife's work contribution in taking care of the farm economy is always required, although the board and lodging included in the traditional contract are covered out of proceeds. Consequently, it is a question of the mother's direct ownership.

On the basis of the four above-mentioned Supreme Administrative Court cases, we can now try to present the essential points in gift taxation, regarding the question of right donor where both spouses consider themselves as donors but just one of them has the registered legal title to the property. First, the decision is always of a *comprehensive* nature: it is not possible to decide the case on the grounds of only one or two facts.

When dealing with property ownership, the name principle should be adhered to. Departing from it may be justified, however, when both spouses are registered donors in the deed of transfer and when it can credibly be established that both are (direct) owners of a farm. On the other hand, it is not possible to depart from the principle on the basis that the intention of the spouses was to acquire and register the property in both names, although the title was registered in the name of one only. In such cases, intention must be firmly proved, applying the principle of fiduciary. In private law this principle is of significance only in the *inter partes* relations, which reflect the factual circumstances. The Supreme Administrative Court contentions can, perhaps, be interpreted so that the significant facts of inter partes relations become the bases of the decisions.

Most essential is that both spouses are able to prove that it was, at least economically, possible for them to take part in financing the real estate deal. Confirming this is not usually possible, since the spouses often have a joint economy. Whether any debt involved is in the name of one or both spouses is not important.

Property ownership is, in Finnish legislation, made public with the system of legal confirmation of possession. As to movables, possession is the important point. Therefore, for movables, no decision can be made on the basis of the ownership of the donated real estate. This was the case at least in the decision dated 20 October 1987, file copy No 4398. The question of the ownership of movables must be decided separately.

As for real estate, factual ownership cannot, however, depart from the way the ownership is registered when the donor/donors are *other than spouses*. Departing from the name principle is possible only exceptionally, and the evidence presented must be well-grounded. Where the donors are living together without marriage, the principles covering spouses may be applied, at least in theory.

As a general rule, the possession of movables indicates their ownership. Still in some cases, a special system of registration of ownership is adopted. The Motor Vehicle Register is a system of this kind. The significance of registration in the Motor Vehicle Register versus other "factual" ownership has been questioned in legal practice. In one case, gift tax was required to be assessed on a car received from both parents, although it was registered in the name of the father only.

> The taxpayer received the car as a gift from both parents. The Inheritance Tax Board should have assessed the gift tax separately on a gift received from the father and on one from the mother, even though the car was bought and registered in the father's name. It could be proved that the mother had also participated in financing the car. Supreme Administrative Court 1987 B 627.

The Supreme Administrative Court attaches little importance to ownership registered in the Motor Vehicle Register. The Court's contention coincides with a well-established registration practice: registration of a car does not, generally, indicate factual ownership, as normally only one person is registered as owner. This holds good at least for spouses. Correspondingly, if there are two cars in a family, which is very usual nowadays, the "first" car is often registered in the name of the father and the "second" in the name of the mother, yet the registration does not correspond to the ownership of the cars.

Consequently, from the point of view of gift tax, the registration of a car should not carry great weight, at least as an indicator of factual

ownership of a vehicle used by all members of a family. The question should be solved in accordance with general principles of decisive influence regarding the presumption of ownership of movables. Neither does the registration of insurance necessarily indicate the owner of a car. In general, the policy is in the name of the registered owner, but sometimes, for technical insurance reasons (the bonus-system) the insurer is the person registered as being in possession.

The car in question was originally financed by both parents. In the Court's reasoning, the decision is based on the principle of fiduciary between the two spouses; hence it is grounded mainly on the *inter partes* relation.

When can chattels be regarded as having been acquired in the name of both spouses? Obviously, this could be the case when the acquired property is a part of "family" property without clearly being the private property of the respective spouses. This applies to e.g. the ownership of an apartment which is also the permanent residence. Therefore, the registration of shares is not so significant as e.g. the legal title to real estate.

In the following case, the main question is whether just one parent, or both of them, are to be regarded as donors of the funds received by a daughter. Financial resources are considered as chattels and the person having custody of an object is regarded as the owner of movable property. Correspondingly, whoever has the donated chattels in his possession is regarded as donor. As far as spouses are concerned, the factual ownership of corporeal family property and money is often impossible to establish. In other relationships, possession is of greater importance.

> A had made two bank transfers, one of FIM 30,000 on 9.1.1984 and one of FIM 29,500 on 20.2.1984. The recipient was his daughter. In accordance with the deed of donation A and his spouse B donated equal amounts. It was not possible to state indisputably that the funds were drawn from a joint bank account. In accordance with tax documents, A's business was registered in his name only. B had neither earned income nor property, though a part of earnings were regarded as her income. Endorsing the County Administrative Court decision, the Supreme Administrative Court found that the gift tax should be assessed on a gift received partly from A and partly from B. Supreme Administrative Court decision of 21.5.1986, file copy 1760.

The report establishes that in accordance with the deed of donation, the parents were the donors of the money gifts equally. The earned income from A's business was partly regarded as the earnings of B. When the

provisions regarding principles[7] applied to division of earned income in sections 26–28 of the Income and Property Tax Act are taken into consideration, the work contribution of B can be established as at least more than minor.

The resolution states that it was not possible to establish that the donated funds were drawn from a joint bank account. Who the registered owner of an account is, is a completely formal point, and should not receive much importance, since an account does not credibly indicate the owner of the funds in it, in the case of spouses. It is probably quite uncommon for spouses to have separate or separable financial resources.

The resolution further emphasises that it could not be established that the funds were the property of one of the spouses: the tax was to be assessed in accordance with the deed of donation.

A very interesting Supreme Administrative Court decision, 1987 B 629, concerned funds donated to a minor. The gift consisted of child allowance saved in an account.

> The bank account was registered in the name of the minor. The subscribed securities were financed with child allowances collected in the account. This was regarded as a gift from both parents. (Vote 6-2).

On 25.10.1983 the father subscribed for debentures in the name of the child. The value was FIM 10 152 on the date of subscription. He drew the funds for the subscription from the child's bank account. The Inheritance Tax Board found that the child had received a taxable gift from the father and tax was assessed. In his capacity as guardian, the father appealed to the County Administrative Court. It appeared from the appeal that it was a matter of child allowances collected in the child's account. The appellant referred to the fact that both parents, as guardians and persons having the care and custody of the child, were entitled to use the deposit. He maintained that Child Allowances Act (CAA) subsection 3 could not have the effect that after withdrawal the funds should belong to the mother, but when saved in a bank account they must be available to both parents. Thus, the appellant considered that there were two separate gifts, one from the mother and one from him as

[7] According to IPTA section 26, earned income from farm economy, business or profession jointly engaged in by spouses is assessed on the spouse who is regarded, in view of the circumstances, as the actual entrepreneur. For state taxes (ICTA section 28), the part of the profits of a business that is earned income can be divided between the spouses provided, however, that they were both engaged in the profession and that the work contribution of one of them is not considered as minor.

the father. The Oulu County Administrative Court accepted the appeal. Since the child was in the care of both parents, it must be considered that the funds in the child's account were common funds of the parents. The Supreme Administrative Court majority concurred. It was stated that when collecting the child allowances in the bank account the mother acted unanimously with the father. Consequently, it must be considered that both parents were entitled to use the funds in the account.

The minority found that it was not a question of a gift at all, since the child must be regarded as the owner of child allowances.

The Uusimaa County Administrative Court decision of 15.12.1986, file copy No 1623/III, also concerns the ownership of remitted child allowances. In this case, the child was not regarded as owner of the funds. The father had subscribed to shares with funds collected in the children's accounts, A part of the funds was said to be child allowance. The father was regarded as the donor, and his action as a donor was not questioned at all. It is thus obvious that the point that child allowances are usually remitted to the mother was not of interest. The County Administrative Court also referred to the Child Allowances Act, subsection 1 and the Child Allowances Act 3, subsection 1 among others.

Subsection 3 of the Act prescribes only who is allowed to draw the child allowances: the Act does not state who is the owner of the funds after withdrawal. Since the purpose of child allowances is to support the parents in financing the maintenance and education of a child, in default of other provisions it may be considered that the parents are joint owners of the funds, when they are the guardians and persons having the care and custody of the child. Consequently, both such parents are equally entitled to decide on the use of funds. That the account is in the name of the child is not significant. The present author would draw the same conclusion as did the majority of the Supreme Administrative Court.

However, in prevailing tax practice, the mother as recipient of the funds is their owner. When the funds are donated to a child, it is only the mother who is regarded as donor.

If it can be established that despite registered ownership, which in that case did not indicate factual ownership, a certain object is jointly owned by certain persons, *the property must be divided between the part-owners.*

The division is based on the idea that the shares of ownership are equal in size. It is, however, possible to depart from this supposition when evidence suggests this. For an object jointly owned by the parents, the property should be regarded as equally divided between the

spouses, unless otherwise shown. This applies also to e.g. funds in a jointly registered bank account.

Supreme Administrative Court decision 1979 II 631 is an example of how ownership can be determined in the case of an object jointly owned by the spouses:

> The spouses had jointly donated shares in a limited liability company to their daughter. The Marriage Act provisions were to be applied in the financial circumstances of the spouses. Under an Act on certain relationships based on co-ownership and in default of other evidence, the spouses were regarded as owning half the shares each. Consequently, gift tax was to be assessed separately on one gift received from the father and on one received from the mother.

The "halving" principle was also departed from in Supreme Administrative Court decision 1987 B 628 mentioned above. It was decided that one third of the gift had been received from the mother and the rest from the father.

The basis is still the presumption of ownership created by either registration or possession. Therefore, whenever it must be deviated from, a decision must first be made as to whether the evidence presented is adequate for this. In general it is a matter of showing the real intent of the parties at the moment when a juristic act is concluded. Only then can proportionate ownership between the part-owners be decided. In other words, how much evidence must be shown to be able to deviate from registration in order to benefit the part-owner. Basically, in all these cases it is a matter of evidence and of evaluating evidence.

In private-law practice regarding the presumption of ownership, the significance of the fiduciary principle is limited to the *inter partes* relation, yet in many cases concerning donations of movable property the tax decision has this principle as a ground. If the tax authorities were regarded mainly as creditors, the decision should be based only on facts of significance in an *ultra partes* relation. Hence the only important thing would be to indicate the direct ownership. However, it is interesting that the debt relationship between the parties is gaining more and more importance in tax decisions. This means also that the position of fact-theory[8] is admitted and that the significance of *inter partes* relations in the taxation of donated movables is supported.[9]

[8] See also Jaakko Voipio, *Verotuksen kiertämisestä* (Tax Avoidance), Porvoo, 1968, p. 141 ff. and p. 190, *Lassi Kilpi*, Oikeustapausselostus (Legal Case Report), *Lakimies*, 1967, p. 768 ff. and Verotuslain 56 pykälän soveltaminen (Applying Taxation Act section 56), *Lakimies*, 1987, pp. 11–12. See also Sture Bergström, *Ogiltighet ur civilrättslig och skatterättslig synvinkel* (Invalidity Seen from the Aspect of Private Law and Tax Law), Stockholm, 1984, p. 151.

[9] Puronen, *op.cit.*, p. 416.

### 1.3. *On the factual donor in the light of taxation practice*

Nowadays the question of factual donor often arises in taxation practice. The ever-increasing number of "split gifts" is one reason for this, but it also occurs in other cases. The current attitude in taxation practice is very uniform, holding firmly to the presumption of ownership. This applies especially to the register of legal title to of real estate, but other registers, too, have firm positions in current practice. Consequently, for example, a housing association share register indicates, in general, the owner of shares entitling to possession of an area or a dwelling.

This, again, can be a result of the fact that the taxation process is an entirely written procedure. Hearing witnesses as when executing distribution of an estate is not possible. On the other hand, deviating from the presumption of ownership often requires clarification of circumstances obtaining when the object was acquired perhaps 20 years before. It can be impossible to present written evidence. Thus, the only documents in a case on which a decision can be based may be e.g. real estate contracts and evidence of the legal title granted. Differing private- and tax-law provisions may render the evidence based on each completely different. Consequently, the decisions might also be opposite.

The prevailing attitude is that in gift taxation the private-legal provisions, legal principles and various practices should be followed as closely as possible. This is why the practice adopted by the Supreme Administrative Court is astonishing, even granting that the Court's view of the position of the private-legal name principle in tax law is correct in principle. Because of the character of the evidence and the limited possibilities of presenting it in taxation proceedings, the view mentioned does not deserve the same position as it has in private law.

The prevailing attitude in taxation practice is, however, regarding taxation itself, very simple and clear. The large volume of gift taxation cases does not allow far-reaching investigations, and in this sense the nature of taxation is more or less rough and ready.

It is certain, however, that in the not-too-distant future the new legal practice will be reflected in tax practice. Supreme Administrative Court decision practice must, however, first put its house in order. Otherwise, the inescapable result will be inconsistent tax practice.

### 1.4. *De lege ferenda*

The question of the "right donor" is rather problematic, since gift taxation has developed away from the private-legal doctrines of presumption of ownership.[10] The only possible way to cure the present muddled situation is to accept a special presumption of donor. This could be bipartite: a general provision on the one hand and a provision for spouses on the other. In the latter, an outsider is not able to indicate the financial circumstances between the spouses regardless of the possible separation of respective property. In fact, given actual "joint ownership" in most relations, such separation could be completely impossible. *Edward Andersson* considers that as far as spouses are concerned, the best solution is that gifts given by parents to their children are always regarded as one gift, e.g. gifts are accumulated. Yet, despite the apparent clarity of the provision, it would not be adequate: spouses could evade it by periodizing their donations. This loophole could be avoided by prescribing that all donations made during a certain period would be considered as cumulative. But then taxation of gifts from parents would be much more severe than taxation of gifts given by other persons, because of the progressivity of gift tax. It is suggested that there would be no tax-political grounds for this. The other possibility is that for gifts given by parents, a law would be enacted on the lines of the United States I.C.R. section 2513, so that gifts given by both parents would be regarded as two separate gifts, this being the declaration of intent of the spouses, despite the factual ownership of the donation (the "split gift" provision).[11] The declaration of intent would apply to all gifts given to one person during a cumulation period, and could not be limited to apply to a certain gift. In the American model, however, gifts given by spouses would be taxed more lightly than gifts given by other persons. From the point of view of taxation procedure the model would be the absolutely best one. In most cases the establishment of ownership could be abandoned, since it would be credible that the spouses availed themselves of the opportunity to minimize the tax. A third possibility is

[10] Also Edward Andersson has criticized the interpretations of the Supreme Administrative Court in his paper Gåvobeskattning vid gåvor från föräldrar till minderåriga barn, in *Juhlajulkaisu Curt Olsson 70 vuotta* (Publication in Honour of Curt Olsson 70 years), Ekenäs, 1989, p.16. The grounds for the criticism are that the Supreme Administrative Court has generally departed from the practice that private-legal norms should be followed as much as possible without support of norms.

[11] See e.g. John K. McNulty, *Federal Estate and Gift Tax*, 4th edition, St.Paul, 1989, p. 52 and Richard B.Stephens-Guy-B. Maxfield-Stephen-A. Lind *Federal Estate and Gift Tax*, 5th edition, Boston, 1983, pp. 10–55.

to try to return to the old practice, emphasising the private-legal doctrines by binding the gift taxation decision firmly to the private-legal presumption of ownership. Without legislation, the situation is hardly soluble.

In practice, the question of gratuitous transfer of assets and liabilities between spouses is in many cases connected with the question of the factual donor. Often in the grounds for reporting both spouses as donors even where clearly only one of them owned the property, the answer is that both were owners of the *donated* property. When it cannot be established that the joint ownership is based on assignment for compensation, the only alternatives are that a part of the property is gratuitously transferred, or that to regard both spouses as donors conflicts with the actual ownership. In the following section, gratuitous transfers between spouses will be discussed.

## 2. GIFTS BETWEEN SPOUSES

The marital property system of the Finnish Marriage Act (MA) is based on the principles of separation of the respective property and debts of the spouses, and on the principle of freedom of contract. Consequently, spouses are entitled to conclude juristic acts with each other (MA section 33 (2). Freedom of juristic act is employed both in the relation of a spouse and a third person (MA section 33 a) and in relations between spouses (MA section 33 s).[12]

Before the beginning of July 1990, when the Marriage Act amendment became effective, as distinct from the principal rule the Act provided that all unusually large gifts between spouses were invalid. The provision was unique: no other Nordic Country has anything like it, although marital property provisions include special arrangements concerning gifts between spouses.[13]

[12] E.g. Aarnio-Helin-Mahkonen, *op.cit.*, pp. 332–333. On the legislation history of the provision, e.g. *Committee Report* 1976:29 pp.2O ff.

[13] In Swedish private law the provisions concerning gifts between the spouses are included in the Marriage Code, chapter 8, which became effective on 1 January 1988. In accordance with the principal rule, in the relation between spouses the donation is regarded as being effected at the moment when the property is received. Thereby, the validity of the donation is determined by the general provisions of private law. Normally the taking possession of a gift requires factual transfer of property. However, for persons living in the same household, ownership of movable property is quite difficult to prove afterwards. Therefore spouses are allowed to transfer property in the form of marriage settlements (chapter 16) by registering the property at District Court sessions. The legal

Until recently, a transfer between spouses which was regarded as unusually large, was not binding either in the *inter partes* relation or in an *ultra partes* relation. Consequently, a transfer was found to be absolutely, self-effectively and definitely invalid. The defectiveness of the juristic act was not overcome by the lapse of time, the passivity or express approval of the spouses or even the creditors' consent to the transfer. The invalidity was to be considered ex officio, as far as e.g. legal title or execution proceedings were concerned.

The situation was very unsatisfactory. The prohibition with invalidity as its consequence prevented all attempts, even well-grounded, to share property between spouses. Yet a donation would have been a feasible way to recompense e.g. a spouse for housekeeping. The prohibition was intended to protect especially the rights of creditors, but another reason was the need to protect the spouse against unconsidered transfers of capital. In present conditions the latter is no longer a reason for a donation prohibition. As far as spouses are concerned, drawing up a marriage settlement, or revoking it, is a juristic act of much more importance than a donation to the other spouse. Given the invalidity of gifts between spouses, any consequences of the ineffectiveness of a gift are, naturally (it would be unnecessary), not separated according to the various relations they would affect. Nevertheless, for example, the interests of a creditor of the beneficiary spouse on the one hand and a creditor of the donor spouse on the other differ essentially.[14]

The donation prohibition did not, again, apply to *ordinary* gifts between the spouses. Exemption from the prohibition may have been for practical reasons: in a shared household, insignificant transfers of property are impossible to trace, to say nothing of adjusting them after-

effects according to the law of property come into existence with this registration. This is never necessary, however, in the case of "ordinary" gifts. The validity of real property transfer requires certain formalities even in an *inter partes* relation. The legal effects of a transfer in relation to a third party do not come into existence before registration at District Court sessions. To enter a registration of title to property requires that the registration is done or will he done when the registration of title to property is applied. See more exactly e.g. Anders Eriksson, *Den nya familjerätten*, 2. uppl., Stockholm, 1988, pp. 98–99. In Norway and Denmark, spouses are, in principle, also allowed to donate property to each other. The validity of transfer in a relation between spouses requires, however, that the transfer be effected in the form of a marriage settlement. The formalities do not apply to ordinary gifts. In Norway and Denmark spouses are also allowed to transfer to each other, without formality, a certain part of income earned during a certain period, whenever it is not needed to cover a debt.

[14] More on the donation prohibition e.g. Aarnio-Helin-Mahkonen, *op.cit.*, p. 337 and *Committee Report* 1986:29 pp. 34–35.

wards. But then again, insignificant transfers of property do not have such an influence on a spouse's financial circumstances that they could endanger creditors' rights.

The concept of ordinary gifts is worth reviewing, since it is admitted also in the new law. When can a gift be called an ordinary one? To be so, it must be ordinary both in nature and in value. Examples of gifts which are ordinary in nature are: birthday, name-day, confirmation, anniversary and wedding presents, Christmas presents and matriculation examination presents; all most usually given between family members. The kind of gift is not important, at least in principle. Consequently, the gift can be a consumer durable just as well as a piece of jewellery or a work of art.

When is a gift reasonable in value, then? According to MA section 45 subsection 2, the financial circumstances of the donor constitute the standard of reasonableness: the value must not be disproportionate to the donor's circumstances. The basis of evaluation is the donor's overall financial and social status. In practice, the financial circumstances and the living conditions of the spouses are taken into consideration even more widely. There must, however, be a limit to everything. A gift with a value of tens of thousands marks cannot be regarded as an ordinary one, even for a millionaire, and one could say that the "reasonable-value" gift does not endanger the creditor's rights.

Of course, by no means all gratuitous transfers between spouses are gifts. The most important exception is performances which must be considered to *belong to the support of the family*. In accordance with MA section 46, both spouses shall participate to the best of their abilities in the joint household and support of the family. It is expressly stated that the support includes the satisfaction of both joint and private needs. Performances included in the maintenance liability thus remain outside the area of gift tax.

### 2.1. *Gifts given between the spouses before the Marriage Act amendment, seen from the point of view of gift taxes*

In Finnish legal literature, with some exceptions, no stand is taken on the influence of MA section 45 on gift tax. The few statements on the matter are very short, stating that gifts between the spouses are invalid even within gift tax. Obviously, the question is regarded as indisputable.

Even the *legal practice* is very *narrow*. Supreme Administrative Court legal practice is limited to one decision published in the year book: 1974

II 591. The decision has become a strong precedent. The final report summary is very concise: "A real estate donation between spouses was not regarded as a gift specified in IHTA".

But, to the present author's knowledge, there is no legal practice on transfers of the nature of a gift between spouses, even at County Administrative Court level. Likewise, there is no legal practice on ordinary gifts.

What have been termed ordinary gifts are not specified in Inheritance Tax Act (IHTA). On the other hand, all presents with a value below FIM 15,000 when given (IHTA section 13) are exempt from gift tax. A gift tax return is seldom filed on ordinary gifts, nor are they otherwise disclosed, for which reason the attitude of taxation practice has been very difficult to assess. In general, the question of ordinary gifts arises in taxation when a spouse has donated e.g. shares to the other spouse. Since the gift is regarded as invalid in the Inheritance Tax Board decision and the tax is not assessed, the taxpayer has protested against the decision and alleged the gift to be of ordinary nature and therefore within the limits of the Marriage Act.

In tax practice, the attitude that ordinary gifts are "normal gifts" seems to prevail. The Act's concept of ordinary gift is, thus, of no significance as far as gift tax is concerned. Anyway, given the FIM 15,000 minimum value of a gift subject to tax, and since the value of ordinary gifts normally remains below this, the gift often remains unassessed for tax.

Spouses have the right to make *assignments for compensation* unrestricted by Finnish legislation. However, the agreed compensation is often much lower than if the object was sold to an outsider. While it is not possible to intervene in this matter, there may be tax legal consequences due to transfers of a gift nature. In cases of transfers below the market price, the "sufficiency" of the compensation agreed by the spouses was sometimes to be decided under the "three-quarters" rule in IHTA section 18 (3). When the difference between the market price and the agreed compensation was less than one fourth of the market price, there was no cause for intervening in the assignment. But when the difference (the part regarded as a gift) was greater, the question arose of whether the donation was tax-legally valid at all or whether it was partially valid.

The situation is also quite complex when the spouses acquire certain property for the benefit of both but only one finances the acquisition. Unless otherwise shown, in these cases half acquisition must be regarded as a forbidden gift and therefore invalid.

From the terms of an extradition treaty it is sometimes possible to conclude that settling the compensation registered in the deed of assignment was not at all the intention of the spouses. The most usual indicators of this are exceptional terms of transfer e.g. the terms of payment. Examples are a regulation by which the purchase price is paid on demand or a regulation by which payment will be in one instalment after twenty years. The same conclusion may be justified even when the total purchase price was to be paid in connection with signing the contract: i.e. if the purchasing spouse did not have funds to finance the acquisition, the transfer cannot be regarded as an assignment for compensation. In these cases there is a dissimulated juridic act. In accordance with general principles followed in tax law, this kind of juridic act shall be evaluated according to its factual nature.

There exists a special group of cases where the debt relationship between the spouses has been regarded as valid within gift taxation, but, for some reason or other, it *becomes* either totally or partially *statute-barred.* It has not been clear whether the fact that a debt becomes *statute-barred* should cause it to be regarded as *a gift,* when the circumstances indicate that the claim became statute-barred *with intent to donate*. In view of the prohibition on gifts between spouses, we are faced with an extremely difficult interpretation problem. In most of such cases there are no tax consequences due to statute-barred debts.

### 2.2. *On alteration of registered possession of property within taxation*

The alteration of registered possession means cases where *an attempt is made to alter* the registration as though for a future assignment. The most important cases must be registered separately. Thus, it is prescribed that a special register of legal title must include acknowledgements of title. Correspondingly, municipalities require notification of changes of ownership of rented plots to a special register of titles to plots. The owner of housing association or condominium shares is entered in the register of shareholders. There are also special registers of vessels, aircraft and motor vehicles.

The question of registered possession is closely related to that of the factual ownership of property. Registration merely creates a certain presumption of ownership. Consequently, to depart from the presumption is possible under certain conditions. What is often characteristic of these cases is that the deviation is connected with the title. In general, the question is of significance at the moment of donation; but also

otherwise, since income and property tax are directed to an owner in virtue of his ownership status.

The presumption of ownership is established in income and property tax. For example, within real property taxation, the assessed owner of real estate is the person who holds the registered title to the property. When spouses hold the registered title to e.g. a weekend cottage in their joint names, the income therefrom must be assessed separately for each of them. All the while there come up cases where registered possession is not regarded by the taxpayer as equivalent to the factual circumstances, and thus he demands an alteration of registered title for tax purposes.

The most ordinary cases can be divided into two groups. The first consists of cases where the claimant's intention is not to alter the registration itself (e.g. legal title), but he requests that the property be processed in taxation as distinct from the private-legal registration, i.e. both spouses must be regarded as owners of real estate, even though the title deeds are in the name of one only. In the other group of cases, an attempt is made to alter a registered title deed considered erroneous (e.g. a register of shareholders of a housing association).

In general, the holder of the legal title to property is regarded as its owner. The procedure of legal confirmation of possession affirms the ownership of real estate to a certain person. If the registration is incorrect, the mistake can be rectified. "Correcting" the legal title by annulling the old title is a very complex process, for which the arguments must be weighty. Error or imperceptibility are not regarded as sound arguments. In an inland revenue office one can hear arguments such as, the legal title is incorrect since the attesting notary drafted the contract in advance, and only one of the spouses was registered as the purchaser, and as a consequence the other spouse did not dare, or was too shy, to question the matter; or that the other spouse could not be present at the conclusion of the contract of sale. Common to all these cases is, however, that the stated intention of the spouses is the acquisition of the property in both their names. Another common feature of such claims is that the title to property was registered perhaps twenty or thirty years ago.

It is established in taxation practice that the legal title indicates the owner of real estate. Thus, it is not possible to register the ownership of real estate as distinct from the registered title, except for transfers of a gift nature mentioned later on. Consequently, both spouses cannot be registered as owners when the legal title is in the name of one of them. In normal cases of this kind, tax is bound to the private-legal decision.

Such being the case, the only way to change the ownership of real estate to correspond to the original intention, was to sell half the property to the other spouse. In accordance with the prevailing attitude before the alteration of the Marriage Act, donation was not possible. Neither had the recipient spouse then received the legal title to his/her "half". In these cases, a deal was often the conclusion and the purchase price was allowed to remain as a debt. The tax authorities did not intervene when the obligation of debtor to creditor was, theoretically at least, factual.[15]

Owners of housing association shares are entered in the register of shareholders kept by the association. Alterations are registered by the superintendent. The legal significance of the registration is not, however, the same as the legal title. When entering the altered information, the superintendent requires evidence of due payment of stamp duty or, in doubtful cases, written evidence from the inland revenue office that no tax shall be assessed.

Normally, the conveyance of securities subject to stamp duty is a procedure of voluntary assessment. The taxpayer works out a stamp duty estimate. The information on the purchaser/purchasers of the shares among others is entered from the deed of transfer in a special register kept by the fiscal administration. This register does not correspond to the register of titles but is used only for fiscal administration and is not public. Even here, however, the name principle still applies.

As mentioned, registration is based on the deed of transfer. Therefore, in current taxation practice, alteration is only possible when a correction equivalent to "factual" ownership has been made to the deed of transfer. In general, it is most unusual to rectify an error in the deed of transfer years after the drafting of the document. However, correcting the registration of ownership from the name of one spouse to the names of both requires that both had funds enough to finance the acquisition. In some cases the registration may have been in the name of one spouse because the one who purchased half the property did in fact represent the other as well. However, it is extremely difficult to prove this years after the event. "Correcting" the ownership is normally relevant only in connection with an assignment for compensation.

In taxation, the issue of factual owner can also arise in the form of "factual" vendor in cases of profit on sale. Yet in legal practice the presumption of ownership is easily disproved even with poor evidence, and here we should pose the following question: is there not a principle

[15] See previous note.

that should also be followed in all other cases of presumption of ownership? Even if the tax is not bound to any register such as the register of legal title, the idea of total separation of taxes from these registers is quite an odd one. The interests of taxpayers, and consequently also their possibilities to alter entries, are, however, limited to cases of fiscal significance, i.e. cases when property representing a certain value has been transferred.

The stand taken on the deviation from the presumption of ownership with poor evidence in donor cases must not be regarded as a general attitude to the position of tax registration. It seems inconceivable that the real estate registrations of tax regarding property owners could conflict with the prevailing legal title. The same goes for other property which must be registered even if the register in question is not of the same significance as the title register.

### 2.3. *Annulment of the donation prohibition between spouses through amendment of the Marriage Act*

In January 1991 Parliament approved an amendment to the Marriage Act (765/1991), section 45, annulling the donation prohibition between spouses.[16] However, *notification of the donation of chattels* must be made to the lower court under the provisions of the altered Gift Pledges Act (GPA) section 6.[17] The legal effects of the donation on a third party e.g. a creditor, come into existence with this notification. In an *inter partes* relation between the spouses a donation is valid even without a report. There is a corresponding duty to report gifts between persons living together as married.

[16] The altered form of the Marriage Act section 45 reads: When a spouse donates movable property to the other spouse, the donation must be reported to a court of justice as provided by the Gift Pledges Act (GPA) section 6, in order to ensure the recipient legal protection against recovery claims of creditors in situations such as bankruptcy or execution. Provisions on the recovery of a gift from a spouse are laid down in the law of recovery to a bankrupt's estate and in the Execution Act.

[17] The altered form of GPA section 6 reads: When a spouse donates movable property to the other spouse, to a direct descendant or direct ascendant or to the spouse of the said relatives, or to a near person, with whom he is living in the same household, the donation must be reported to a court of justice, in order to ensure the recipient legal protection against recovery claims of creditors in situations such as bankruptcy or execution. This does not apply to such ordinary gifts as are in disproportion with the financial circumstances of the donor. Written notification must be made to the court of justice of the municipal district in which the person is domiciled, or when the person is not domiciled in Finland, to the Helsinki city court, stating donor, recipient, object and time of donation. Registration and publication of a donation are prescribed by statute.

However, no report is needed on a real estate gift, since the publicity requirement is met by registering the title. Ordinary gifts are also exempt from notification (GPA section 6). This kind of gift is thus valid even without any notification.

### 2.4. *Effects of the amendment on gift tax*

Gift tax is closely connected with the statutes of the Marriage Act. Consequently, it is obvious that after the amendment came into force, gifts between spouses are liable to tax as provided in IHTA section 1.[18] Still, the significance of the *statute of GPA* referring to the duty to report must be questioned from the point of view of gift tax. Must it be seen that a gift becomes valid in a way described in IHTA section 20 subsection 1? And does a gift tax obligation of debtor to creditor come into existence at the physical moment of donation or at the moment the donation is notified?

The duty to report described in GPA is intended for bringing the gift to the knowledge of creditors and other parties as well as for safeguarding the rights of the recipient. In taxation practice, functions of this kind are not significant. The moment of factual donation is the moment of the physical donation, whereafter the spouses are bound by the factual donation. If the gift tax debtor/creditor obligation were linked to the obligation to notify a court of justice, the taxpayer would be able to postpone the taxation process for as long as he considered necessary. It would be extremely arduous, even administratively, to require a notification from every donor of movable property as to whether or not he followed the statute of GPA. *GPA section 6 is not of importance as seen from the aspect of regular taxes.* Should a donation subsequently become invalid, the tax can be annulled with fiscal arrangements.

*The duty to report prescribed in IHTA* arises when the recipient has received custody of the gift. For real estate, it is the moment of donation that is decisive, not e.g. the receipt of legal title or, in the case of chattels, the moment of handing over. The amendment does not cause any changes in determination of time limits of the notification obligation. For chattels, the time is thus determined from the moment of donation and not from the moment the gift is notified to a court of justice.

[18] Nowadays, gift tax can be directed to e.g. a debt between spouses that has become statute-barred with intention. See above, p. 208.

A gift from a spouse belongs to tax class I (IHTA 11 subsection 1, point 1).[19]

Gift tax remains, at least for the present, quite a minor expense, considering the income fiscal advantages gained by spreading the family property between spouses (e.g. graded income tax, separate assessment of property income of spouses, property income deduction, advantages of maximizing the available portion of the profit on sale). It is quite certain that donation between spouses will rapidly become general. Further, it is both obvious and desirable that the present complex arrangements for evading the present prohibition of the Marriage Act section 45 can be abandoned. However, this requires that people are prepared to pay gift taxes.

There remain interpretation questions of whether a payment is intended for family maintenance as specified in the Marriage Act section 46, or whether it must be regarded as a gift to the other spouse.

The annulment of the donation prohibition does not remove the interpretation problems related to e.g. debt relationships between spouses. Especially in the case of fictitious debt relationships, the opinion seems to be forming that a debt will be taxed at the moment it arises as a gift received by the debtor spouse.

[19] See above, footnote 2.