

FEATURES OF THE RESPONSIBILITY FOR VIOLATIONS OF TAX LEGISLATION IN UKRAINE AND THE COUNTRIES OF THE EUROPEAN UNION: THE QUESTION OF GUILT

ОСОБЛИВОСТІ ВІДПОВІДАЛЬНОСТІ ЗА ПОРУШЕННЯ ПОДАТКОВОГО ЗАКОНОДАВСТВА В УКРАЇНІ ТА КРАЇНАХ ЄВРОПЕЙСЬКОГО СОЮЗУ: ПИТАННЯ ВИНИ

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A particularly difficult issue in the study of the institution of responsibility in tax law is the question of the guilt of business entities – taxpayers. Since taxes are one of the financial instruments used to build relationships between economic entities and the state, the study of the issue of taxpayers' guilt is particularly relevant. Taxpayers are slowly adapting to changes in tax legislation that came into effect on January 1, 2021. One of the most discussed and radical novelties is the official legalization of the institution of guilt as a mandatory element of certain tax offenses and, accordingly, a necessary condition for holding taxpayers to financial responsibility. The Supreme Court has repeatedly emphasized that taxpayers exercise reasonable care, although the risks of choosing an unscrupulous counterparty lie with them. However, in practice, a situation often arises when regulatory authorities hold business entities – taxpayers to account for violations of tax legislation, without paying attention to the presence of guilt in the latter's actions or inactions. Thus, the introduction of the legal construction of guilt into the tax legislation of Ukraine significantly increased the quality of the legislative construction of the composition of the tax offense. However, the legal construction of the guilt of each of the mandatory elements of the composition of a tax offense must contain clear criteria of understanding, since the composition of the offense is the basis for bringing a person to financial responsibility.

However, in practice, in Ukrainian realities, questions of qualification of the actual act will still arise. In addition, taking into account the stable and clear vector of Ukraine's foreign policy, it is necessary to harmonize the tax law of Ukraine with the law of the European Union, including in the part of the legal structure of the composition of the tax offense and the institution of guilt.

Key words: guilty, guilt cognitions, tax evasion, tax compliance, tax legislation.

Особливо складним питанням у дослідженні інституту відповідальності в податковому праві є питання вини суб'єктів господарювання – платників податків. Оскільки податки є одним із фінансових інструментів побудови взаємовідносин між суб'єктами господарювання та державою, дослідження питання вини платників податків є особливо актуальним. Податківці поступово адаптуються до змін у податковому законодавстві України, що набули чинності з 1 січня 2021 року. Однією з найбільш обговорюваних і радикальних новел є офіційне узаконення інституту вини як обов'язкового елемента окремих податкових правопорушень і, відповідно, необхідна умова притягнення платників податків до фінансової відповідальності. Верховний Суд неодноразово наголошував, що платники податків проявляють розумну обережність, хоча ризики вибору недобросовісного контрагента лежать на них самих. Однак, на практиці досить часто виникає ситуація, коли контролюючі органи притягують суб'єктів господарювання – платників податків до відповідальності за порушення податкового законодавства, не звертаючи уваги на наявність вини в діях чи бездіяльності останніх. Таким чином, впровадження в податкове законодавство України правової конструкції вини значно підвищило якість законодавчої конструкції складу податкового правопорушення. Проте правова конструкція вини кожного з обов'язкових елементів складу податкового правопорушення повинна містити чіткі критерії розуміння, оскільки склад правопорушення є підставою для притягнення особи до фінансової відповідальності. Проте на практиці в українських реаліях питання кваліфікації фактичного діяння все одно виникатимуть. Крім того, враховуючи стабільний та чіткий вектор зовнішньої політики України, необхідно гармонізувати податкове законодавство України з правом Європейського Союзу, у тому числі в частині юридичної конструкції складу податкового правопорушення та інституту вини.

Ключові слова: вина, усвідомлення вини, ухилення від сплати податків, дотримання податкового законодавства, податкове законодавство.

Formulation of scientific problem and its significance.

A particularly difficult issue in the study of the institution of responsibility in tax law is the question of the guilt of business entities – taxpayers. Since taxes are one of the financial instruments used to build relationships between economic entities and the state, the study of the issue of taxpayers' guilt is particularly relevant. Taxpayers are slowly adapting to changes in tax legislation that came into effect on January 1, 2021. One of the most discussed and radical novelties is the official legalization of the institution of guilt as a mandatory element of certain tax offenses and, accordingly, a necessary condition for holding taxpayers to financial responsibility. Thus, in practice, quite often there is a situation when control bodies bring economic entities – taxpayers to responsibility for violations of tax legislation, without paying attention to the presence of guilt in the actions or inaction of the latter.

Analysis of research on a scientific problem. Many scientists dealt with issues of legislative regulation of relations in the tax sphere. In the process of analyzing tax relations in Ukraine and EU, we especially studied the works of Dragan O., Helminen M., Karmalita M., Servaas Van Thiel and others.

Formulation of the purpose and objectives of the article.

The purpose of the article is to analyze the specifics of liability for violation of tax legislation in Ukraine and the countries of the European Union (EU), in terms of the institution of guilt.

Presentation of the main material and substantiation of the obtained research results.

According to paragraph 109.1 of Article 109 of the Tax Code of Ukraine, a tax offense is an illegal, culpable (in the cases expressly provided for by this Code) action (action or inaction) of a taxpayer (including persons equated to him), controlling bodies and/or their officials (officials), other subjects in the cases expressly provided for by this Code.

As N. Onishchuk said, in the legal definition of a tax offense according to the Tax Code of Ukraine, such an element of its composition as the subjective side is absent at all. They do not contain instructions on the need for the presence of a subjective party and the specific composition of tax offenses provided for in Art. 117–128 of the Tax Code of Ukraine [1].

Ukrainian scientists and practitioners draw attention to the fact that in judicial practice, «due diligence» was actively used to assess the legality of taxpayers' behavior, regardless of the notification of these concepts in the previously effective tax legislation [2].

From January 1, 2021, a mandatory indication in the tax notice-decision must be a statement of the circumstances regarding the presence of guilt in the actions of the taxpayer, since the Law of Ukraine «On Amending the Tax Code of Ukraine on Improving Tax Administration, Eliminating Technical and Logical Inconsistencies in Tax Legislation»

dated January 16, 2020 № 466-IX updated the concept of guilt in tax law.

To accept the failure to take special, sufficient measures to comply with the established rules and regulations, although there was a special opportunity to take such measures.

It is interesting that it is the tax authority that must prove that the measures taken by the person were not sufficient. In other words, it is tacitly understood that the company has achieved such a principle. To argue otherwise, the IRS must prove that the taxpayer acted unreasonably, in bad faith, and without proper payment.

Establishing guilt in the commission of a tax offense is possible in case of proof of this by the controlling body. That is, the necessary basis for bringing a person to financial responsibility for committing such an offense is the establishment by the controlling body in the cases established by clause 109.3 of Article 109 of the Code of Criminal Procedure of the Code of Criminal Procedure of the payer, which means that the person had and can comply with the rules and regulations established by Code of Criminal Procedure. Article 112 of the Code of Civil Procedure establishes the grounds for which a person is considered guilty: establishing the possibility of a person's compliance with the rules and norms for the violation of which the Code provides for responsibility, but the person's failure to take sufficient measures to comply with them; proving by the controlling authority that the taxpayer acted unreasonably, in bad faith, and without due diligence by performing actions or by allowing inaction for which liability is provided.

A person's guilt in committing a tax offense is evidenced, provided that this is proven by the controlling body, by unreasonable, dishonest and without due diligence actions, provided that the person has the ability to comply with the rules and norms for the violation of which the Code provides for responsibility, but the failure to take sufficient measures to comply with them. Given the legislator's use of the conjunction «and» between the words «unreasonably, in bad faith and without due diligence», it is important to prove all the above circumstances in total, if the payer had the opportunity to behave appropriately. All these three criteria are evaluative concepts, the precise meaning of which must be determined by the results of judicial interpretation [3].

It is necessary to take into account that in this case the legislator formally fixed the criteria that were already applied contextually in judicial practice. In particular, the decision of the Supreme Court of December 17, 2020 in case № 826/6821/13-a stated that due tax due diligence is a legal prerequisite for receiving a tax benefit, which implies that conscientious taxpayers need to take care of preparing the evidence base, which would confirm due diligence when choosing a counterparty. The taxpayer should be guided by due diligence when choosing a counterparty and concluding contracts with him, as the subsequent actual execution of such contracts, earning profit and the right to receive certain preferences depend on this. Although the current legislation provides for freedom in the choice of directions for the implementation of such activity, its form, but entrepreneurial activity is built primarily on the good faith performance by the business entity of its duties, assumed obligations and compliance with the rules of conduct established by the state. One of the manifestations of a business entity's observance of the principle of good faith is reasonable prudence, which is realized, in particular, during the proper and reasonable selection of counterparties. Since business activities are carried out by the business entity at its own risk, in economic legal relations, participants in economic turnover should exercise reasonable prudence, especially considering the purchase of such a specific product as natural gas, since the consequences of choosing an unscrupulous counterparty rest on such participants [4].

The updated concept of guilt in tax law covers circumstances that mitigate a person's responsibility for com-

mitting a tax offense, based on Article 112-1 of the Code of Criminal Procedure: committing an act under the influence of threats, coercion or due to material, official or other dependence; committing an act in the event of a coincidence of grave personal or family circumstances; independent notification by the taxpayer about the offense committed by him, except for the offenses provided for in Articles 123, 125-1 of the Code of Criminal Procedure; other circumstances not provided for by this article of the PKU, which, in the opinion of the supervisory body, mitigate the taxpayer's responsibility. Clause 113.6 of Article 113 of the Criminal Procedure Code also reduced the amount of fines for committing a tax offense by 50% in the presence of at least one mitigating circumstance.

Clause 112.8 of Article 112 of the Code of Civil Procedure established additional circumstances that exempt the taxpayer from financial responsibility, in particular, the commission of an act by a person who acted in accordance with the conclusion of the joint chamber, the Grand Chamber of the Supreme Court, the exemplary case of the Supreme Court regarding the application of the rule of law from which was subsequently withdrawn; as a result of illegal decisions, actions or inaction of regulatory authorities.

Clause 109.4 of Article 109 of the Code of Civil Procedure established responsibility for the commission of tax offenses by controlling bodies regardless of guilt. A taxpayer may be held liable for committing a tax offense if he is not guilty of any of the tax offenses stipulated in Clause 112.1 of Article 112 of the Code of Civil Procedure: alienation of property that is in a tax lien without the consent of the tax authority; failure to submit documents for registration on time; carrying out expenditure operations on the taxpayer's account by a bank or other financial institution before receiving a notification from the relevant supervisory authority; non-notification by natural persons-entrepreneurs of their bank status when opening an account, etc.

Ukraine has recently faced a tendency for narrowing the scope of existing individual rights because the legislator is guided by the financial and economic capacity of the state and seeks to maintain a fair balance between the interests of man, society, and the state. One is put in mind of the well-known postulate of Roman law: *bona fides semper praesumitur, nisi malam fidem adesse probetur* – bona fides is always presumed until malicious intent is proven [5].

Within the European Union, a more sophisticated legal framework aimed at combating tax evasion under the heading of «tax good governance» has also recently been developed. Within the EU, good governance policy covers recent regulatory action on administrative assistance between tax authorities (recovery and valuation assistance and savings tax). Externally, good governance includes various efforts related to EU export standards on transparency and fair tax competition, including through savings tax and anti-fraud agreements with third countries [6].

EU tax law substantially impacts the domestic tax laws of the EU Member States and the way in which those laws should be interpreted and applied. The effect of EU tax law on national legislation is becoming increasingly complex. EU tax law develops rapidly, especially because of the growing number of judgments from the EU Court on direct tax matters. Therefore, regular updates of the book are necessary. The most recent judgments have clarified the many remaining, unclear issues concerning the impact of EU law on direct taxation. This 2021 edition takes into account all judgments of the EU Court on direct tax matters issued by 31 May 2021. These include, for example, *Impressa Pizzarotti* (C-558/19) concerning transfer pricing, *Lexel AB* (C-484/19) concerning interest deduction limitation and tax avoidance, *E* (C-480/19) concerning comparability of a Luxembourg SICAV to a Finnish investment fund and *Société Générale* (C-403/19) concerning the amount of foreign dividend tax credit [7, p. 17].

The Tax Code of Ukraine currently does not define the criteria of good faith, reasonableness and due diligence of the taxpayer. In the absence of a consistent legal consolidation of the concept, features and consequences of bad faith, unreasonable and imprudent conduct of the taxpayer, the efforts of the controlling authority to prevent harm to the public interest due to abuse of rights by taxpayers are discretionary powers; when assessing the actions/inaction of a taxpayer with a «fictitious» counterparty, first of all, one has to assess the degree of involvement of each party in the offense, identify the direction of actions of a particular taxpayer for violating the law, and determine its good faith, reasonableness and due diligence – this requires the use of unconditional and expressly interpreted evidence [5].

The problem of guilt is only one of those that arise in the practice of judicial bodies. So, for example, in the case of *Pop and others v. Romania* of April 2, 2019 (decision on admissibility). The applicants, who had all three purchased second-hand vehicles within EU, complained that they had been required to pay a pollution tax in order to register their vehicles in Romania, in application of an emergency ordinance (OUG no. 50/2008) which had been held to be incompatible with EU law by the Court of Justice of the European Union.

The Court declared the applications inadmissible for failure to exhaust domestic remedies. In the case of two applicants, it noted in particular that the remedy introduced by another emergency ordinance (OUG no. 52/2017), in force

since 7 August 2017, afforded them an opportunity to obtain reimbursement of the pollution tax and payment of the corresponding interest. It also set out clear and foreseeable procedural rules, with binding time limits and the possibility of an effective judicial review. The remedy provided by OUG no. 52/2017 thus represented an effective remedy for the purposes of Article 35 (admissibility criteria) of the Convention. As to the third applicant, he had acknowledged that he had not taken any steps at national level to recover the interest he was claiming (the pollution tax and some of the interest had been refunded following a final ruling by a national court) and did not put forward any argument showing that such an approach would have been ineffective [8, p. 8].

Conclusion. Thus, the introduction of the legal construction of guilt into the tax legislation of Ukraine significantly increased the quality of the legislative construction of the composition of the tax offense. However, the legal construction of the guilt of each of the mandatory elements of the composition of a tax offense must contain clear criteria of understanding, since the composition of the offense is the basis for bringing a person to financial responsibility.

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