

IMPROVING CONDITIONS FOR TRANSFERRING FAMILY ENTERPRISES IN ESTONIA

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Abstract

Family enterprise is a business entity that belongs to the family. In Estonia the concept of family business, family entrepreneur, or family enterprise has not been defined in legislation. The concepts of business and enterprise have been defined in several pieces of law with some dissensions in their interpretations, however. Differences in legal definitions become obvious when transferring a business.

The aim of the article is to assess the legislative conditions of family enterprises in Estonia. Family enterprises can be transferred either by way of transferring the holding status or by transferring the enterprise. Holding can be transferred in companies; a sole proprietor should transfer the business entity either as a whole or transfer the business entity into a company to have a holding there. Family businesses operating as sole proprietors may incur tax liability by transferring the family enterprise. The paper outlines special features of transferring enterprises, including family enterprises in Estonia. Business transfers have been few and there is no unambiguous practice in this sphere. Transfer of family enterprises is identified with transfer of enterprises; differences arise when family business has been registered as a sole proprietor.

The paper provides a brief description of the differences in transferring enterprises, including family enterprises in Estonia. A purpose was to evaluate the legal environment of transferring family enterprises. In Estonia guidelines should be formulated for transferring the business of a self-employed family member and legal regulations should be introduced to avoid ill-intentioned transfer of enterprises.

Keywords: undertaking; family entrepreneur, family enterprise, family business, sole proprietor, transferring enterprises

JEL Classification Codes: M10; M13; M19.

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Introduction

Transfer of business as an economic entity is complicated for entrepreneurs because of various law provisions. It is even more complicated to transfer a family enterprise. Family enterprises can be transferred by transferring the holding status, or by transferring a whole business. Holding can be transferred in different types of companies, but a sole proprietor should transfer an economic unit as a whole or transform the economic unit into a company to have a holding there. Such a transfer is complicated for family enterprises since they want to hand over to descendants what they have done, whereas a self-employed family member incurs excessive tax liability because wishing to end business under his name, he needs to pay income and social tax on the value of the enterprise's assets.

Family business traditions in Estonia were broken in connection with the incorporation of Estonia into the Soviet Union. Entrepreneurship in Estonia had advanced in past centuries, but during the occupation period private entrepreneurship was prohibited. After Estonia regained independence in 1991, private entrepreneurship got off the ground, the first family farms were set up and family business started to develop. Enterprising people started to develop private business as private entrepreneurs. By 2014, the restorers of family farms have reached the age where they do not want to continue with family business any more, either because of health or due to old age. They wish that their successors continue what they have done.

The topic is a burning issue since the family entrepreneurs who started in the period of regaining independence are now in the age where they wish to pass the family business on to the next generation. Family enterprise is a business entity that belongs to the family. In Estonia the concept of family business, family entrepreneur, or family enterprise has not been defined in legislation. The concepts of business and enterprise have been defined in several pieces of law with some dissensions in their interpretations, however. A family enterprise in Estonia may be a company where family members have a majority holding, or a sole proprietor who has engaged family members in the business (Kirsipuu 2013). A problem is that a tax liability may incur by transferring a family business, which will jeopardise the sustainability of the family enterprise.

The paper briefly describes differences in transferring enterprises, including family enterprises in Estonia. A purpose was to evaluate the legal environment of transferring family enterprises. The following research tasks were set for the achievement of the objective:

1. Provide an overview of the legal environment of family enterprise transfers on the basis of scientific literature.
2. Provide an overview of legal problems of transferring family enterprises in Estonia
3. Assess the possibilities of transferring family enterprises in Estonia

The paper is based on various research papers on transfer of family businesses, and the Republic of Estonia legislation which regulate transfer of enterprises.

Transferring of the family enterprise as a problem of society

Painless transfer of family enterprises is a worldwide topic. Various authors have conducted research projects in order to identify problems involved in transfer of family enterprises.

Analysing research papers written in other countries about transfer of family enterprises it can be said that the process of transferring family enterprises in Poland has reached a critical stage, since the first generation of family businesses are elderly (20% older than the retirement age), they lack the skill of transferring family business painlessly (Koladkiewicz 2012). The second generation, at the same time, needs assistance to take over the family business and since this has not been available, then 10% of the first generation family enterprises ended family business in the first generation (Koladkiewicz 2007). In Kosovo and Serbia, those family businesses which have not valued family traditions have ended family business in the first generation (Barbato 2012).

Various research papers have demonstrated that family enterprise is sustainable in the first generation; in the second generation only 30% of them are sustainable, in the third 10...15% (Aronoff 1999; Kets de Vries 1993; Ward 1987). If they are able to transfer a family enterprise professionally, there is no risk of family business traditions ceasing in the next generation (Fang et al. 2012). 19% of the family enterprises in Argentina, USA, Egypt, Serbia, Kosovo, France, Croatia and Kuwait have reached the third generation; businesses are managed by up to two family members (Lussier et al. 2012).

The theoretical background (Table) for transfer of family enterprises evidences that family enterprise's sustainability is ensured by dynamic development of family business and its strong organisational culture, and knowledge of how to transfer a family enterprise.

Table 1. Theoretical background of generation change in a family enterprise (compiled by the author)

Theory	Source
In the first generation dynamic development and valuation of the organisational culture of family business can be assured only when staff are family members.	Nedlin 2003; Khaemasunun 2004; Miller et al. 2007; Ferguson 2011
Strategic management of a family enterprise and valuation of organisational culture ensure dynamic development of the family enterprise and family enterprises are able to exist successfully until change of generation.	Nedlin 2003; Khaemasunun 2004; Miller et al. 2007
Family enterprises where changes of generation have been within the family (from parent to child, not grandchild or some other family member) are more efficient and their economic performance is more remunerative.	Cuervo-Cazurra, 2006
In the event of change of generation, Various problems occur in family enterprises, which are caused by insufficient knowledge about transfer.	Wickham 2004; Moyer 2006; Hautala 2006; Brun de Pontet 2008
Family enterprise's stability depends on the family enterprise's composition.	Ferguson 2011

The generation change related problems are among family businesses increasingly more burning; increasingly more attention is being focused on transfer of family enterprises to descendants; great importance in handing over property is attached to continuity and family traditions because every new generation inherits a legacy from their ancestors (Tormakangas 2005). Different generations may have a different effect on further development and strategy of the family business (Brun de Pontet 2008).

Along with the ageing of the first generation of family enterprises the following issues arise on the agenda: What will happen when they retire? Is the successor from family? How to transfer management to the successor, not only position but also skills, contacts, leader's role and ownership (Kirsipuu 2007). Generation change is more successful when successor is interested in the family business; however, it is not enough to want to, they should also acquire various entrepreneurial skills (Brun de Pontet 2008). If children want to continue what their parent started, knowledge and skills are passed on to children (Littunen 2001; Hautala 2006). Cuervo-Cazurra (2006) draw a conclusion that family enterprises where generation changes have been within the family (from parent to child, not grandchild or some other family members) are more efficient and their economic activities will be more remunerative in future, whereas he admitted that in different economic conditions change of generation should be investigated further.

Juridical problems of transferring family enterprises in Estonia

Many family enterprises transfer their family business and then face an unpleasant tax liability. In order to avoid such situations, provisions of laws and regulations should be inspected before transferring the family enterprise and only then find an appropriate strategy for transferring the family business.

Business transfers in Estonia are not just based on the Law of Obligations Act, but provisions of the Income Tax Act and of the Value-added Tax Act should be examined as well. In some cases also provisions of the Taxation Act, Commercial Code, Law of Succession Act, Family Law Act and Social Tax Act should be consulted. Most of the family businesses in Estonia are sole proprietors or have registered their business as a private limited company, a few have chosen the legal form of public limited company, general or limited partnership.

Transfer of an enterprise or a part thereof is stipulated in Division 4 of the Law of Obligations Act. The parties involved have to conclude a preliminary contract and then the transferor is required to transfer all rights and obligations relating to the management of the enterprise. The transferor of an enterprise is required to transfer possession of things to the transferee and, in the case of property subject to registration, to ensure that the corresponding entries are made in the registers (Võlaõiguseadus, § 182, (1)). The same is stipulated in §37 of the Taxation Act: In the event of transfer of ownership or possession of an enterprise or a part thereof, the claims and obligations which are related to the enterprise transfer to the transferee.

Transfer of an enterprise is not a transaction, this is not deemed to be supply. Accounting entities make on the basis of the deed of transfer only an accounting entry, they do not declare such transactions as supply. Transferee shall continue activity of the acquired enterprise, which should be unambiguously identifiable. Pursuant to the Value-added Tax Act, transfer of goods and transfer of ownership are different. Pursuant to the Value-added Tax Act, business means the independent economic activity of a person in the course of which goods are transferred or services provided whatever the purpose or results of that activity. Value added tax is imposed on the transfer of goods and provision of services in the course of business activities (Käibemaksuseadus, §4 (1), 1).

The transfer of an enterprise or a part thereof within the meaning of the Law of Obligations Act is not deemed to be supply pursuant to the Value-added Tax Act (Value-Added Tax Act, Chapter 2, § 4 (2) 1). Judgement of the European Union Court claims that in the event of a transfer of an undertaking (Euroopa...2011):

- both clients and suppliers are transferred;
- tangible assets are transferred;
- the identity of the economic entity is maintained;
- continued economic activity resembles the past activity.

If the above conditions are fulfilled, a transfer of an enterprise has happened rather than a traditional economic transaction which incurs value-added tax liability to the VAT payer (Euroopa...2011).

According to the European States' legal system, transfers of enterprises should be regulated by national legislations, where an enterprise is either transferred or merged with another enterprise. This will ensure unambiguous interpretation of transfer related conflicts (Reuvid, Bennet 1993). Based on the OECD model tax convention, the term "enterprise" applies to the carrying on of any business, and the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes (OECD...2010).

Upon transferring an enterprise income tax is charged on gains from the transaction; however, in the event of a merger income tax is not charged (Lehis 2013). An enterprise can be transferred by way of succession; after the successor has accepted the succession (enterprise), she/he may not renounce it any more (Pärimisseadus, § 116 (2)). With the acceptance of a succession, all rights and obligations of the bequeather transfer to the successor who is required to perform all the obligations of the bequeather. If an estate is insufficient, a successor shall perform the obligations out of the successor's own property (Pärimisseadus, § 130).

Transferor and transferee must be taxable persons. In the event of transfer of an enterprise, the following claims and obligations transfer to the transferee (Maksukorralduse seadus § 37):

- tax liability (to pay required taxes);
- obligation to withhold (to withhold tax and to pay the withheld amount of tax);
- claim for refund (the right to be refunded the amounts of tax paid which exceed the prescribed amounts or other excess payments);
- tax liability of third party (the obligation of a third party to pay the tax arrears);
- accessory obligation (the obligation to pay interest or a penalty payment or to reimburse the costs of substitutive enforcement).

Upon transfer of an enterprise it is necessary to specify the enterprise's composition because a transfer involves transfer of all obligations related to the enterprise regardless of whether or not the transferee was aware of their scope and content. Consent of the obligee is not necessary for transferring contractual obligations (Varul et al. 2006). The fact that contracts have been concluded in the name of an enterprise subject to transfer and the transferee continues performance of contractual obligations implies directly transfer of a real enterprise, not a feigned transaction to hide turnover generation (Künnapas 2011). In Estonia, quite a few persons burdened with business obligations have registered a new enterprise in order not to incur VAT liability. Actually only the business name changes, owners are the same and there is no transfer in terms of the Law of Obligations Act. The Administrative Law Chamber of the Supreme Court of Estonia has made judgements on transfer of a part of an enterprise based on the following criteria (Supreme...2011):

- type of enterprise;
- transfer of immovable property, means of production and other tangible assets;
- transfer of immaterial assets and organisation as a whole;
- continuity of customer and supply relationships;
- similarity of pre- and post-transfer activities;
- continuity of business activity;
- maintaining personnel;
- previous activity of the new owner;
- transferor's and transferee's locality;
- overlapping members in management bodies.

Transferee of an enterprise has solidary liability for legal obligations which have arisen before the transfer of the enterprise and which has fallen due at the time of transfer. § 183 of the Law of Obligations Act provides supplementary protection and guarantee to the obligees of the enterprise subject to transfer. Business name, which as a rule belongs to the enterprise, transfers analogously with the transfer of rights (Võlaõigusseadus, § 184).

The Estonian Supreme Court has assured that even in case a set of transactions represents transfer of an enterprise, taxes shall be charged for the transactions made in this framework through third parties pursuant to general procedure (Supreme...2012). In case movement of enterprise's assets takes place through a third party, it is supply subject to regular taxation where input value added tax may be deducted; such transfer of an enterprise is not riskless for the final acquirer of assets from the aspect of deducting input value added tax. Of decisive importance in such cases is § 83 (4) of the Taxation Act, providing that ostensible transactions shall not be taken into account upon taxation, and § 84 providing that if it is evident from the content of a transaction or act that the transaction or act is performed for the purposes of tax evasion, conditions that correspond to the actual economic content of the transaction or act apply upon taxation.

Enterprises have no income tax liability in case money is not withdrawn for personal consumption. Income tax is imposed on income of natural persons. Pursuant to the Income Tax Act, income tax is not charged on income from the exchange of a holding (shares, contributions) in the course of a merger or transformation of companies and income from the increase or acquisition of a holding in a company by way of a non-monetary contribution (Tulumaksuseadus § 15 (4) 9 and 10).

Types of legal persons (subjects of law pursuant to law) are provided in § 25 of the General Part of the Civil Code Act. A subject of law founded pursuant to law is an abstract formation that is attributed the status of a person. Creating a subject of law means that the law provides the type of and procedure for founding a legal person and as a result of going through this procedure a subject of law is considered being founded. Upon registration of a sole proprietor, a new subject of law is not founded, a person only registers himself as an undertaking. Operating as a sole proprietor is

legal, but this act cannot be regarded as a transaction or a subject of law pursuant to § 24 of the General Part of the Civil Code Act (Lehis 2000).

A sole proprietor who declares personal and business income together may enjoy an income tax incentive pursuant to the Income Tax Act § 36 (7) as follows: If the assets of a sole proprietor which belonged among the assets of an enterprise are transferred or bequeathed to a person who will continue the activities of the enterprise, the assets shall not be deemed to have been taken into personal use. A sole proprietor's business property taken into personal use is regarded as business income at the market price (Tulumaksuseadus § 36 (3-5)) and taxes shall be charged on that.

In the event a sole proprietor transfers an enterprise to another undertaking, he transfers the enterprise without any reward. The acquisition cost of a holding acquired by way of a non-monetary contribution is equivalent to the acquisition cost of the assets which constituted the non-monetary contribution. If the acquisition cost of the thing or proprietary right which constituted a non-monetary contribution has previously been deducted from the business income of the natural person and income tax has not been charged on it as assets taken into personal use, the acquisition cost of the holding is deemed to be zero (Tulumaksuseadus § 38 (5¹)). If the holding is transferred later or transferee's property is liquidated, income tax is charged on gains; in that case social tax liability does not incur. Income tax liability is a liability of the transferor of a holding or liquidator, not a liability of the person who made the non-monetary contribution. A sole proprietor shall pay both income and social tax on his annual business income. The taxable period for social tax on business income is one calendar year (Sotsiaalmaksuseadus § 8 (2)). Given the above, a sole proprietor may transfer assets used in business exempt from tax to any natural or legal person. A condition, however, is that the transferee is a registered enterprise (either a sole proprietor or company). It is not stipulated whether the transferee should be an old, existing or start-up enterprise.

Upon hidden transfer of an enterprise the transactors seek to avoid application of the transfer regulation; therefore the parties involved make transactions and acts that make it difficult to identify transfer of business. Transactors do not confess transfer of business, any written proof of a business transfer transaction is missing (Tamme 2009). A hidden transfer of an enterprise seeks to declare supply and hence get tax incentives. Whether a family enterprise is sustainable or not depends on the interrelationships between family members and how simple it is to transfer business, because if transfer of a family enterprise involves growth of tax burden, many rather drop transfer of the enterprise and set up a new family enterprise, and the family business has the first generation again.

Transfer of an enterprise in Estonia is not a regular event and hence parties involved do not always want to show it appropriately. Since transfer of an enterprise is not supply for the business and input value added tax cannot be applied, therefore transfers of enterprises are often surreptitious so as to be able to compensate for the transaction with respect to value-added tax. The tax authority is monitoring enterprise transfers

and audits their accuracy; so far, an undertaking in Estonia has taken legal proceedings to contest the Estonian Tax and Customs Board's assessment notices. The Estonian judicial practice is based on the European judicial practice.

No separate research has been conducted on the family business transfer process in Estonia; An overview of the possibilities of transferring a family enterprise pursuant to the provisions of law those family undertakings which plan to transfer their enterprise to the next generation in the near future. Transfer of a family business to a descendant has to be registered legally as transfer of an enterprise. Therefore it is necessary to inform family enterprises of the transfer process. In addition to the legislation, for the purpose of highlighting the importance of the article is used the data of the survey conducted among family enterprises in 2007-2011 (1212) which showed the ignorance of family enterprises of the family business transfer procedures.

In 2011, an undertaking contested a Tax and Customs Board's notice claiming that a transaction to be ostensible to hide an enterprise transfer transaction with the purpose to recover without ground input value added tax on a formal sales transaction. The Court judged that transfer of an enterprise with solvency problems is not a reason for suspecting a surreptitious transaction and the tax authority is obliged to file an evidence based claim; every transfer of an enterprise should be evaluated separately (OÜ T...2011).

In 2012, the Court found that the Tax and Customs Board has made a justified assessment notice and it is transfer of an enterprise; they wanted to show transfer of an enterprise as sale again. Continuing activity of an enterprise in the same rooms in the same field of activity was apparent, only the business name was changed (OÜ Auto...2012).

In 2013, the Supreme Court, to clarify the issue, provided arguments that should be taken into consideration when transferring an enterprise or part therein. They discussed whether the case is supply of goods or transfer of an enterprise, and if it is supply of goods, whether it is tax exempt supply or not. The Supreme Court stated that sale of one property can be regarded as transfer of an enterprise if the character of the enterprise's economic activity allows this. That in case the property has turned into an economic entity and the property is employed with the purpose of earning income, it may be an enterprise. A set of assets not engaged in economic activity cannot be regarded as an enterprise regardless of that the company has no other assets (Elling 2013).

Already in 2009, the European Court of Justice made a decision that transfer of an enterprise should involve the economic entity as a whole; activity of an economic entity may not be limited to execution of only one specific contract. In order to decide whether the conditions of transfer of a stable economic entity are fulfilled, all factual circumstances that characterise the transaction should be considered, including, first of all, the type of undertaking and enterprise; whether the tangible assets, including buildings and movable property, have been transferred or not; value of immaterial

assets at the time of transfer; whether the new employer took over most of the employees or not; whether clients were transferred or not; as well as similarity of operations performed prior to and after transfer; and whether the activity had been suspended in the meanwhile, and if it was, for how long. However, these requirements represent only a few elements of the obligatory holistic evaluation and cannot be evaluated separately (Federación...2009).

The necessity of assessment of the legal environment of a family enterprises transpired from the survey conducted by the author in 2007-2011 which revealed that the most of the family businesses (67%) are registered as sole proprietors, 31% as private limited companies and the others (2%) have founded a commercial association, public limited company, limited or general partnership. Public limited companies were founded on the basis of previous collective or state farm ancillary enterprises or entities. 90% of the family farmers are sole proprietors; a reason is that business can be registered with the farm name and one's own and family enterprise's money need not be kept separately. Some family businesses which have transformed into private limited companies consider it a mistake since the family business funds cannot be used for family needs, whereas others who have changed the legal form are content that they could transform from sole proprietorship into private limited company without incurring extra taxes since they believe their liability is now limited to the equity of the private limited company. Those who started a family business immediately after Estonia regained independence choose public limited company for the legal form; however, when the minimum share capital requirement was increased, the business was re-registered as a private limited company. Sometimes several forms of entrepreneurship are used in parallel. For example, a family undertaking may be a sole proprietor as well as partner in a private limited company or shareholder in a public limited company. All family enterprises were convinced that this it is important for all family enterprises to provide a future for their children and they are worried about the survival, sustainability and transfer of the family business to their offspring. 80% of the respondents hope that a family member will continue their business; however, they are not sure whether with the knowledge they have the successors wish to continue the same activity under the same conditions. All family enterprises which were interviewed answered that they hope their family business will go on also after they retire from business. Deterioration of health or high age was prognosticated to be the reason for retiring from family business. Those family businessmen who had no children or whose children did not want to take part in family business are worried that the family business traditions may discontinue. Those who have children are convinced that the children will continue the family business they started and carry on family traditions and family business culture. It is of primary importance for all family enterprises to provide welfare to their family and only then expansion of business. Family enterprises believe that longevity of family business is important, that family business is passed on to family members.

Possibilities of transferring family enterprises in Estonia

If to compare compatibility of the theoretical background and conditions in Estonia, it can be pointed out on the basis of the survey conducted among Estonian family enterprises family enterprises' strategic management and valuation of organisational culture will ensure dynamic development of family enterprises, they are capable of existing successfully until a generation change. In Estonia a few family enterprises have been successfully passed on from the first generation to the second; business activity of those farms that have been transferred to children is effective whereas those farms which have been passed on to nieces or nephews are not so successful. Nearly all family entrepreneurs need training, especially how to painlessly transfer to offspring not only management but also experiences and skills.

Theoretical background in the Estonian conditions does not coincide with that the family enterprises' specialty in the first generation depends on whether the workers are family members or not. Dynamic development of family enterprises and continuous valuation of the organisational culture are secured in the first generation regardless of the employees. Family enterprises' stability depends rather on whether the family enterprise has formulated strategic plans and value organisational culture.

There are no separate judicial decisions on transfer of a family enterprise in Estonia. In case of a family business registered as a company, no problems arise in transferring the family enterprise. All of the family enterprise or a particular part is transferred. Current and fixed assets, obligations and equity capital including trademark, clients, bank accounts, deposits, etc. are transferred.

A problem is transfer of a sole proprietorship in case the transferor is ill-intentioned. Bad faith can arise when family relationships have been broken or in the case of disagreements in the transfer process. They wish to maintain control over the financial resources of the family business transferred in case there are accounts receivable at the moment of transfer. Upon transfer of a sole proprietor, everything transfers similarly with a company, however, only a special account transfers from bank accounts. Few sole proprietors have a special account (bank account where sole proprietor can deposit money for long-term investment without incurring income tax liability); in real life they use private accounts for business. Private bank accounts are not subject to transfer when the enterprise is transferred and the transferee can only hope in good faith that after transfer the transferor will transfer the business related amounts on his private account to the transferee's account. Hence a sole proprietor should consider the possibility that some outstanding amounts might not be received upon transfer. Transfer of a sole proprietorship is registered similarly with transfer of a company, as a contract under the law of obligations; however, it is unlikely that the transferee will contest the non-performance of contractual obligations of a sole proprietor as the transferor, and the transferee may lose income that might question the sustainability of the acquired family business.

Pursuant to the Income Tax Act, sole proprietors have to declare also business income received after termination of engagement in business. The situation is clear for tax authorities – income shall be declared and tax paid by a previous undertaking. The transferee of the enterprise however has a problem because he has missed income from transferred business whereas he needs to fulfil all obligations of the enterprise transferred to him.

Moreover, problems may arise in transfer of sole proprietorship also from the aspect of taxation; for example, sole proprietors who are liable to value added tax and operating at home face another problem when transferring the enterprise. § 4 section 2 clause 1 of the Value-Added Tax Act provides that transfer of an enterprise or a part thereof is not deemed to be supply. This provision is based on the regulation of transfer of enterprises in the Law of Obligations Act, § 180–185. Transfer of a single property by way of nonmonetary contribution is not a tax-free transaction but an ordinary sale of property; exempt transaction is only transfer of an enterprise as a pool of assets. In order to prevent problems it is advisable for a natural person to terminate activity as sole proprietor after transferring the family enterprise and delete himself from the register of taxable persons, because then the family business has been transferred as whole and this is evidenced by termination of activity as sole proprietor. This helps to avoid the situation where transfer of assets is exempt from income and social tax but not from value-added tax. It should be clearly taken into consideration that a sole proprietor who is a taxable person should first delete himself from the register of taxable persons for VAT and then terminate business and file a relevant application with the commercial register, otherwise the termination involves tax liability.

Pursuant to the Law of Obligations Act, subject to transfer may an enterprise or a part of an enterprise which is an organisational whole. In general, an enterprise of a sole proprietor cannot be divided into organisationally whole parts because although economic activities are different (e.g. animal husbandry and grain growing), the assets used for economic activity are usually the same. To simplify transfer of enterprises their economic activities should be registered separately in the business register. Pursuant to the Commercial Code, a sole proprietor has an obligation to register different enterprises separately in the commercial register, whereas the traditionally related economic activities are not registered separately and registration of some parts separately may be confusing. For example, one and the same plot of land is used for growing crops, grazing and to build a barn for fodder storage on.

Transfer of property to a company is tax exempt only for a natural person who has been registered as a sole proprietor, i.e. sole proprietor may not terminate business before the transfer process is finished. Otherwise the property will go first in connection with termination of business into personal consumption of the natural person, which involves income and social tax liability immediately. When a sole proprietor who is liable to value added tax terminates business he shall delete himself from the register for persons liable to value added tax.

Upon transfer of a family enterprise a free form contract should be concluded, which contains a detailed list of assets to be transferred, including quantity and monetary value at the time of transfer. For a family enterprise with accrual accounting financial statements (balance sheets), which show the family enterprise's assets and their sources, serve as the basis for transfer. Fixed assets are reported in the balance sheet in fair value deducting calculated depreciation of fixed assets from their original cost. Sole proprietors who use cash based accounting are required to draw up a balance, which should be based on family undertaking's assets and inventory of their sources. Income tax forms for declaring business income of a natural person, where the cost of fixed assets has been reported in the year of acquisition, assist to identify fixed assets. Information on fixed assets can be checked by a sole proprietor who is registered as a person liable to value added tax on the VAT form in which an undertaking should separately report the amount of VAT paid upon purchase of fixed assets. Natural person's income tax return and VAT form give information on the acquisition cost of fixed assets, not on depreciation of fixed assets, however. Upon transfer of an enterprise's fixed assets fair value of each specific item of fixed assets should be identified at the moment of transfer. Sales offers of fixed assets, expert assessments, and where necessary, auditors' assistance can be used for that purpose.

Complications in transfer of a sole proprietor's business can be caused also by that the sole proprietor and natural person is one and the same person, she/he is married and they have joint property with the spouse. The Supreme Court claimed in the case 3-2-1-127-13 that property acquired by spouses during the marriage is their joint property. This applies to immovables and immovables acquired as a result of transactions by one spouse regardless of whether the immovable property is entered in the land register in the name of both spouses or not; principally similar is the acquisition of properties into spouses' joint property, pursuant to the current Family Law Act. Sole proprietorship does not create a new subject of law by the side of the sole proprietor, and does not automatically change the proprietary relations, including marital proprietary relationship. In case there is no marital property contract, the sole proprietor's property written off during the marriage is part of joint property. In case one spouse has used the joint property at his/her discretion it is not possible for the other spouse to disclaim solidary liability for debts incurred because pursuant to the Family Law Act § 18, the spouses are solidary obligees. It should be certified whether the property is separate property or joint property and the certifying documents should be legible. If the spouse of a sole proprietor pays no attention to the spouse's business, it is almost impossible for him/her to escape solidary liability in the event of the sole proprietor's bankruptcy.

If a natural person who is simultaneously a sole proprietor dies and there is no marital property contract, then the property written off as business expense as well as personal property is included among the joint property. A problem arises when someone from family wants to continue with business, but the surviving spouse does not. In that case, she/he shall pay the tax liability from his/her share like all other successors who won't continue in the business. § 37 (4) of the Income Tax Act provides that if the acquisition cost of property has been deducted from the business income, then the market price

of the property is included in the business income upon taking property into personal use. If the sole proprietor was or is liable to value added tax, this may involve liability to pay value added tax pursuant to the Value-Added Tax Act § 2 (6) or § 29 (10). Taxation should be based on the market price of the property as of the termination of business or date of taking into personal consumption.

If the property of a sole proprietor used in business is separate property and no marital property contract has been concluded, it is complicated to distribute the joint property from business acquired during marriage. A married natural person who wants to become a sole proprietor should enter into a marital property contract prior to becoming an entrepreneur. If there is no marital property contact, it would be reasonable that the property that had been in personal use and not been shown in business, remains with the spouse. In the case of succession, the successors have to divide business related income and costs, which may be complicated. Possible liability to pay value-added tax should be considered, which should be paid from property transferred into personal use.

Determination of types of income is the issue of choice between the contracting parties. It is enough that a person registers himself as an undertaking and then he may show all income as business income. If a sole proprietor finds that the company form is more beneficial to him, it is sufficient for starting a company. The equality principle arising from the first sentence of section 1, § 12 of the Family Law Act demands that all persons in a similar situation were treated equally. A natural person and a legal persona cannot be in an equal situation because legal person is an abstraction.

Hence, transfer of a family enterprise is a regular transaction under the law of obligations, which does not involve problems to transferee in case both parties are registered as companies. On the other hand, problems may arise in transfer of a family enterprise of a sole proprietor when property is taken into person use or in case of failure to fulfil contract conditions.

Conclusions

The paper described briefly transfer of enterprises and some related judicial decisions. Judicial decisions concerning family enterprises are missing in Estonia. In other countries, achieving of the same or different results as the theoretical background is the main contribution to the theory. On the basis of past research it can be said that differences between family enterprises are caused by long family traditions and orientation to value.

More attention should be paid to family business education and the subject should be included in a curriculum or then the entrepreneurship subject volume should be enlarged because the first generation of family entrepreneurs have started handing their family business over to the successors; therefore it is in every way justified to make respective amendments to study programmes in order to teach family

entrepreneurship as a separate subject rather than read during an hour or two the specific features of enterprise transfer as a part of entrepreneurship course.

The research findings allow concluding that the wish to operate in one or several areas of activity during a long period and become a family enterprise with long traditions with well-developed family business culture is dominating among family entrepreneurs.

In Estonia, family enterprises are being transferred to the second generation, which is a long process and demands balanced preparation. There are several different stages in the development of family enterprises: at the beginning a business is managed only by the head of family; then he/she starts training him/herself and then the successors; simultaneously he/she has to develop the family business. It should not be forgotten that a family entrepreneur needs to have confidential relations with the successors, only then „he can transfer management with peace of mind“. Successors should have an opportunity to participate in day-to-day processes of the family business, family business owner must „slacken the reins“ and allow successor to manage by himself; hence the founder of family business should be able to delegate tasks to successors and not interfere constantly. Family entrepreneur must trust other family members and especially the person he wants to hand management down to in the future. Proper management transfer is one of the preconditions of longevity of a family business.

Increasing awareness of the importance of family business culture in family enterprises will contribute to development and survival of family enterprises in a longer perspective. Family entrepreneurship has been thriving in recent years, most of all in rural areas. The most frequently used legal form is sole proprietorship as the simplest form of entrepreneurship. In Estonia guidelines for transferring a business of a self-employed family should be formulated and legal regulations should be introduced to avoid ill-intentioned transfer of enterprises

Other research should analyse the process of transferring family businesses through various case studies.

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PEREETTEVÖTTE ÜLEANDMISE VÕIMALUSTEST EESTIS

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Sissejuhatus

Ettevõtte kui majandusüksuse üleandmine on ettevõtjatele õigusaktide erinevate sätete tõttu keeruline. Veelgi keerulisem on see, kui soovitakse üle anda pereettevõtet. Pereettevõtet võib üle anda nii, et antakse üle osaluse staatus, kuid ka selliselt, et antaks üle terviklik ettevõtte. Osalust saab üle anda erinevates äriühingutes, kuid füüsilisest isikust ettevõtja peab üle andma majandusüksuse terviklikult või siis andma majandusüksuse äriühingusse saamaks seal osaluse. Pereettevõtjatele tekitab selline üleminek raskusi, kuna soovitakse anda järeltulijale üle tehtu, samas tekib füüsilisest isikust pereettevõtjal liigne maksukoormus, sest soovides lõpetada enda nimel ettevõtlustegevus, peab ta tasuma ettevõtte vara väärtuselt tulu- ja sotsiaalmaksu.

Teemal on aktuaalne, kuna taasiseseisvumisajal alustanud pereettevõtjad on eas, kus soovitakse anda pereettevõtte edasi järglastele. Pereettevõtte on majandusüksus, mis kuulub pereettevõtjale. Eestis ei ole õigusaktides defineeritud pereettevõtte ja pereettevõtja mõistet. Defineeritud on ettevõtja ja ettevõtte mõiste mitmes õigusaktis, kuid ka nende tõlgendamisel esineb mõningaid erisusi. Eestis saab pereettevõtjaks olla äriühing, milles enamusosalus on pereliikmetel või siis füüsilisest isikust ettevõtja, kes on ettevõtlustegevusse kaasanud pereliikmeid (Kirsipuu 2013).

Probleemiks on see, et pereettevõtte üleandmisega võib kaasneda maksukohustus, mis seab pereettevõtte jätkusuutlikkuse küsitavaks. Eesmärgiks on hinnata pereettevõtte üleandmise võimalusi.

Ettevõtte üleandmine

Paljud pereettevõtjad annavad pereettevõtte üle ja seejärel ootab neid ebameeldiv maksukohustus. Et selliseid situatsioone vältida peab enne pereettevõtte üleandmist tutvuma erinevate õigusaktide sätetega ning alles siis valima välja õige strateegia pereettevõtte üleandmiseks. Ettevõtte üleandmisel Eestis ei tohi pelgalt lähtuda Võlaõigusseadusest, peab arvestama Tulumaksuseaduse ja Käibemaksuseaduse sätetega. Mõnel juhul tuleb võtta arvesse veel Maksukorralduse seaduses, Äriseadustikus, Pärimisseaduses, Perekonnaseaduses ja Sotsiaalmaksuseaduses sätestatud.

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Ettevõtte võõrandamisel maksustatakse tehinguga teenitud kasum, kuid kui toimub ühinemine, siis sellist tegevust tulumaksuga ei maksustata (Lehis 2013). Võimalik on ettevõtte üleminek pärimise teel, kui pärija on pärandi (ettevõtte) vastu võtnud, ei saa ta sellest enam loobuda (Pärimisseadus, §116 lg 2). Pärandi vastuvõtmisel lähevad pärijale üle kõik õigused ja kohustused ning ta peab kohustused täitma oma vara arvelt, kui pärandvarast ei piisa kohustuste täitmiseks (Pärimisseadus, §130).

Ettevõtte üleandja ja vastuvõtja peavad olema maksukohustuslased. Ettevõtte üleandmisel lähevad vastuvõtjale üle järgmised õigused ja kohustused (Maksukorralduse seadus § 31 lg 1):

- maksukohustus (tasuda nõutavad maksusummad);
- kinnipidamiskohustus (pidada kinni ja tasuda kinnipeetav maksusumma);
- tagastusnõue (õigus saada tagasi enammakse või rohkem tasutud maksusumma);
- vastutuskohustus (kohustus tasuda maksuvõlg);
- kõrvalkohustus (kohustus tasuda intress, sunniraha, asendustäitmise kulu).

Ettevõtte üleminekul on vajalik ettevõtte koosseisu määratlemine, sest ettevõtte üleminek toob kaasa kõikide ettevõttele kuuluvate kohustuste ülemineku sõltumata sellest, kas omandaja nende ulatust ja sisu teadis või mitte. Lepinguliste kohustuste üleminekuks ei ole vaja saada nõusolekut võlausaldajalt (Varul et al. 2006). See, et üleantava ettevõtte nimel on sõlmitud lepinguid ja vastuvõtja jätkab lepinguliste kohustuste täitmist, viitab otseselt sellele, et tegemist on reaalse ettevõtte ülemineku, mitte fiktiivse tehinguga, mille arvel soovitakse varjata käibe tekkimist (Künnapas 2011). Eestis on nii mõnigi ettevõtja kohustustega koormatud ettevõtte vormistanud uue ettevõtte nimele selleks, et võõrandamisega ei kaasneks käibemaksukohustus. Reaalselt muutub ettevõtja ärinimi, omanikering jääb samaks ning üleandmist Võlaõigusseaduse mõistes ei ole toimunud. Eesti Riigikohtu Halduskollegium on otsuste tegemisel lähtunud ettevõtte osa ülemineku hindamisel järgmisi kriteeriumeid (Supreme...2011):

- ettevõtte tüüp;
- kinnisasja, tootmisvahendite ja muude materiaalsete vahendite üleminek;
- immateriaalsete vahendite ja organisatsooni kui terviku üleminek;
- kliendi- ja tarnijasuhete jätkuvus;
- üleminekule eelneva ja sellele järgneva tegevuse sarnasus;
- majandustegevuse jätkuvus;
- personali säilitamine;
- ettevõtja omandaja varasem tegevus;
- üleandja ja omandaja tegevuskoht;
- juhtorganite liikmete kattuvus.

Ettevõtte ülevõtjal on solidaarvastutus õigusjärgsete kohustuste ees, mis on tekkinud enne ettevõtte üleminekut ning on üleminekuajaks muutunud sissenõutavaks. Võlaõigusseaduse § 183 sätestab üleantava ettevõtte võlalaudajatele täiendava kaitse ja garantii. Äriniime, mis üldreeglina kuulub ettevõtte koosseisu, üleminek on analoogiline õiguste üleminekuga (Võlaõigusseadus, § 184).

Ettevõtjatel puudub tulumaksukohustus sellisel juhul, kui nad ei võta ettevõttest raha välja isiklikuks tarbeks. Tulumaksuga maksustatakse füüsilise isiku tulu. Tulumaksuseaduse kohaselt ei kuulu tulumaksustamisele tulu osaluse (aktsiad, osad, osamakse, sissemaks) vahetumisest äriühingute ühinemise või ümberkujunduse käigus ja tulu äriühingu osaluse suurendamisest või omandamisest mitterahalise sissemaksuga (Tulumaksuseadus § 15 lg 4 punktid 9 ja 10). Füüsilisest isikust ettevõtjale, kes deklareerib isiklikku ja ettevõtlustulu koos, on tehtud tulumaksusoodustus vastavalt Tulumaksuseaduse § 35 lg 7 alusel järgmiselt: isiklikku tarbimisele ei loeta füüsilisest isikust ettevõtja ettevõtte hulka kuulunud vara üleandmist või pärandamist isikule, kes jätkab ettevõtte tegevust. Füüsilisest isikust ettevõtja ettevõtlusest isiklikku tarbimisele võetud vara kajastatakse ettevõtja ettevõtlustuluna vara turuhinnas (Tulumaksuseadus § 35 lg 3-5) ning vara kuulub maksustamisele.

Juhul, kui füüsilisest isikust ettevõtja annab üle ettevõtte teisele ettevõtjale, siis ta annab üle ettevõtte saamata selle eest tasu. Mitterahalise sissemaksuga omandatud osalus on võrdne mitterahaliseks sissemakseks olnud vara soetusmaksumusega. Juhul kui mitterahaliseks sissemakseks olnud asja või varalise õiguse soetusmaksumus on eelnevalt maha arvatud füüsilisest isikust ettevõtja ettevõtlustulust ja seda ei ole maksustatud isiklikku tarbimisele võetud varana, loetakse osaluse soetusmaksumuseks null (Tulumaksuseadus § 38 lg 5¹). Osaluse hilisemal võõrandamisel või vara vastuvõtja likvideerimisel maksustatakse saadud tulu tulumaksuga, sellisel juhul ei kaasne enam sotsiaalmaksukohustus. Tulumaksukohustus on osaluse võõrandaja või vara likvideerija kohustus, mitte enam mitterahalise sissemaks teinud isiku kohustus. Füüsilisest isikust ettevõtja igaaastaselt ettevõtlustulust tuleb tasuda nii tulu- kui ka sotsiaalmaks. Ettevõtlustulu sotsiaalmaksuga maksustamise periood on kalendriaasta (Sotsiaalmaksuseadus § 8 lg 2). Lähtuvalt eeltoodust saab füüsilisest isikust ettevõtja ettevõtluses kasutatud vara maksuvabalt tasuta üle anda ükskõik millisele füüsilisele või juriidilisele isikule. Tingimuseks on, et vara omandaja peab olema registreeritud ettevõtja (kas siis füüsilisest isikust ettevõtja või äriühing). Seda, kas vara omandaja võib olla pikemat aega tegutsev või alles loodud ettevõtja, ei ole õigusaktidega määratletud. Pereettevõtte jätkusuutlikkus sõltub pereliikmete omavahelistest suhetest ning pereettevõtte ülemineku lihtsusest, sest kui pereettevõtte üleminekuga kaasneb maksukoormuse tõus, siis paljud pigem loobuvad pereettevõtte üleandmisest ja loovad uue pereettevõtte, seega pereettevõttel on taas esimene põlvkond.

Maksuhaldur jälgib ettevõtte üleminekut ja kontrollib selle õigsust, senini on Eestis ettevõtja pöördunud kohtusse vaidlustamaks Maksu- ja Tolliameti maksuotsuseid. Eesti kohtupraktika tugineb Euroopa kohtupraktikale.

Analüüsidest teistes riikides läbiviidud pereettevõtte üleandmise kohta teostatud uurimistööid saab väita, et Poolas on pereettevõtte üleandmise protsess jõudnud kriitilisse staadiumisse, kuna esimene pereettevõtja põlvkond on eakas (20% pereettevõtjatest on ületanud pensioniea), neil puudub oskus valutult pereettevõtlust üle anda (Koladkiewicz 2012). Teine põlvkond samas vajab pereettevõtte vastuvõtuks abi ja kuna seda ei ole pakutud, siis 10% esimese põlvkonna pereettevõtjaid lõpetas pereettevõtluse esimeses põlvkonnas (Koladkiewicz 2007). Kosovas ja Serbias on esimeses põlvkonnas lõpetanud pereettevõtluse need pereettevõtjad, kes ei ole peretraditsioone väärtustanud (Barbato 2012).

Erinevatest uuringutest on selgunud, et pereettevõtte on esimeses põlvkonnas jätkusuutlik, teises põlvkonnas on nendest edukad vaid 30%, kolmandas 10...15% (Aronoff 1999; Kets de Vries 1993; Ward 1987). Samas kui pereettevõtet osatakse üle anda professionaalselt, siis järgmises põlvkonnas ei ole ohtu pereettevõtlustraditsiooni katkemiseks (Fang et al. 2012). Argentiina, USA, Egiptuse, Serbia, Kosova, Prantsusmaa, Horvaatia ja Kuvaidi pereettevõtetest 19% on jõudnud kolmanda põlvkonnani, ettevõtlustegevust juhib kuni kaks pereliiget (Lussier et al. 2012). Teoreetilised lähtekohad pereettevõtte üleandmise kohta kinnitavad, et pereettevõtte jätkusuutlikkuse tagab pereettevõtte dünaamiline areng ja tugev pereettevõtte organisatsioonikultuur ning pereettevõtte üleandmisest teadmiste olemasolu. Põlvkonnavahetusega seotud probleemide aktuaalsus pereettevõtjate seas suureneb, pereettevõtte üleandmisele järeltulevatele põlvkondadele on hakatud pöörama tähelepanu, oluliseks peetakse omandi jagamisel järjepidevust ja peretraditsioone, sest iga uus põlvkond saab kaasa esivanemate pärandi (Tormakangas 2005). Erinevad põlvkonnad võivad edasisele pereettevõtte arengule ja strateegiale mõjuda erinevalt (Brun de Pontet 2008).

Koos esimese põlvkonna pereettevõtjate vananemisega muutuvad aktuaalseks küsimused: mis saab pärast nende kõrvaletõmbumist; kas järeltulija on perekonnast; kuidas järeltulijale juhtimine üle anda, mitte ainult ametikoha üleandmine vaid oskuste, sidemete, juhirolli ja omandi üleandmine (Kirsipuu 2007). Põlvkondadevahetused on edukamad siis, kui järeltulija on pereettevõtlusest huvitatud, kuid ainult tahtest on vähe, peab omandama erinevaid ettevõtlusalaseid oskusi (Brun de Pontet 2008). Kui lapsed soovivad jätkata vanemate alustatud, siis antakse teadmised ja oskused edasi lastele (Littunen 2001; Hautala 2006). Cuervo-Cazurra (2006) järeltas, et pereettevõtted, kus on toimunud põlvkonnavahetused peresiselselt (vanemalt lapsele, mitte lapselapsele või mõnele muule pereliikmele) on tõhusamad ja nende majandustegevus tulevikus on kasumlikum, samas tõdes ta, et erinevates majandustingimustes tuleb kindlasti põlvkonnavahetust järeltulijatele jätkuvalt uurida.

Tulemused

Kui võrrelda teoreetiliste lähtekohtade sobivust Eesti tingimustes, siis saab Eesti pereettevõtjate seas läbi viidud uurimistööst lähtuvalt väita, et pereettevõtte strateegiline juhtimine ja organisatsioonikultuuri väärtustamine tagab pereettevõtte dünaamilise arengu, pereettevõtted on suutelised eksisteerima edukalt kuni põlvkonna vahetuseni. Eestis on vähesel määral toimunud pereettevõtte esimesest põlvkonnast teisele üleandmist, kuid nende talude, mis on üle antud lastele, ettevõtlustegevus on tulemuslik, samas talude, mis on üle antud venna- või õelastele, ettevõtlustegevus ei ole niivõrd tulemuslik.

Teoreetilised lähtekohad Eesti tingimustes ei kattu sellega, et pereettevõtte erisus sõltub esimeses põlvkonnas sellest kas töötajad on pereliikmed või mitte. Pereettevõtte dünaamiline areng ja organisatsioonikultuuri jätkuv väärtustamine tagatakse esimeses põlvkonnas sõltumata töötajatest. Pereettevõtte stabiilsus sõltub pigem sellest, kas pereettevõtjatel on koostatud strateegilised plaanid ja väärtustatud organisatsioonikultuur.

Kui tegemist on pereettevõtjaga, kes on äriühinguna end ettevõtjana registreerinud, siis pereettevõtte üleminekul probleeme ei teki. Üle antakse kogu pereettevõtte või konkreetne pereettevõtte osa. Üle antakse käibe- ja põhivara, kohustused ja omakapital sh kaubamärk, kliendid, pankades olevad pangakontod, hoiused jms. Probleemiks on füüsilisest isikust ettevõtja ettevõtte üleminek sellisel juhul kui üleandja on pahatahtlik. Pahatahtlikkus saab tekkida sellisel juhul, kui pereettevõtja perekondlikud sidemed on katkenud või üleandmisprotsessiga kaasnevad lahkkelid. Näiteks soovitakse omada kontrolli üleantud pereettevõtte rahaliste ressursside osas kui on üleandmise hetkel laekumata nõudeid. Füüsilisest isikust ettevõtja ettevõtte üleminekul läheb üle kõik sarnaselt äriühinguga, kuid pangakontodest vaid erikonto. Vähesed füüsilisest isikust ettevõtjad on kasutusele võtnud erikonto (pangakonto, kuhu füüsilisest isikust ettevõtja saab koguda pikaajaliseks investeringuks raha ilma kaasneva tulumaksudohustusega), praktikas kasutavad nad ettevõtlustegevuses eraisiku pangakontosid. Eraisiku pangakontod ei kuulu ettevõtte üleminekul üleandmisele ning ülevõtja saab vaid heauskselt loota, et ettevõtja peale üleminekut kannab enda isiklikule pangakontole laekunud ettevõtlusega seotud summad teisele ettevõtjale. Seega peab füüsilisest isikust ettevõtja ettevõtte üleminekul arvestama võimalikkusega, et üleantavale nõuded osutuvad mitte laekuvaks. Füüsilisest isikust ettevõtja ettevõtte üleminek vormistatakse samaselt äriühingu üleminekuga võlaõigusliku lepinguna, kuid suure tõenäosusega ei hakka ülevõtja füüsilisest isikust ettevõtja kui üleandja lepingukohustuste mitte täitmist vaidlustama ning ülevõtjal võib jääda saamata rahaline sissetulek, mis võib seada ülevõetud pereettevõtte jätkusuutlikkuse küsitavuse alla.

Tulumaksuseaduse kohaselt peab füüsilisest isikust ettevõtja deklareerima ka selle tulu, mis on ettevõtlustegevusest laekunud peale ettevõtjana tegevuse lõpetamist. Maksuhalduri seisukohalt on olukord selge, tulu deklareerimata ja maksukohustus täitmata endise ettevõtja poolt ei jää. Kuid samas tekib probleem ettevõtte vastuvõtjal, sest temale ei laeku üleantud ettevõtja nõuded, kuid samas kõik üleantud ettevõtte kohustused tuleb tal täita.

Samas tekib füüsilisest isikust ettevõtja ettevõtte üleminekul maksustamise seisukohalt takistusi, näiteks käibemaksukohustuslastest kodus tegutsevatel füüsilisest isikust ettevõtjal on ettevõtte üleandmisega täiendav probleem. Käibemaksuseaduse § 4 lõike 2 punkt 1 sätestab, et mittekäibena käsitletakse ettevõtte või selle osa üleandmist. Antud säte tugineb VÕS § 180 - 185 sätestatud ettevõtte ülemineku regulatsioonile. Üksiku vara üleandmine mitterahalise sissemaksena ei ole maksuvaba toiming, vaid tavaline vara müük, maksuvaba toiminguks on vaid ettevõtte kui vara kogumi üleandmine. Et vältida täiendavate probleemide teket on soovituslik füüsilisel isikul peale pereettevõtte üleminekut tegevus füüsilisest isikust ettevõtjana lõpetada ja maksukohustuslaste registrist end kustutada, sest siis on üle antud pereettevõtte tervikuna ning seda tõestab füüsilisest isikust ettevõtjana tegevuse lõpetamine. Nii välditakse olukorda, kus vara üleandmine on tulu- ja sotsiaalmaksuvaba, aga ei ole käibemaksuvaba. Kindlasti tuleb arvestada sellega, et käibemaksukohustuslastest füüsilisest isikust ettevõtja peab esmalt kustutama end käibemaksukohustuslaste registrist ja alles seejärel lõpetama ettevõtlustegevuse ning esitama sellekohase avalduse äriregistrisse. Tegevuse lõpetamisega ilma vormistamata kaasneb maksukohustus.

Vara äriühingule üleandmine on maksuvaba ainult füüsilisest isikust ettevõtjana registreeritud füüsilisele isikule st enne üleandmise lõpetamist ei tohi FIE ettevõtlustegevust lõpetada. Vastasel korral läheb vara esmalt seoses ettevõtluse lõpetamisega füüsilise isiku isiklikku tarbimisse, kuid sellega kaasneb koheselt tulu- ja sotsiaalmaksukohustus. Käibemaksukohustuslastest FIE ettevõtlustegevuse lõpetamisel peab end käibemaksukohustuslaste registrist kustutama.

Pereettevõtte üleminekul tuleb koostada vabas vormis leping, kuhu on märgitud üleantava ettevõtte vara detailne nimekiri, milles on vara kogus ja üleandmishetke rahaline väärtus. Tekkepõhise raamatupidamisarvestusega pereettevõtjatel on vara üleandmise aluseks raamatupidamislik aruanne (bilanss), millest kajastub pereettevõtja vara ja selle allikad. Põhivara kajastub bilansis õiglases väärtuses, põhivara esialgselt maksumusest on maha arvatud põhivara arvestuslik kulum. Kassapõhise raamatupidamisarvestusega füüsilisest isikust ettevõtjatest pereettevõtjatel on vajalik koostada samuti bilanss, mille koostamise aluseks on pereettevõtja vara ja selle allikate inventuur. Põhivara olemasolu väljaselgitamisel on abiks füüsilise isiku poolt esitatud tuludeklaratsiooni ettevõtlustegevuse vormid, millel on ettevõtja põhivara soetamisaastal teada andnud põhivara maksumuse. Informatsiooni ostetud põhivara kohta on võimalik käibemaksukohustuslasena registreeritud füüsilisest isikust ettevõtjal kontrollida esitatud käibemaksu deklaratsioonidelt, millel ettevõtja on kohustatud eraldi välja tooma põhivara

soetamisel tasutud käibemaksu summa. Füüsilise isiku tuludeklaratsioonilt ja käibemaksu deklaratsioonilt saab informatsiooni põhivara soetusmaksumuse kohta, kuid põhivara kulumi kohta mitte. Ettevõtte põhivara üleandmisel tuleb välja selgitada iga konkreetse põhivara õiglane väärtus ettevõtte üleandmise hetkel. Selleks saab kasutada kasutatud põhivara müüjate müügipakkumisi, ekspertide hinnanguid ja vajadusel audiitorite abi.

Komplikatsioone võib füüsilisest isikust ettevõtja ettevõtte üleminekul tekkida veel seetõttu, et füüsilisest isikust ettevõtja ja füüsiline isik on üks ja sama inimene, ta on abielus ja neil on abikaasaga ühisvara. Riigikohus kinnitas kohtuasjas 3-2-1-127-13, et abielu kestel abikaasade omandatud vara on abikaasade ühisvara. See kehtib ühe abikaasa tehingute tulemusena omandatud kinnisasjade ja vallasvara kohta, sõltumata sellest, kas kinnisasi kantakse kinnistusraamatus mõlema abikaasa nimele, põhimõtteliselt sarnane on abikaasade ühisvarasse vara omandamine kehtiva perekonnaseaduse järgi. Kui ei ole abieluvaralepingut, kuulub abielu ajal füüsilisest isikust ettevõtja ettevõtluse kuldesse kantud vara ühisvara hulka. Kui ettevõtjast abikaasa on ühisvara oma äranägemise kohaselt kasutanud, ei ole võimalik võlgade tekkides abikaasal solidaarvastutusest vabaneda, sest perekonnaseaduse § 18 järgi on abikaasad solidaarvõlausaldajad. Kui füüsilisest isikust ettevõtja abikaasa tema tegemistele tähelepanu ei pööra, on füüsilisest isikust ettevõtja pankroti puhul praktiliselt võimatu abikaasal solidaarvastutusest pääseda.

Kui füüsilisest isikust ettevõtja ettevõtluses kasutatav vara on lahusvara ning pole sõlmitud abieluvaralepingut, on abielu jooksul pereettevõtlusest tekkinud ühisvara jagamine keeruline. Abielus olev füüsiline isik, kes soovib hakata füüsilisest isikust ettevõtjaks, peaks enne ettevõtjaks hakkamist sõlmima abieluvaralepingu. Kui seda ei ole sõlmitud, siis oleks mõistlik, et isiklikus kasutuses olnud vara, mis ei ole ettevõtluses kajastatud, jääb abikaasale. Pärimise korral tuleb ettevõtlusega seotud kulu ja tulu pärijatel jagada, see võib osutada keerukaks. Arvesse tuleb võtta võimalikku käibemaksukohustust, mida tuleb tasuda isiklikku tarbimisse läinud varalt.

Seega on pereettevõtte üleminek tavapärane võlaõiguslik tehing, millega ei kaasne ülevõtval pereettevõtjal probleeme siis kui mõlemad pooled on end äriühinguna registreerinud. Kuid füüsilisest isikust pereettevõtja pereettevõtte üleminekul võivad tekkida probleemid kas siis vara isiklikku tarbimisse võtmisel või lepingutingimuste mitte täitmisel.

Kokkuvõte

Artiklis anti ülevaade ettevõtte üleminekust ning teemakohastest kohtulahenditest. Pereettevõtte ülemineku kohta kohtulahendid Eestis puuduvad. Teistes riikides teoreetiliste lähtekohtadega samade või erinevate tulemuste saavutamine on peamiseks panuseks teooriasse. Läbiviidud uurimistööde alusel saab väita, et pereettevõtjate erinevused on tingitud juba ainuüksi pikaajalistest peretraditsioonidest ja väärtustele orienteerimisest.

Eestis on toimumas pereettevõtete üleminek teisele põlvkonnale, mis on pikaajaline protsess ja nõuab tasakaalustatud ettevalmistust. Pereettevõtete arengus on mitu erinevat etappi, esmalt juhib pereettevõtet vaid perekonnapea, seejärel asub ta koolitama ennast ja siis juba järeltulijat, samaaegselt peab ta arendama pereettevõtet. Unustada ei tohi seda, et pereettevõtja peab looma usalduslikud sidemed järeltulijatega, alles siis „võib ta rahuliku südamega juhtimise üle anda“. Järglastele peab andma võimaluse osaleda igapäevastes pereettevõtte protsessides, pereettevõtja peab „ohjad lõdvemaks laskma“ ja järeltulijal lubama ise juhtida, seega peab asutajast pereettevõtja suutma delegeerida ülesandeid järglastele ja ise mitte sugugi pidevalt ettevõtlustegevusse sekkuma. Pereettevõtja peab usaldama teisi pereliikmeid ja eriti seda, kellele soovitakse tulevikus juhtimine üle anda. Õige juhtimise üleandmine on üheks pereettevõtete pikaealisuse tingimuseks.

Järgmised uurijad peaksid analüüsima pereettevõtte üleandmisprotsessi läbi erinevate juhtumiuuringute.