A comparison amid tax treatment of property settlements upon divorce in Japan and the United States

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財産分与に関する課税制度の日米比較

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要約

日本では、離婚によって財産分与が行われる場合、財産分与者にキャピタルゲイン所得税が課せられる可能性がある。これは、裁判所が財産分与を財産分与義務の消滅という有償取引であると捉えており、所得税法 33 条 1 項の「資産の譲渡」に該当すると解釈しているからである。しかし、この解釈に対しては、財産分与は本質的には夫婦間の共同財産の分割であり、所得税法 33 条 1 項の「資産の譲渡」には該当しないとする説が有力に唱えられている。米国では、1984 年までは、United States V. Davis, 370 U.S. 65（1962）の判決に従い、日本と同様に、財産分配時にキャピタルゲイン課税が行われていた。しかし、1984 年の税制改正後は、財産分与を受けた者がその財産を第三者に譲渡するまでは、キャピタルゲイン課税が繰延べられることとなった。米国が制度を転換した理由として、夫と妻は同一の経済単位であるという事実があること、また、国民はその課税ルールを理解できておらず、キャピタルゲイン課税はそれらの人々に罠をかけるようなものであることが挙げられている。わが国においては、財産分与時の課税が離婚協議を成立させにくい状況を作り出しているといわれている。本稿は、離婚によって財産分与を行うことを躊躇させるわが国の財産分与の課税制度を見直し、米国の現行制度のように、財産分与を受けた者がその財産を譲渡するまでキャピタルゲイン課税を繰延べる制度を立法すべきであると主張する。

Key words

distribution of property, transfer of assets, capital gain, tax deferral, United States v. Davis, 370 U.S. 65

1. Introduction

In Civil Law, one party to a divorce by agreement may claim a distribution of property from the other party.(1) This is known as the distribution of property systems. In Japan, the party with the responsibility to transfer their real estate property may be required to pay a capital gains income tax at the time of transfer. The Income Tax Act of Japan defines capital gains income as income arising from the transfer of assets.(2) A Supreme Court Case of May 27, 1975,(3) which is the leading case regarding the taxation of property settlements specific to real estate, regarded such transactions as a transfer of assets from one owner to another. The Supreme Court stated that “when transferring assets such as real estate incident to a divorce, the transferor is considered to have received the economic benefit of releasing oneself of the obligation to cede one’s property through the transfer,” and supported the taxation of property settlements incident to a divorce where the burden is placed on the transferor based on the Income Tax Act of Japan, 33 (1) if the property being transferred is a separate (i.e. owned solely by the transferor) real estate. The transfer of property resulting from a divorce is also interpreted by the Government of Japan as a transfer of assets with the economic benefit of releasing oneself of the obligation to transfer one’s property upon divorce - the value of which is interpreted as being equivalent to the fair market value of the property at the time of transfer.(4)

Furthermore, according to a 2020 document(5) released by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) of Japan, the national average price of land has increased 5 years in a row. There is now an increased focus on taxation of property settlements pursuant to a separation agreement, as there exists the possibility of the transferor with the legal obligation to cede their property being burdened with capital gains income tax due to increased land prices when they have transferred real estate property to their former partners. This article aims to examine the validity of Japan’s handling of the taxation of property settlement by referencing the American system.

It should be noted that, this article will base its argument on the assumption that—as a general rule—the value of the property at the time of property settlement has increased compared to the price of said property at the time when the transferor had obtained it (basis of tax) by taking into account the recent information regarding increased land value released by the MLIT.

2. The Japanese taxation system and court cases regarding distribution of property

While Civil Law governs the distribution of property, it is the Japanese Tax Law that handles the taxation of such distribu-

tions. This section will look at several relevant articles in the Income Tax Act that aim to define certain issues when a distribution of property occurs. Income Tax Act 33(1) defines what the term capital gains entails. Income Tax Act 33(3) establishes the method in which capital gains is calculated. Income Tax Act 59(1) and 60(1) touches on how the basis of capital gains is determined. This section will then conclude by introducing several court cases pertaining to distribution of property in Japan.

2.1 Income Tax Act of Japan, 33

Income Tax Act of Japan, 33 (1) defines what capital gains income is. It states that "capital gains income means income arising from the transfer of assets (including the establishment of a superficies right or right of lease for owning a building or structure, and any other act carried out to have another person use land for a long period of time under contract as specified by Cabinet Order)."(6) The two most problematic factors regarding Income Tax Act of Japan, 33(1) are the definition of what an asset is and also how it defines a transfer. An asset is said to be anything which holds economic value—the value of which is prone to appreciation as well as depreciation—and is transferable to another party.(7) A transfer is described as any action that allows another party to take over the possession rights of an asset.(8) Income Tax Act of Japan, 33(1) is applied to onerous transfer of assets.

Income Tax Act of Japan, 33(3) states that "the amount of capital gains income shall be the calculated by deducting the sum of the acquisition costs and the expenses required for the transfer of assets from the amount of gross revenue related to the relevant income for the year, and then by making a special capital gains income deduction from the remaining amount."(9)

Furthermore, Income Tax Act of Japan, 38(1) describes that "acquisition costs of assets to be deducted in the calculation of the amount of capital gains income shall, unless otherwise provided, be the sum of the amount required for the acquisition of the assets and the amounts of equipment expenses and improvement expenses."(10)

2.2 Income Tax Act of Japan, 59(1) and 60(1)

Income Tax Act of Japan, 59(1) and 60(1) establishes the basis of capital gains income in several situations. Income Tax Act of Japan, 59(1) states the following:(11)

[…] In the case when assets generating capital gains income that a resident holds have been transferred due to either of the following events, the amount of capital gains income shall be calculated by referring to the assets' fair market value at the time of the transfer:

(i) gift (limited to a gift to a corporation), inheritance (limited to inheritance subject to qualified acceptance) or legacy (limited to a legacy to a corporation and a universal legacy to an individual subject to qualified acceptance); and
(ii) transfer at a value specified by Cabinet Order as consideration at an extremely low value (limited to a transfer to a corporation).

The above-mentioned (i) and (ii) do not apply when an individual gifts to another individual. Thus, capital gains income is not recognized for the donor as the gift is not considered to have been transferred at an amount equivalent to the value of the assets at the time that the transfer took place.

Because it is clearly stated in the Income Tax Act of Japan, 59(1)(i) and (ii) that these rules only apply to a transfer or gift that takes place between an individual and a corporation, should an individual gift of land that they had bought for ¥1,000 in the past to another individual at the fair market price of at the time of transfer or gift ¥10,000, then the transferor or donor would not be responsible for paying capital gains income tax on the ¥9,000 they had accrued when the transfer or gift took place.

When that individual gifts that land to the corporation, it is considered that capital gains income has been realized at the time of the transfer. If one looks back at the example, when the individual gifted the land that they bought for ¥1,000 to a corporation at the fair market value of ¥10,000, the individual is required to pay capital income tax on the ¥9,000 'profit' that they made from the transaction. When the corporation sells the land in the future for ¥12,000, the corporation may deduct ¥10,000 from ¥12,000 because the basis of tax for the corporation is ¥10,000 and not ¥1,000.

Income Tax Act of Japan, 60 (1) states the following:(12)

[…] when a resident has transferred assets prescribed in paragraph (1) of the preceding Article that the resident had acquired due to any of the following events, the amount of capital gains income will be determined by deducting the value of the asset at the time of purchase of the original owner from the value of the asset at the time the new owner has transferred it. Furthermore, the asset is deemed to have been under the ownership of the new owner since the time it was purchased by the original owner:

(i) gift, inheritance (excluding inheritance subject to qualified acceptance) or legacy (excluding a universal legacy subject to qualified acceptance); and
(ii) transfer that falls under the provisions of paragraph (2) of the preceding Article.

Thus, the recipient of the assets carries over the basis of tax at the time the donor had acquired the asset, as well as the length of time that the donor or decedent had the assets in their possession. The basis of tax is carried over to the recipient of a gift or an heir, therefore the donor or decedent is not taxed for any capital gains income, and taxation is deferred until the recipient

sells the asset in question to another party.

Suppose for a moment that an individual gifts land they bought for ¥1,000 and held for 5 years to another individual for ¥10,000. Let us suppose further that the second individual, John, holds on to that same land for 3 more years and then sells it to a third individual party for ¥12,000. In this instance, because the sum of the acquisition costs of the assets from the first individual is carried over by John, the amount of which John can deduct from the amount of gross revenue related to the relevant income for the year—which is ¥12,000 in this case—is only ¥1,000. Furthermore, because the length of time that the first individual held on to the land is carried over by John, it is considered that John was in possession of the land for a total of 8 years.

2.3 Japanese court cases involving distribution of property

By examining the following two court cases, how the courts interpret the taxation concerning distribution of property becomes clear. The two court cases are the 1975 Case and the 1978 Case. Below are the outlines of each case.

2.3.1 May 27th of 1975 case

There exists a May 27th of 1975 landmark case(13) that deals with the taxation of distributed property. The main argument of this landmark case was whether the real estate property transferred from the plaintiff to his former wife should have been taxed for capital gains income or not when the couple got divorced. The plaintiff, who is a private-practicing doctor, had only reported his business income from his medical clinic. However, the Chief of Tax Office made a reassessment which required the plaintiff's capital gains income deriving from the distribution of his real estate property to be included in his income. The plaintiff claimed that the reassessment is illegal since the distribution of property is not a monetary transaction, and therefore the Income Tax Act of Japan, 33(1) should not be applicable in his case.

Although there were no conflicting opinions between the plaintiff and the defendant regarding whether the real estate property in question is a separate property (property owned singularly by one party to a marriage), it was also determined that the transfer of the property was considered to be a distribution of property and as alimony paid by the plaintiff to his former wife. For this reason, it was determined during the first hearing that the plaintiff had gained an "economic benefit," as defined in Income Tax Act of Japan, 36(1), through the distribution of his property. Furthermore, it was established that this distribution of property had generated capital gains income as defined by the Income Tax Act of Japan, 33(1). Thus, the plaintiff's claims were dismissed as a result.(14)

The Court of Appeals determined that the real estate in question is regarded as property that has been transferred to support the wife in the future or as alimony. The Court of Appeals described the nature of taxation toward capital gains income as follows. If the property has gained in value by the time of the transfer, then that appreciation in value should be considered as capital gains income. Taxation should occur when the control of the property changes hands. If the property exchanges hands in the form of a monetary transaction or exchanging properties, the realized capital gains is subject to taxation. This was the decision made in the Supreme Court in 1968.(15) This includes situations where assets are transferred in exchange for money or traded for different properties, as well as when the asset is transferred as part of an alimony or to pay off other financial obligations.

Generally speaking, when an individual distributes property that they own to fulfill financial obligations to another party, it is considered that the transferor has enjoyed economic benefits equivalent to the price of the property at the time of the transfer. Since the financial obligation is terminated as a result of the transfer, the transfer is said to have benefited the transferor financially whether they had actually received money or other properties in exchange. Thus, the plaintiff's claims were once more dismissed.(16)

The plaintiff made a final appeal stating that distribution of property which does not involve payment or exchanging other properties does not fall under the term "transfer" as described in Income Tax Law 33. The plaintiff claimed that to be taxed on property that has been transferred without any monetary gains would mean taxing the plaintiff who has no cash to meet such obligations. This would, in effect, violate The Constitution of Japan, Article 29(1) (i.e. the right to own or to hold property is inviolable), Article 25(1) (i.e. all people shall have the right to maintain the minimum standards of wholesome and cultured living), and Article 13 (i.e. all of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs) stated in the Japanese Constitution.

Normally, by having property transferred, the capital gain of the transferor is objectively calculated by the market and the transferor is able to obtain the cash to pay for the tax. For this reason, the appropriate timing to tax the transferor is said to be when the transferor receives the money deriving from the transfer of the property. The plaintiff claimed that it would be unconstitutional to tax monetary gains that have not been realized since this transfer does not involve any cash income.

The Supreme Court referenced the aforementioned case in 1968 and stated that "the property has gained in value by the time of the transfer, then that appreciation in value should be considered as capital gains income."(17)

The Supreme Court then concluded that:

When a couple divorces, one party may request the other for a distribution of property (Minpō [Civil Code of Japan], 768 and 771). Although the specifics of the right to distribution of prop-

erty are determined by the courts, the rights and obligations materialize at the time of the divorce. Upon settling on the specifics of the divorce, and once the payment or distribution of property is complete, the obligation to distribute property is eliminated. This elimination of the obligation should be considered as a financial benefit for the liable party. Therefore, it could be said that a liable party that transfers assets—such as real estate property as a part of their property distribution obligation pursuant to divorce, has received the financial benefit of having such an obligation eliminated.

This decision demonstrates that the Japanese Supreme Court interprets asset transfers as a monetary transaction when it is a part of a property distribution process. Therefore, based on the Income Tax Act of Japan, 33(1), this court decision approved the taxation of capital gains on the real estate property transferred by the ex-husband during the distribution of property.

2.3.2 February 16th of 1978 case

The plaintiff, when divorcing her then husband, transferred a separate real estate property (that is, a real estate property that is owned solely by the wife) as a distribution of property incident to divorce. The plaintiff did not report capital gains income deriving from the transfer of said real estate property. To this, the Chief of Tax Office—the defendant of the case—made a correction to the plaintiff's income tax, claiming that the transfer of the real estate in question is considered to be "a transfer of assets" as defined by the Income Tax act of Japan, 33(1).

The plaintiff went to court demanding a repeal of the correction. To support her claims, the plaintiff stated that the property was a community property between her and the husband, so this distribution of property does not fall under "a transfer of assets" as defined in the Income Tax Act of Japan, 33(1). Furthermore, the plaintiff stated that transfers of assets in the name of distribution of property does not fall under the same "a transfer of assets" as defined in the above act.

However, both the district court[18] and appeals court[19] determined that the real estate in question is the plaintiff's separate property in formality as well as in practicality and rejected the plaintiff's claims. The plaintiff then argued that:

Taxing the distribution of property is unconstitutional as it violates Article 24(2) of the Constitution of Japan which states that "with regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes. The distribution of property in question is simply a matter of dividing a community property and should not fall under "transfer of property" as described in the Income Tax Act 33(1). The plaintiff did not gain any sort of economic benefit from this distribution as there were no monetary transactions involved.

The plaintiff argued that property obtained during marriage should be separated evenly among both parties of marriage regardless of the amount of income that each party generates to maintain the marriage. Not doing so would violate Article 24 of the Constitution of Japan. The plaintiff also appealed that in the case of property pertaining to marriage, the property cannot be considered as a separate property unless it can be proven that it was obtained solely by the owner (paid for by the owner's money or other properties). Furthermore, the plaintiff also noted that she had not enjoyed any economic benefits from the distribution.

The Supreme Court dismissed the plaintiff's appeal because a precedent has been set[20] that the Japanese Civil Law Article 762(1) which states that "property owned by one party before marriage and property obtained in the name of that party during marriage shall be separate property" does not violate Article 24 of the Japanese Constitution. Moreover, it upheld the decision of the appeals court stating that the real estate in question is a separate property of the plaintiff in both formality and in practicality. Lastly, the Supreme Court cited the aforementioned case in 1975 that "a transfer of assets" as described in Income Tax Act 33(1) includes all types of activities involving movement of property, and that to transfer a separate property of one party to marriage to another party falls under "a transfer of assets" in which capital gains income is realized.[21]

What can be said from these two cases is as follows:

When property was transferred as a distribution of property in a divorce, the transferor has fulfilled the obligation to distribute the property.

Therefore, the person obligated to distribute the property will enjoy an economic benefit from the performance of the obligation to distribute the property. Hence, the transfer of the property constitutes an onerous transfer of property.

In the case of an onerous transfer of property, if the value of the property has increased, capital gains tax is levied on the person obliged to distribute the property in accordance with Article 33(1) of the Income Tax Act.

Furthermore, the tax practice in Japan also interprets the transfer of property by way of distribution as a transfer in exchange for an economic benefit in the form of extinguishment of the obligation to distribute the property, and as a transfer of property at the market value at the time of the property distribution (Income Tax Act Circular Notice 33(1)(4)).

However, if the distribution of property is considered to be a non-onerous transfer of property and it is verified to be a gift, then, of the Income Tax Act 59(1) would apply. As mentioned above, the Act does not impose a capital gains tax on the donor of a gift from one individual to another. In that case, under the Income Tax Act 60(1), the recipient would succeed the price of the property that the donor had paid at the time of acquisition. As a result, the taxation on distribution of property will be deferred until the recipient sells the property.

Moreover, if, as the plaintiff argued in the 1978 court case, the distribution of property is determined to be a division of the

community property between a married couple, then no taxation would be incurred by the person obliged to divide the property because it cannot be said that any income is realized by division of community property.

3. Taxation policy and court cases regarding distribution of property in the United States

In this section we look at important court cases from the United States related to distribution of property. In doing so, we see the differences between the United States and Japan's handling of identical situations and can determine which method is logically sound.

3.1 Pre 1984 tax reform

Prior to the 1984 tax reform, when a property appreciated in value and, as a result, its owner enjoyed some amount of capital gains and the owner distributes the property for the release of marital claim, it was required in the United States for the distributor to regard any capital gains as his or her income. The recipient was required to consider the fair market price of the distributed property as their basis of tax. The handling of these taxes was based on the case *United States V. Davis, 370 U.S. 65 (1962)* described below.

3.2 United States v. Davis, 370 U.S. 65 (1962)

The following is the outline of the United States v. Davis case.[22] Thomas Crowley Davis (henceforth Mr. Davis) divorced his former wife, Alice M. Davis (henceforth Mrs. Davis), in 1955 and distributed his E. I. du Pont de Nemours & Co. stock. Its adjusted basis was $74,775 and its fair market value was $82,250. Mrs. Davis' divorce attorney fee of $2,500 was paid by Mr. Davis. Mr. Davis did not file the distribution as capital gains income but reported his wife's attorney fees as a deductible expense. The Internal Revenue Service Commissioner denied Mr. Davis' application for the deduction and requested him to report the difference between the fair market value and adjusted basis of his stock as capital gains income. Mr. Davis disagreed and filed a lawsuit.

The Court of Claims decided that Mrs. Davis' attorney fees could not be filed for deduction by Mr. Davis, but also denied the Commissioner's claims that Mr. Davis should file the distribution of his stocks as his capital gains income, on the grounds that the value of said capital gains income could not be determined. However, the Supreme Court of the United States came to the conclusion that Mr. Davis had made taxable gains from the distribution of his property. Moreover, it had determined that Mr. Davis may not file his former wife's attorney fees as a deductible expense.

Mr. Justice Clark stated "Congress, as evidenced by its inclusive definition of income subject to taxation, i. e., 'all income from whatever source derived, including ... gains derived from dealings in property', intended that the economic growth of this stock be taxed."[23] This refers to the provisions of Internal Revenue Code 61(a)(3).

He also stated "the problem confronting us is determining when such accretion is to be taxed. Should the economic gain be presently recognized against the taxpayer, or should this assessment await a subsequent transfer of the property by the wife? The controlling statutory language, which provides that gains from dealings in property are to be taxed upon sale or other disposition, is too general to include or exclude conclusively the transaction presently in issue; that is the distribution of Mr. Davis's property as a result of divorce. Recognizing this, the Government and the taxpayer argued by analogy with transactions more easily classified as within or without the ambient of taxable events. The taxpayer asserts that the present disposition is comparable to a nontaxable division of property between two co-owners, while the Government contends it more resembles a taxable transfer of property in exchange for the release of an independent legal obligation."[24]

In the end, the Supreme Court determined that the taxpayer has earned income from the transfer of property on the basis that "Our interpretation of the general statutory language is fortified by the long-standing administrative practice…for these latter courts in holding the gain indeterminable assumed that the transaction was otherwise a taxable event. Such unanimity of views in support of a position representing a reasonable construction of an ambiguous statute will not lightly be put aside."[25]

3.3 Post 1984 tax reform

Internal Revenue Code§1041 was established by the 1984 Tax Reform - 20 years after the Davis case.

Internal Revenue Code§ 1041(a) states that, in general, those who distribute their property do not recognize any income or loss when their property is distributed to a spouse or—in the case of a divorce—a former spouse.

Moreover, Internal Revenue Code§ 1041(b) states that the distribution in (a) is considered to be a gift from the transferor to the spouse or former spouse. As such, the basis of tax of the transferor is carried over to the transferee. This is known as the 'carryover basis.' Following this statute, any taxation on the appreciation of the property's value is deferred until the recipient transfers said property. House Ways and Means Committee Report explains the reason behind the 1984 Tax Reform as follows:

The committee believes that, in general, it is inappropriate to tax transfers between spouses. This policy reflects the fact that a husband and wife are a single economic unit.

The current rules governing transfers of property between spouses or former spouses incident to divorce have not worked well and have led to much controversy and litigation. Often the rules have proved a trap for the unwary.

Furthermore, in divorce cases, the government often gets whipsawed. The transferor will not report any gain on the transfer, while the recipient spouse, when he or she sells, is entitled

under the Davis rule to compute his or her gain or loss by reference to a basis equal to the fair market value of the property at the time received.

4. The academic theory of Japanese taxation system regarding distribution of property

4.1 Kaneko and Wagatsuma Theories

In Japan, when a distribution of property takes place, the two court cases and the Income Tax Act Circular Notice mentioned earlier have determined that such distributions are an onerous transfer of property. As such, the taxation of capital gains income toward the transferor is acceptable based on the Income Tax Act 33(1). Furthermore, the fair market value of the property at the time of distribution (Income Tax Act of Japan, 36(2)) must be considered when calculating the transferor's capital gains income.

However, distribution of property can imply the division of community property between the husband and the wife. If the distribution of property occurs as a part of division of community property, then the distribution does not fall under "a transfer of assets" as defined in Income Tax Act of Japan 33(1) - an opinion held also by Professor Kaneko, a notable scholar in the field. Professor Kaneko also states that situations wherein a property that is a de facto community property is transferred to the wife can be interpreted as a division of community property. He argued that the act of distributing the property is analogous to officially identifying the wife as the owner of the property by actualizing the wife's latent ownership of a property that is only legally owned by the husband.(26)

This line of thought is known as the Kaneko Theory and is based on Professor Wagatsuma's theory which shall be discussed later in detail. First, let us look at the Japanese Civil Law 762 on which Professor Wagatsuma based his theory.

Japanese Civil Law 762 states the following:(27)

- Property owned by one party before marriage and property obtained in the name of that party during marriage shall be separate property (property owned singularly by one party to a marriage).
- Property that does not clearly belong to either husband or wife shall be presumed to be held in co-ownership.

There are two interpretations of Civil Law 762. One being an interpretation based on Professor Wagatsuma's theory and the other being an interpretation based on tradition.

In a traditional sense, property owned by the husband or wife before marriage belongs solely to themselves. Likewise, anything bought with their own funds after marriage is, by extension, their own property. However, this way of interpreting ownership was criticized for placing spouses who worked only in the home (most likely wives as homemakers) in a disadvantageous position.

Professor Wagatsuma states that there are three types of property ownership when the situation involves married couples. The first type describes properties that are clearly owned individually by either the husband or the wife (Type 1). The second type of ownership defines properties that are documented to be co-owned properties (Type 2). The last type of ownership is in regards to properties that are owned by either one of the couples on paper, but shared among the two in practice (Type 3).(28)

Professor Wagatsuma argued that the only type of ownership that falls under Civil Law 762(1) are Type 1 properties. His reasoning was that in the case where only one partner works and brings income to the home, the working partner could not have been able to focus on their work unless the other helped out with tasks such as housework. Therefore, a homemaker can claim half of the working partner's income. Therefore, he interprets all properties purchased by the couple while married as being held in de facto co-ownership. Furthermore, Professor Wagatsuma argues that while the couple is married, these properties are considered to be held in co-ownership only in practice, but in a case such as divorce, the co-ownership becomes official or legally binding.(29)

If one were to interpret Civil Law 762 based on the Wagatsuma Theory, all properties purchased by the couple while married will be seen as being a co-ownership in practice. Furthermore, if the distribution of property takes place as a means to liquidate properties held in co-ownership, said transaction is not recognized as a transfer of property as stated in Kaneko Theory.

4.2 The author's opinion regarding Japanese taxation policy

We have thus far summarized the different property distribution taxation system within Japan and the United States. The author's opinion is that the taxation system in Japan regarding the distribution of property must be changed to match the current (i.e. post 1984) system used in the United States. Here are the two reasons:

The first reason is the fact that the burden of paying the tax is put on the person who must distribute their property does "not feel right" to the general public who is not well-versed in taxation law. In fact, in the Supreme Court Case of September 14, 1989,(30) which involved a professional banker, mistakenly assumed that the burden of tax rested on his former wife who received his property. He went so far as to make statements that he felt concerned for his former wife having to pay for the capital gains tax. This case shows that the policy of taxing the transferor is easily missed even by a professional banker who should have been trained to know about this taxation policy.

Secondly, if the value of the property has increased at the time of the transfer, the transferor will be burdened with an expensive capital gains income tax payment and will create a situation in which reaching a divorce agreement becomes greatly difficult.

In Japan, the tax system puts the burden of tax on the transferor at the time of distribution of property, it should be possible to consider changing the legislation to defer the taxation until the transferee transfers that property to another party as is the case currently in the United States. The legislative theory is that, if the distribution of property were considered to be a gift from an individual to another, then Income Tax Act of Japan, 59(1) and 60(1) could be applied to defer the taxation of the transferor of the property.

5. Conclusion

This paper examined the validity of the way Japan handles the taxation burdened by the transferor in a distribution of property by looking at the system that is in place in the United States. Upon examination, the author has come to the conclusion that Japan should consider making legislation to defer the taxation until the property is transferred by the transferee in the future in order to promote the distribution of property pursuant to a divorce.

One possible caveat that should be mentioned is the fact that this paper made its examination by focusing mainly on the transferor and did not consider how taxation is handled by the recipient of the property. The author would like to examine the taxation of the transferee on a separate occasion.

Notes

(1) Minpō [Civil Code of Japan], No. 768 (1), http://www.japaneselawtranslation.go.jp/law/detail/?id=2058&vm=&re=.

(2) Shotokuzeihō [Income Tax Act of Japan], No. 33 (1), https://www.sozeishiryokan.or.jp/income_tax/income_tax2016e.html.

(3) Saikō Saibansho [Sup. Ct.] May 27, 1975, 29:5 MINSHU 641.

(4) Income Tax Act Circular Notice No. 33 (1) (4).

(5) https://www.mlit.go.jp/common/001333698.pdf.

(6) Shotokuzeihō [Income Tax Act] Article No. 33 (1), https://www.sozeishiryokan.or.jp/income_tax/income_tax2017e.html.

(7) *See* Hideaki Sato, *Sutandādo Shotokuzeihō* (*The Standard Income Tax Law*) 87 (Kōbundō, 2nd ed. 2020).

(8) *Id.* at 88.

(9) Shotokuzeihō [Income Tax Act] Article No. 33 (3), https://www.sozeishiryokan.or.jp/income_tax/income_tax2017e.html.

(10) Shotokuzeihō [Income Tax Act] Article No. 38 (1), https://www.sozeishiryokan.or.jp/income_tax/income_tax2017e.htm.

(11) Shotokuzeihō [Income Tax Act] Article No. 59 (1), https://www.sozeishiryokan.or.jp/income_tax/income_tax2017e.htm.

(12) Shotokuzeihō [Income Tax Act] Article No. 60 (1), https://www.sozeishiryokan.or.jp/income_tax/income_tax2017e.htm.

(13) Saikō Saibansho [Sup. Ct.] May 27, 1975, 29:5 MINSHU 641.

(14) Nagoya Chihō Saibansho [Nagoya Dist. Ct.] April 11, 1970, 22:10 GYOSHU 1685.

(15) Saikō Saibansho [Sup. Ct.] October 31, 1968, 14:12 SHOMU GEPPO 1442.

(16) Nagoya Kōtō Saibansho [Nagoya High Ct.] October 28, 1971, 22:10 GYOSHU 1679.

(17) 14:12 SHOMU GEPPO at 1443-1444.

(18) Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] January 25, 1973, 19:6 SHOMU GEPPO 104.

(19) Tōkyō Kōtō Saibansho [Tokyo High Ct.] November 27, 1975, 21:12 SHOMU GEPPO 2615.

(20) Saikō Saibansho [Sup. Ct.] September 6, 1961, 15:8 MINSHU 2047.

(21) Saikō Saibansho [Sup. Ct.] February 16, 1978, 885 HANREI JIHO 113-114.

(22) United States v. Davis, 370 U.S. 65 (1962).

(23) *Id.* at 68.

(24) *Id.* at 68-69.

(25) *Id.* at 71.

(26) *See* Hiroshi Kaneko, Income Tax and Capital Gain, 3 Sozeihō Kenkyu 40, 53 (1975).

(27) Minpō [Civil Code of Japan], No.762, http://www.japaneselawtranslation.go.jp/law/detail/?id=2058&vm=&re=.

(28) *See* Sakae Wagatsuma, *Shinzokuhō* (*Family Law*) 102-103 (Yuhikaku, 1st ed. 1961).

(29) *Id.* at 103.

(30) Saikō Saibansho [Sup. Ct.] September 14, 1989, 1336 HANREI JIHO 93.

(Received November 17, 2020; accepted December 1, 2020)