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GUILT AS AN ELEMENT OF A TAX OFFENSE

Abstract. The authors substantiate the relevance of the issue under consideration, which is closely related to bringing a taxpayer to justice under the updated version of the Tax Code of Ukraine; from now, it can take place only if there is a set of elements of an offense involving core element – guilt. ***The purpose*** of the article is to analyze the essence and legal regulation of guilt as an element of a tax offense, and the tasks embrace analysis of the concepts and categories, including "guilt", "intent", "unreasonable, dishonest and without due diligence", establishment of a legal basis, which ensures the functioning of the relevant institution, the determination of methodological principles, and the development of recommendations for applying the concept of guilt of a taxpayer for the committed tax offense. ***Research methods:*** the methodological ground of the study is a set of general and special methods used in the science of financial law. ***Results.*** Attention is paid to the conceptual and categorical framework of the institution of responsibility in law, taking into account the peculiarities of taxation. By relying on the analyzed scientific opinions and provisions of normative legal acts, the authors additionally argue that the body of a tax offense consisting of such components as object, actus reus (physical element), subject, mens rea (mental element) comprises features (elements) established by tax law the combination of which allows considering an illegal act as a tax offense. Among the listed features are those that are not absolute. In particular, it refers to the guilt of an act. Considerable emphasis is put on the category of the taxpayer's bona fides. Approaches to its understanding by the scientific community and its use in law enforcement practice are analyzed. It is highlighted a correlation between the procedure for establishing the taxpayer's guilt and the effect of the presumption of guilt / innocence in terms of tax liability. The authors have interpreted a range of other concepts, including "act against all sense" and "act without due diligence". The stand of the State Tax Service of Ukraine on the development of a methodology for performing tax control measures in the part of implementing the concept of bringing a taxpayer to financial responsibility in case of proving his guilt is shown. In December 2020 and March 2021, it prepared the relevant information and recommendations. ***Conclusions.*** By relying on the current case law of applying the concept of the taxpayer's guilt in a tax offense, the authors have concluded about the content and features of the guilt category in tax law. Based on research findings, the authors have put forward methodological fundamentals for the application of the concept of the taxpayer's guilt for the committed tax offense in practical activity of the domestic fiscal authority.

Key words: tax law, tax offense, guilt as part of offense, taxpayer, tax obligation, supervisory agency.

1. Introduction

The vast majority of study guides on law theory contains a separate chapter devoted to behavior in law, i.e., its characteristics as to compliance with provisions of legal rules. Branch legal rules comprise formally-obligatory criteria which allow conducting a legal assessment of actions, conduct, inactivity of the parties to legal relations in the relevant realm.

Entering into legal relations, participants seek to exercise their rights and freedoms and meet their interests and needs. If their conduct damages legitimate private and/or public interests and is contrary to legal rules, it is illegal. The offense is a kind of unlawful conduct which is characterized by specific features. Their presence makes it possible to qualify unlawful conduct as a violation of legal rules

and may result in bringing a person to legal liability. It is about the act of a person which has an external manifestation, is dangerous to the public, and breaches a particular legal rule. The features complete the characteristics of offenses committed by individuals, namely: the conscious, willed nature of the act and its guiltiness.

Taking into account outcomes of the study of the conceptual and categorical framework of the tax law of Ukraine (Baik, 2019), it is emphasized that scientists divide features of a tax offense into objective and subjective. Objective features of a tax offense are 1) social damage which lays the groundwork for public security; 2) illegality; 3) punishability. Subjective features of a tax offense are 1) guiltiness; 2) sanity (passive dispositive capacity).

The set of the above subjective and objective features determining an illegal act as a tax offense constitute the body of the tax offense (Podatkove pravo, 2012), which is a sole reason for bringing a violator of the tax law to liability. The body of a tax offense, consisting of such components as object, actus reus (physical element), subject, mens rea (mental element), is characterized by the features (elements) established by the tax law the combination of which allows considering an illegal act as a tax offense. Among the above features are those that are not absolute. In particular, it refers to the guilt of the act.

There are two main types of representation of the guilt concept in legal doctrine, namely: 1) legal liability arises exclusively for a guilty act; 2) legal liability arises for both the guilty act and the innocent act (Oleshko, 2011).

Guilt in law theory is considered as the principal condition for the incurrence of legal liability for the person who committed the offense. M. Kucheriavenko marks guilty conduct (along with the public danger of the act and the illegality of actions or omissions) among the features of a tax offense (Kucheriavenko, 2016). The general theoretical construction shows that the following is not regarded as an offense: the infliction of harm in the absence of guilt; the act is not illegal, conscious, and willful. According to O. Skakun, it is accidental, complex, innocent, has exclusively external features of an offense. Thus, an innocent act does not entail legal liability (Skakun, 2009). The authors state that determining the essence of guilt is a key aspect in studying the body of any offense. A. Bryzghalin, Z. Budko, O. Hedziuk, D. Hetmantsev, E. Dmytrenko, O. Domin, A. Ivanskyi, M. Kucheriavenko, O. Pokataieva, Yu. Rovynskyi et al. laid the general theoretical grounds of guilt as an element of a tax offense.

2. Guilt as an element of the body of an offense, incl. of a tax offense

Legal doctrine generates the definition and terminology of an offense. The consolidation of some definitions at the legislative level (in Ukraine – the Tax Code of Ukraine (hereinafter – TCU) takes place due to law-making activity. At the same time, neither the definitions of concepts provided in Art. 14 of TCU nor other articles of the basic tax law interpret "guilt".

With the development of society and the state and complication of legal relations, the institution of legal responsibility is subject to transformational changes, and its rules are revised and improved. Amendments to TCU made in January 2020, incl. in terms of the qualification of a tax offense, the amount of liability for a tax offense and mitigating circumstances, did not provide a statutory definition of guilt and resulted in active discussion of updating the guilt concept in tax law by scholars and practicing lawyers.

A tax offense, as well as the offense in general, is characterized by the following features: social harm or socially dangerous of conduct; illegality; conscious act of will; activity or omissions, guiltiness, and punishability. In the absence of the above features, the act cannot be considered an offense. This is stipulated by the fact that legal rules can affect the acts of will of a person controlled by human consciousness. In other circumstances, a prescribed rule cannot be implemented.

The above aspects are applicable only towards an individual because the individual has intellect, i.e., the ability to act voluntarily. Therefore, this statement is based on the psychological concept of guilt (Joffe, 1955) predominant in the scientific and practical scope. S. Pepeliaiev distinguishes intellectual and volitional criterion in guilt and notes that their different combination forms the basis of the division of guilt into forms (Pepeljaev, 2000). The presence of a person's free will to commit a tax offense is a criterion of guilt in the form of intent. Under such conditions, it is assumed that the perpetrator was aware of the illegal nature of his actions (omissions), wanted, or knowingly allowed ensuing their harmful consequences. In other circumstances, the person who committed the offense was not aware of the illegal nature of his actions (omissions) or did not want / anticipate the onset of socially detrimental consequences but had to and could realize them – it is about negligence.

Methods of proving guilt have not yet been developed in financial law. It is believed that the net result is that guilt transited to the category of legal presumption from the category

of a subject of proving that gave rise to a rather negative phenomenon: formally declaring the presumption of innocence, the domestic legislator constructed a mechanism of the presumption of guilt. The authors admit the fact that there is no unambiguous evidence evidence that would unequivocally confirm the genuine mental processes occurring in the perpetrator's mind. As A. A. Ivanskyi highlights, the legislator interprets the perpetrator's guilt not as the genuine psychological processes that took place in his mind but as those which, in his (legislator's) opinion, took place in the mind of the perpetrator (Ivanskyi, 2008). The scientist notes that the clarification of psychological processes, which took place in the perpetrator's mind, is conducted by authorized persons at their discretion and understanding based on their assessment of the state and a conscious experience of the perpetrator.

If the subject of a financial offense is an individual, then, according to the principles of the concept, there are no discussions about establishing his guilt. However, it is known that legal entities can be the subjects of financial relations (government agencies, local government bodies, enterprises, institutions, organizations, etc.). In this case, the guilt of a legal entity is considered as the guilt of its officials or employees, or another approach may be used to establish the guilt of the perpetrator. Domestic tax legislation does not single out an article that would elucidate the concept and features of the guilt of a legal entity-taxpayer.

Not supporting psychological theory, the authors do not share the view that "the guilt of an individual who has committed a tax offense should be regarded as his mental attitude to his illegal act of the violation of tax law and awareness of ensuing socially harmful (socially dangerous) consequences.

The authors believe that the normative theory, which is an alternative to the psychological understanding of guilt, deserves special attention. It interprets guilt not as a conscious act but as a characteristic of the preparator's activity in a particular context (Puginskij, 1979). Although such a definition of guilt is permissible towards all taxpayers as subjects of a tax offense – it has positive nature compared to the previous approach – the practical identification of guiltiness with the wrongful conduct of a person causes mixing of concepts and requires their clear statutory consolidation.

Scientists put forward a rational proposal to combine individual aspects of these approaches to understanding guilt, which together will address interrelated issues. A. Ivanskyi insists that guilt as intent or negligence should be an integral element of any offense, incl. financial (Ivanskyi, 2008). The authors agree with the scientist in terms that "the very principle of responsibility for guilt is a progressive achievement of the theory of responsibility, as it is a significant guarantee of individualization and validity of responsibility". D. Hetmantsev, T. Kushnarova, A. Selivanov, and other scholars also stressed the need to enshrine guilt in financial legislation, in particular, tax law, as well as the principle of financial liability if there is guilt.

Today, Article 23 of the Criminal Code of Ukraine defines guilt: guilt is a person's mental attitude to a committed act or omission prescribed by this Code and its consequences in the form of intent or negligence. The following articles of the Code define intent and negligence and name their types. Thus, there is direct and indirect intent. Direct intent means that a person was aware of the socially dangerous nature of his action (acts or omissions), foresaw its socially dangerous consequences, and wanted them to occur. Indirect intent means that a person was aware of the socially dangerous nature of his action (acts or omissions), foresaw its socially dangerous consequences, but didn't want them to occur, and consciously assumed their occurrence (Article 24 of the Criminal Code of Ukraine. According to the rules of criminal law, negligence is divided into criminal illegal self-esteem and criminal illegal carelessness.

The Code of Ukraine on Administrative Offenses didn't enshrine the definition of "guilt", but guilty activity is a characteristic feature of an administrative offense under Art. 9 of the Code. Therefore, an administrative offense (misdemeanor) is an illegal, guilty (intentional or negligent) act or omission which trespasses against public order, property, rights and freedoms of citizens, the established order of management, and entails administrative liability under the law. The proposed definition indicates the types of guilt of the person who committed the offense, such as intent and negligence.

According to civil law, guilt is the basis for liability for breach of obligation (Article 614 of the Civil Code of Ukraine). In this context, it is established the following: a person who violated the obligation is liable for his guilt (intent or negligence) unless otherwise provided by contract or law. A person is innocent if he proves that he has bent every effort to fulfill the obligation properly; the person who violated the obligation proves the absence of guilt.

3. Theoretical and methodological principles of establishing the guilt of a taxpayer for the committed tax offense

Pursuant to Art.109 of TCU, a tax offense is an illegal, guilty (in cases directly provided

by TCU) act (action or omission) of a taxpayer (including similar persons), controlling bodies and/or their officials (officers), other entities in cases directly provided by TCU. The peculiarity of such a definition is the consolidation of a new independent feature of the offense – the guilty act (action or omission) of the offender.

Novelties of tax laws include the provisions of para. 109.3 of Art. 109 of TCU and para. 111.3 of Art. 111 TCU, namely:

– in the cases specified in para. 119.3 of Art. 119, paras. 123.2–123.5. of Art. 123, para. 124.2, 124.3 of art. 124, paras. 125¹.2–125¹.4 of Art. 125¹ of TCU, a necessary condition for bringing a person to financial responsibility for the committed tax offense is the establishment of the person's guilt by monitoring bodies;

– bringing a natural or legal person to financial responsibility for a tax offense, which provides for the establishment of the person's guilt by monitoring bodies, does not enshrine the presumption of guilt of a natural person or officials (officers) of a legal entity in cases of bringing the natural person or officials (officers) of the legal entity to the liability of other types and does not release from the obligation to prove it in the manner prescribed by law.

Consequently, the establishment of the person's guilt for the committed tax offense is possible in case of its proof by the fiscal authority. For example, in the USA, a taxpayer shall not be held liable if he provides evidence that he has shown concern and precaution (such a degree of care and precaution as a reasonable, cautious person would have shown) but violated the law because of circumstances he could not control. In the United Kingdom of Great Britain and Northern Ireland, a taxpayer is obliged to state a justified reason for his contempt of legal obligations, otherwise such contempt will be interpreted as "a failure to do what any intelligent person would do".

In this context, the authors consider it reasonable to pay attention to the interrelations between the procedure for establishing the guilt of the taxpayer and the effect of the presumption of guilt / innocence in tax liability. In the USA, the presumption of taxpayer's guilt is applied even if a person is charged with a criminal offence. Thus, the legislation of many foreign countries enshrines the presumption of guilt/innocence among the conceptual framework of bringing a person to justice for violating tax legislation.

Based on the achievements of legal science, it is noted that liability for guilt is a principle of substantive law and the presumption of innocence – of procedural. Tax law is characterized by a combination of substantive and procedural rules within one system. Although the presumption of innocence is a constitutional principle (according to Art. 62 of the Constitution of Ukraine), its legal influence goes beyond criminal procedure, acquiring interbranch significance. Branch specifics affect the content and application of the presumption of innocence within a particular branch, sub-branch, and institution of law (Demin, 2003).

In the context of domestic tax legislation, paragraphs 4.1.4 of Article 4 of TCU enshrine the presumption of legality of taxpayer's decisions, if the rule of law or other normative legal act issued based on the law, or if the rules of different laws or normative legal acts presuppose ambiguous (diversified) interpretation of rights and obligations of taxpayers or monitoring authorities; as a result, it is possible to make decisions in favor of both the taxpayer and the monitoring authority.

Article 112 of TCU elucidates cases when a taxpayer is held guilty:

– establishing a person's compliance with the rules and regulations for violation of which TCU provides for liability, but a failure of the person to take sufficient measures to comply with them;

– monitoring body's proof that a taxpayer acted imprudently, unscrupulously and without due diligence in performing actions or committing inactions, which entail liability.

As for proving reasonableness, good faith and due diligence, scientific literature often defines them as the limits of the exercise of subjective rights. Good faith is a characteristic feature of the behavior of the subject of legal relations if the person, who carries it out, is aware of his responsibility to other members of society, focuses on the honest performance of their obligations, follows socially useful intentions. In exercising rights and responsibilities, the legal essence of reasonableness is the need of participants to balance their actions with the goals of objective right, legal patterns of behavior, rights, freedoms, and legitimate interests of others, as well as society and the state. Prudence is discussed as a caution, predictability of future actions, etc.

"Being a bona fide taxpayer means having some advantages" – taxpayers made this conclusion in 2012, associating the taxpayer's good faith with automatic VAT refunds and indicating that entrepreneurs must be strongly aware of the need for full and timeous payment of taxes (Sobuckij, 2012). At the same time, it is mentioned the positive (during the last 36 months) tax history of taxpayers, which will help reduce procedure duration. In this context, one can conclude that bona fides and conscientious performance of the tax obligation are interchangeable categories.

TCU uses the concept "good faith" in several articles, and only in one of them – in terms of financial liability for a tax offense (para. 112.2 of Art. 112 of TCU). The definition of "good faith" has been discussed in scientific contributions for a long time (Karmalita, 2019). The concept of "good faith" has a dual nature. In the objective sense, good faith means requirements for the conduct of an indefinite circle of participants in civil relations set by the rules of law and customs of business. In the subjective sense, good faith is an assessment of the conduct of the subject of legal relations for compliance with the rules of morality established in society, respect for the rights of other participants in legal relations (Bakalinska, 2011). Criteria of good faith may involve the taxpayer's complete and timely fulfillment of his obligation to pay taxes and fees; the absence of elements of a tax offense in the actions of a person (Pashkov, 2004). When analyzing cases of mala fide found in the case law, S. Savseris points out that a "dishonest taxpayer" is a person who implements fictitious and fraudulent transactions to obtain tax benefits (Savseris, 2006). There is a similar approach requiring the use of judicial doctrines (concepts) developed by foreign and domestic case law as criteria for confirming mala fide (Ardashev, 2005).

The taxpayer's commission of actions or inaction without due diligence is another component of establishing his guilt by the controlling body. Due diligence means that the taxpayer must express reasonable diligence in selecting a counterparty: to establish its legal capacity, the authority of persons acting on its behalf, and, in an ideal scenario, clarify the good faith of the counterparty in terms of tax payment (Putilin, 2009). A. Pilipenko structures the terminological understanding of the phrase "due diligence" in which the word "due" corresponds to the commission of particular legal actions by business entities (Pilipenko, 2018). In his opinion, the term "prudence" should be interpreted in the applied sense as a variation of actions that have an element of potential internal economic security, which allows the business entity to carry out its activities without reputational and entrepreneurial risks. Thus, when selecting a counterparty, the economic entity must take sufficient and reasonable efforts to verify the reliability and capabilities of an individual to implement the relevant agreement. However, it is of paramount importance to clarify what an entity should do (what expresses the sufficiency of the measures taken) when selecting a counterparty to avoid the claims of regulatory authorities.

Consequently, in selecting a counterparty, the entity shall take reasonable and sufficient efforts to verify the reliability and capabilities of the entity to fulfill its obligations. There remains an open issue about what efforts the business entity should take (what expresses the adequacy of the efforts taken) when selecting a counterparty to avoid claims from fiscal authorities in the future. Efforts aimed at obtaining the following documents from the counterparty may seem reasonable from the taxpayer's perspective: charter or memorandum of association; copies of the state registration certificate; copies of a VAT number; documents confirming the authority of the person signing the contract; copies of the license to carry out the activities provided for in the contract, in case of its licensing.

In science and practice, the doctrine of tax due diligence is used as a legal precondition for obtaining a tax benefit. N. Blazhivska emphasizes that good faith taxpayers need to prepare the evidence base, which would confirm the manifestation of due diligence in selecting a counterparty. Thus, before making the deal, a "prudent" VAT payer in Ukraine should at least, but not limited to, check his counterparty for tax "integrity" by relying on available databases, as well as be ready to give evidence to prove the validity of the counterparty's choice, etc. (Blazhivska, 2019).

In foreign countries, monitoring bodies, in their consultations and explanations, provide a taxpayer with recommendations on how to assess their risks and set guidelines for identifying reasonable prudence when checking their counterparties. However, the rules of domestic legislation do not stipulate the obligation of the taxpayer to check its counterparties additionally. It is not specified what information about one's counterparty the taxpayer must check to comply with the doctrine of tax due diligence.

D. Alexandrov, Judge of the Supreme Court of the Republic of Belarus, emphasizes that the principle, underlying the tax laws of many countries of the world, focuses on obedient conduct, exclusion of taxpayer's gaining any benefit from his illegal actions for tax savings and unjustified advantages over other taxpayers and provides for the implementation of a set of measures aimed at general tax compliance by taxpayers (Aleksandrov, 2019). It is necessary to state that the legislation of the Republic of Belarus makes it possible to create a "portrait" of a bona fide taxpayer consistently following a risk-based approach. This is also about the expediency of introducing "tax history" into the practice of tax authorities which will differentiate taxpayers according to the degree of their good faith.

The good faith of a taxpayer is manifested in his tax culture, which directs him to indepen-

dent, voluntary fulfillment of the tax obligation in strict accordance with statutory provisions. In the case of finding the taxpayer's abuse of an option to fulfill the tax obligation independently, he loses the trust of the state and he must pay a settled amount of taxes to the budget. According to para. 4 of Article 33 of the Tax Code of the Republic of Belarus, the grounds for adjustments are as follows:

– misrepresentation of data on business transactions, taxable items, which are rendered in accounting, tax returns, other elements and information necessary for deduction and payment of taxes (fees);

– the main (business) purpose of the business transaction: non-payment, incomplete payment, offset or refund of taxes (fees);

– lack of reality of the conducted business transaction.

At the same time, the legislator recognizes the following as important components of the taxpayer's good faith: the taxpayer's active exercise of his right to check data on the reliability of the counterparty's reputation using open state information resources (sub-para. 1.13, para. 1 of Art. 21 of the Tax Code of the Republic of Belarus); the taxpayer's fulfillment of the obligation to ensure the verification of primary accounting documents for their compliance with the legislative requirements (sub-para. 1.16, para. 1 of Art. 22 of the Tax Code of the Republic of Belarus).

In the 2015-2017 cases, foreign judicial practice took into account the following evidence to verify the legality of the decisions of monitoring authorities about additional tax assessment for businesses which had counterparties with increased risk of tax offenses: coordination of actions of the payer and counterparty to establish a sort of statutory compliance to obtain tax saving; the complex nature of the taxpayer's actions within the tax scheme (the commission of such actions in conducting ordinary business activities is excluded); conducting transactions involving goods that were not manufactured or could not be manufactured in the quantity specified in the primary accounting document, etc. The criteria of the monitoring body, which laid the foundation for the conclusion on proving the guilt of the taxpayer, comprised: explanations of the director of the organization on the formal nature of his status and failure of the contractor's employees to carry out construction works; explanation of the founder of the counterparty for the formal nature of the state registration of a legal entity at the request of third parties; counterparty's lack of staff; the counterparty's long-term failure to run financial and economic activities, submit tax returns to the tax authority; invalidity of the passport in the name of the counterparty due to the death of its true owner; discrepancy of the shipping point specified in the consignment note with the location of the counterparty; absence in the consignment note of data on actually concluded agreements, numbers of shipping manifest; the column "Goods accepted" in the consignment note is signed by a person who is not responsible for the transaction; the absence of contractual relations between the consignee and the owner of the warehouses specified in the consignment note as the shipping point; analysis of data on the flow of funds in the current account of the counterparty indicates their transfer as tax payments in the minimum amount, the lack of costs for real financial and economic activities (incl. capital lease, telephony services, payment of wages, etc.).

As you can note, the qualifying elements of establishing the guilt of the taxpayer are put forward to the economic activity of the taxpayer (in particular, to prepare for it during the selection of contractors, to keep tax records during the preparation of primary documents and calculate the amount of tax liabilities).

Today, judicial staff also pays a lot of attention to the updated concept of guilt in tax law. They are concerned about striking balance between the interests of taxpayers and the state. They point out that they are authorized to make a final decision on the interpretation of guilt and application of the relevant TCU provisions, and hope to develop a well-established practice within this category of cases (Khanova, 2021).

The Judgement of the Supreme Court in case No. 826/6821/13 as of 17.12.2020 stated that tax due diligence is a legal precondition for obtaining a tax benefit, which means that good faith taxpayers must take care of arranging an evidence base that would confirm due diligence in selecting a counter party. Domestic case law shows that the very tax authorities and judges are not ready to modify Art. 109 of TCU. Judgements of Kharkiv District Administrative Court in case № 520/8790/21 as of 14.07.2021 and Dnipropetrovsk District Administrative Court in case № 160/9112/21 as of 12.08.2021 just copy provisions of the code and neither indicate any interpretation of guilt, nor provide the features of guilt of a taxpayer. The Judgment of Odessa District Administrative Court in the case No. 420/5497/21 as of 28.07.2021 contains the following provision: given legal instructions for the rules of retail sale of alcohol products by business entities, i.e., the availability of relevant licenses and prohibitions on their sale without payment transactions recorders (PTR) and not in the designated

place, the entity may be prosecuted for violating the rules, i.e., committed illegal acts. The authors regard the above as an example of proving the guilt of a taxpayer.

The State Tax Service of Ukraine recognizes the importance of developing a tax control methodology in terms of implementing the concept of bringing the taxpayer to financial liability provided that his guilt is proved. It has elaborated the relevant recommendations in December 2020 and March 2021 (Letters of the State Tax Service as of 31.12.2020 № 24242/7/99-00-20-01-02-07 and as of 26.03.2021 № 7485/7/99-00-18-02-02-07).

4. Conclusions

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.

Basic requirements for legal support of private and public interest in taxation are preciseness of rules, observance of taxation principles and tax law, consistent law enforcement practice, reliable protection of legitimate interests in case of violation (Karmalita, 2019). The authors believe that the legislator's regulatory use of the concepts of reasonableness, good faith and due diligence in TCU has reinforced the tendency of law enforcement practice to analyze the conduct of taxpayers carefully. However, it is important to prevent arbitrary assessment by the monitoring authority in terms of the obligation to prove the level of competence of the authorized entity.

Summing up the outcomes of this article, it should be noted that:

1) the legal doctrine lacks the unity of views on the category of guilt as an element of a tax offense. One of the key points in applying the concept of taxpayer's guilt may comprise a combination of statutory and psychological approaches in its definition;

2) TCU today 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;

3) 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.

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ВИНА ЯК ЕЛЕМЕНТ ПОДАТКОВОГО ПРАВОПОРУШЕННЯ

Анотація. У статті обґрунтовується актуальність визначеної тематики, що тісно пов'язана з питанням притягнення до юридичної відповідальності платника податків в умовах дії оновленої редакції Податкового кодексу України: відтепер юридична відповідальність може мати місце лише на підставі наявності складу правопорушення з важливим елементом – виною. ***Метою*** статті є аналіз сутності та нормативно-правового регулювання вини як елементу податкового правопорушення. Її досягненню сприяють такі завдання: здійснення аналізу понять і категорій, зокрема «вина», «умисел», «нерозумно, недобросовісно та без належної обачності»; визначення нормативно-правового підґрунтя, що забезпечує функціонування відповідного інституту; визначення методологічних засад та розроблення рекомендацій щодо застосування концепції вини платника податків за вчинене податкове правопорушення. ***Методи дослідження.*** Методологічна основа дослідження представлена комплексом загальнонаукових і спеціальних методів, які застосовуються в науці фінансового права. ***Результати.*** Акцентується на понятійно-категоріальному апараті інституту відповідальності у праві з урахуванням особливостей сфери оподаткування. На підставі проаналізованих наукових думок та положень нормативно-правових актів додатково аргументується, що склад податкового правопорушення з такими компонентами, як об'єкт, об'єктивна сторона, суб'єкт, суб'єктивна сторона, – це встановлені нормами податкового права ознаки (елементи), сукупність яких дає змогу вважати протиправне діяння податковим правопорушенням. Серед перелічених ознак є такі, що не є абсолютними (зокрема, ідеться про винність діяння). Значну увагу приділено категорії добросовісності платника податків. Проаналізовано підходи до її розуміння в наукових колах, а також використання у правозастосовній практиці. Акцентовано на співвідношенні порядку встановлення вини платника податків та дії презумпції винності/невинуватості у сфері податкової відповідальності. Розтлумачено низку інших понять, зокрема «діяти нерозумно» та «діяти без належної обачності». Продемонстровано позицію Державної податкової служби України щодо вироблення методології проведення заходів податкового контролю в частині реалізації концепції притягнення до фінансової відповідальності платника податків за умови доведення його вини, якою у грудні 2020 р. та в березні 2021 р. було підготовлено інформацію та відповідні рекомендації. ***Висновки***. На підставі ознайомлення з актуальною практикою застосування суддями концепції вини платника податків у податковому правопорушенні зроблено висновки щодо змісту й особливостей категорії вини в податковому праві. У результаті дослідження запропоновано методологічні засади застосування концепції вини платника податків за вчинене податкове правопорушення у практичній діяльності вітчизняного податкового відомства.

Ключові слова: податкове право, податкове правопорушення, вина у складі правопорушення, платник податку, податкове зобов'язання, контролюючий орган.

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