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## **SOME SPECIFIC FEATURES OF THE GUILT OF A TAXPAYER UNDER THE TAX CODE OF UKRAINE**

**Abstract. Purpose.** Clarification of the content of the taxpayer's guilt as one of the elements of tax offenses and as one of the conditions for bringing to financial responsibility in the cases provided for by the Tax Code of Ukraine.

**Research methods.** In preparing the work, there were used both general scientific (analysis, synthesis) and special (historical-legal, comparative-legal) methods of scientific research.

**Results.** The study analyzes the concept of guilt in the contemporary theory of law and establishes that the guilt of a taxpayer in tax law is consistent with the concept of behavioral (objective) guilt. It is emphasized that evidence of guilt in committing a tax offense is a possibility for the taxpayer to comply with the rules and regulations for the violation of which the Tax Code of Ukraine provides for liability, but the failure to take sufficient measures to comply with acts that can be classified as unreasonable, unfair and negligent, upon proving this fact by the supervisory authority. There are also analyzed the preconditions of legislative consolidation of valuation concepts, which are the criteria for proving the taxpayer's guilt by the controlling body. The use of the concepts of reasonableness, good faith, due diligence in judicial practice is studied.

**Conclusions.** Guilt as an element of a tax offense is expressed in the model of the offender's behavior and characterizes his actions as the failure to meet the established criteria in specific cases provided for by the Tax Code of Ukraine, which is consistent with the concept of behavioral (objective) guilt. When proving the guilt of a taxpayer by the controlling body, the objective circumstances of the tax offense are important, not the subjective attitude of the taxpayer to the committed offense. The combination of the interrelated concepts of "reasonableness", "good faith", and "due diligence" is the basis for the supervisory authority's conclusion as to whether the taxpayer has taken sufficient measures to prevent the committing of an offense when proving his guilt.

**Key words:** taxpayer's guilt, guilt concepts, reasonableness, good faith, due diligence.

### **1. Introduction**

With the entry into force of the relevant amendments to the Tax Code of Ukraine (TCU) as of January 1, 2021, it was introduced a taxpayer to be held financially liable for tax offenses if there is guilt in his actions in the cases provided by the TCU. In particular, paragraph 109.1 of Art. 109 defines a tax offense as an illegal, guilty (in cases expressly provided by the TCU) act (action or failure to act) of the taxpayer (including persons equated to

it), regulatory authorities and/or their officers (officials), other subjects in cases expressly provided by the TCU. Paragraph 109.3 of Art. 109 of the TCU provides a list of cases in which the establishment by the supervisory authorities of the guilt of a person is a necessary condition for bringing him/her to financial responsibility for committing a tax offense.

Until January 1, 2021, para. 109.1 of Art. 109 of the TCU defined tax offenses as "illegal acts (action or inaction) of taxpayers, tax agents

and/or their officials, as well as officials of regulatory authorities, which led to non-compliance or improper compliance with the requirements of this Code and other legislation, control in compliance with which is entrusted to the supervisory authorities”.

Comparison of both versions of para. 109.1 of Art. 109 of the TCU permit us to conclude that their main difference in the definition of "tax offense" is the introduction of such a component as the **guilt** of a taxpayer.

Thus, until January 1, 2021, the domestic tax legislation provided for liability without establishing the guilt of a taxpayer (as a mandatory element of the tax offense in the cases provided), which led to the application of financial sanctions in case of proof of the offense. However, some scholars believe that innocent liability is directly contrary to the goals, functions, and principles of legal responsibility. Thus, innocent responsibility creates in citizens disrespect for the law and relevant public authorities (Basin, 2006).

Guilt is the basis of legal responsibility, but, despite this, there is no unity in the legal doctrine on the definition of this concept. Its content remains the subject of debate among many scholars in various fields of law. Guilt is a complex and multifaceted phenomenon that can be considered as a philosophical, psychological, sociological and ethical-legal problem. Many domestic and foreign scholars and practitioners (L. Voronova, O. Gedziuk, T. Gubanova, D. Getmantsev, A. Ivansky, M. Kucheryavenko, S. Lawskey, O. Muzyka-Stefanchuk, A. Polyanychko, E. Smychok, R. Usenko, M. Fedorov, R. Khanova, and others) devoted their works to the study of guilt in tax relations, but a significant number of aspects remain controversial and unresolved even today.

Consequently, the **purpose** of this publication is the clarification of the content of the taxpayer's guilt as one of the elements of tax offenses and as one of the conditions for enforcing the financial responsibility in the cases provided for by the Tax Code of Ukraine. This involves studying the concepts of guilt in the theory of law using general scientific (analysis, synthesis) and special (historical-legal, comparative-legal) methods of scientific research.

## 2. The concept of guilt in legal science

In the theory of law, there are several concepts of guilt: normative, evaluative, psychological, dangerous state, behavioral (objective guilt), behavioral-psychological (objective-subjective), and so on. The science of criminal law most greatly developed the study of guilt that influenced the approaches to determining the institution of guilt in other branches of legal science.

V. Zhernokuy notes that the concept of guilt can be generally reduced to two approaches. The first (psychological) consists of the views of those scientists who understand guilt as a "mental attitude of a person to their illegal behavior." The second approach involves behavioral theory according to which an abstract model of expected behavior in a particular situation of a reasonable and conscientious participant should be used to determine guilt (Zhornokui, 2020, p. 161). In the post-Soviet countries, the concept of behavior (the concept of objective guilt) is studied mainly by representatives of the civil law science. According to this approach, guilt is considered not as a special mental attitude of the individual, but as an objective category. Its supporters argue that the guilt is the failure to take measures to prevent adverse consequences of their own behavior (Braginskij, Vitryanskij, 1998, pp. 582–613).

Some scholars believe that the characterization of guilt as a person's mental attitude to the act is one-sided, so there is a need to find other approaches to defining the concept of "guilt" (Halkevych, 2017, pp. 109–110). The understanding of guilt as a person's mental attitude to the act does not meet the needs of evolving legislation and law enforcement practice, it cannot be viewed as general in all branches of law, neither can it be applied to legal entities, so it is necessary to develop a different, general theoretical approach to characterizing this concept (Yurchak, 2016). Another significant disadvantage of the psychological theory of guilt is that, interpreting guilt as a mental attitude, its representatives actually identify guilt as a legal category with the concept of guilt in psychology, i.e. implement the concept taken from psychology "guilt-emotion" (attitude) with its inherent subjectivism in the categorical apparatus of the legal science (Zhornokui, 2020, p. 161).

The understanding of guilt acquires special significance in the context of liability of legal entities. This aspect provoked heated discussions among Soviet scholars, representatives of the general theory of law, as well as civil and administrative law. In particular, the impossibility of practical application to organizations of "psychological" understanding of guilt under civil and administrative law was one of the prerequisites for the application of "behavioral" concept of guilt, which was supported, in particular, by B.I. Puginsky in the 1970s (Puginskij, 1979, pp. 63–70). Today, some scholars argue that the most acceptable, consistent, logical approach is to understand the guilt of legal entities on the basis of a behavioral concept that can be applied in civil, tax, administrative and other areas of law (Samylov, 2013, p. 171).

### 3. The concept of behavioral (objective) guilt and specific features of the taxpayer's guilt

The so-called objective approach to determining guilt (the concept of objective guilt or behavioral concept) is inherent in Anglo-American and continental law, as well as international commercial law (Karnaukh, 2014, p. 104). An analysis of the special literature shows that in common law and in German law, the concept of objective guilt dominates in legal practice, in particular, in the administration of justice (Lahe, 2001, p. 130). However, the use of the word "guilt" is not common, instead the term "negligence" is preferred, although the legal reference literature considers the terms "guilt" and "negligence" as synonymous (Black's law dictionary, 1991, p. 421).

A. Karnaukh, having thoroughly studied guilt as a condition of tortious liability in the countries of the Anglo-American legal family, points out that the philosophical basis and starting point of the legal interpretation of guilt in Anglo-American jurisdictions is the assertion that guilt is legally different from guilt in the moral and ethical sense. A person cannot judge another person, he can only condemn his/her actions (Karnaukh, 2011, p. 530).

Based on such philosophical origins, British scholars note that guilt is a deviation from the standard of good behavior, not a mental attitude to action (Tunc, 1983, pp. 63–86). For example, J. Fleming emphasizes: "We must assume that guilt is not a mental attitude, but a way of behavior that does not meet the appropriate standard set in society" (Fleming, 1992, p. 105). In the law of Great Britain and the USA, such standard of prudence, which should be the purpose of behavior, is considered "behavior of the reasonable man". An intelligent person is an abstract concept used by judges, comparing the behavior of each individual defendant with the standard of behavior of this abstract intelligent person. This is the so-called test, in which the main answer to the question: "How would a reasonable person behave in this situation?" (Howarth, 1995, p. 37). For example, in the United States, a taxpayer is exempt from liability if there is evidence that he or she has taken the appropriate precautions and prudence in the conduct of business, that is, the conformity of a pattern of conduct chosen by a reasonable person. Thus, the violation of the law occurred in circumstances beyond the control of the taxpayer. Reasonableness of behavior and good faith for these purposes is determined separately in each case (Lawsy, 2009, p. 104). In other words, guilt is seen as failure to take the precautions that a reasonable person would resort to under the same circumstances.

The Tax Code of Ukraine does not contain the concept of "guilt", but para. 112.2 of Art. 112 of the TCU states that a person is considered guilty of an offense if it is established that he/she had a possibility to comply with the rules and regulations for violation of which the TCU makes liable, but did not take sufficient measures to comply with them. The measures taken by the taxpayer to comply with the rules and regulations of tax law are considered sufficient if the supervisory authority does not prove that by performing certain actions or inaction for which liability is provided, the taxpayer acted unreasonably, in bad faith and without due diligence.

In other words, the possibility for a taxpayer to comply with the rules and regulations for which the TCU makes liable, but failure to take sufficient measures to comply with them through acts that may be classified as unreasonable, unfair and without due diligence, provided the control body proves committing a tax offense.

A. Polyanychko notes that guilt as an element of a tax offense is a form of behavior of the offender. This understanding of guilt in tax law is radically different from the content of the concept of guilt as an institution of criminal law. The key to criminal law is to understand whether a person was aware of the nature of his action and whether he/she foresaw or could have foreseen its consequences. Instead, the presence of guilt in committing a tax offense is determined by the external features of the act itself and does not require clarification of the mental attitude of the person to his actions. Thus, guilt in tax law is an element of the objective part of the composition of the tax offense, not its subjective part (Polianychko, 2021).

Thus, the analysis of the TCU norms states that guilt as an element of a tax offense is expressed in the model of the offender's behavior and characterizes his/her actions as not meeting the established criteria in specific cases provided for by the TCU, consistent with the concept of behavioral (objective) guilt. According to the TCU, the guilt of the taxpayer is determined by the objective part of the tax offense, so when proving it by the supervisory authority, the objective circumstances of the tax offense are important, not the subjective attitude of the taxpayer to the offense.

### 4. Criteria for proving the taxpayer's guilt by the controlling body

It should also be noted that the TCU enshrines valuation concepts (interpretation of these concepts is not provided in the TCU), which are the main criteria when proving the taxpayer's guilt as one of the mandatory conditions for bringing him/her to financial respon-

sibility in the TCU cases. The set of interrelated evaluative concepts of "reasonableness", "good faith", "due diligence" is the basis for concluding whether the taxpayer has taken sufficient measures to prevent committing of an offense (having a possibility to comply with rules and regulations), but only conclusion is not enough, the supervisory authority is obliged to provide convincing evidence of guilt.

Legislation of such vague concepts as "sufficient measures", "reasonableness", "good faith" and "due diligence" gives the supervisory authorities the power to assess the taxpayer's actions at their discretion, based on specific circumstances, which, in turn, will provide some flexibility of the tax legislation and is designed to prevent abuse by taxpayers.

According to M. Kucheryavenko, discretion in the tax regulation is a complex and multifaceted phenomenon. The main factors that determine the existence of several behaviors of the subjects of tax relations are the nature and content of tax law, the specifics of the terminology of tax law, the presence of conflicts of tax law and valuation concepts in the content of the latter (Kucheryavenko, 2017, p. 41).

Evaluative concepts in their interpretation by the controlling body each time acquire a specific meaning, are filled with meaning and are an important manifestation of discretion. The presence of assessment categories in the tax norms significantly strengthens the discretionary powers of tax authorities and courts. The open, i.e. deliberately incomplete structure of the evaluation concept allows the law enforcer to supplement it with new features and content (Demin, 2017, p. 50). The authors of the book "Delicate Balance: Taxes, Discretion and the Rule of Law" are also right to point out that "giving discretionary powers to tax administrations evokes the strongest feelings in the field of tax law" (Evans, Freedman, Krever, 2011).

A fair balance between the needs of the public interest and the requirements for the protection of fundamental human rights in a democracy must be taken into account both during rule-making and in the process of law enforcement (Zadorozhnia, Kapeliush, Karmalita et al., 2018, p. 46). At the same time, all states in one way or another actively oppose aggressive tax planning, in particular, using the General Anti-Avoidance Rules (GAAR), i.e. general approaches to combating tax evasion, which began to apply in practice by different states in the beginning of the 20th century.

According to A. Demin, General Anti-Avoidance Rules are a special kind of relatively specific legal remedies in the field of taxes and fees. In the general sense, GAARs are superordinate

principles that prohibit a taxpayer from abusing subjective tax rights, dishonest conduct in the field of taxes and fees, but do not specify what "abuse" is. The taxpayer is offered general and vague criteria and guidelines developed by the judicial and law enforcement practice. Opposition to such norms has been very strong throughout the world, but today they are widely implemented either as general principles of tax law or as judicial doctrines (Demin, 2017, p. 50).

This approach is not new for domestic judicial practice and law enforcement activities of regulatory authorities. For example, in the decision of the Supreme Court of December 4, 2019 in case № 826/15729/17, it is stated: "business activities are carried out by the business entity at its own risk, and therefore, in economic relations, the participants of economic turnover must exercise reasonable caution, because the negative consequences of choosing an unscrupulous counterparty are borne by such participants. Thus, proper tax prudence as a legal prerequisite for obtaining tax benefits, which implies that conscientious taxpayers need to take care of the preparation of the evidence base, which would confirm the manifestation of due diligence in choosing a counterparty" (Postanova Verkhovnoho Sudu vid 04.12.2019 u spravi № 826/15729/17).

In turn, the requirements for a taxpayer to justify the choice of counterparty are conditioned by the decisions of the European Court of Human Rights, which stipulate that the taxpayer should not be liable for abuses committed by his counterparties if he/she did not know about such abuses and could not know about them (Rishennia Yevropeiskoho sudu z prav liudyny u spravi «Biznes Support Tsentru proty Bolharii» (2010, March 18), №6689/03). The decision of the Supreme Court of the panel of judges of the Administrative Court of Cassation of January 14, 2020 in case № 826/16482/15/ established that the good faith of the taxpayer's actions is in accordance with the actions committed by him for economic purposes. Accordingly, the taxpayer, in addition to assessing the commercial attractiveness of the terms of the contract, must take into account the risks that indicate the bad faith of the counterparty, and his actions must be consistent with the economic purpose (Postanova Verkhovnoho Sudu vid 14.01.2020 u spravi № 826/16482/15/).

## 5. Conclusions

Summarizing the above, we specify that in accordance with the provisions of the TCU, guilt as an element of a tax offense is expressed in the model of the offender and characterizes his actions as not meeting the criteria in specific cases provided by the TCU, consistent with the concept of behavioral (objec-

tive) guilt. According to the TCU, the guilt of the taxpayer is determined by the objective side of the tax offense, so when proving it by the supervisory authority, the objective circumstances of the tax offense are important, not the subjective attitude of the taxpayer to the offense.

The combination of the concepts of "reasonableness", "good faith" and "due diligence" is the basis for the conclusion of the supervisory authority on whether the taxpayer has taken sufficient measures to prevent the commission of an offense when proving his guilt. Thus, the taxpayer's guilt is seen as the failure to take the precautionary measures that a "reasonable person" would resort to in the same circumstances. In this case, the concepts of "good faith", "due diligence", "caution" are interrelated and determine the characteristics of the behav-

ior of a "reasonable person", which is used as an appropriate standard of prudence and can be considered the purpose of proper behavior of the taxpayer.

Giving the tax authorities the discretion to assess the actions of the taxpayer in proving his/her guilt, based on the criteria of reasonableness, good faith and due diligence can be seen as a necessary response of the state to the challenges of the economic globalization and aggressive tax planning. After all, taxpayers are constantly looking for new ways to reduce tax liabilities, using the stability of tax rules and manipulating them without formally violating the law. At the same time, such an approach requires a balance between the ability of tax authorities to perform their tasks and functions and the compliance with the legitimate rights and interests of taxpayers.

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## **ДЕЯКІ ОСОБЛИВОСТІ ВИНИ ПЛАТНИКА ПОДАТКІВ ЗА ПОДАТКОВИМ КОДЕКСОМ УКРАЇНИ**

**Анотація.** *Метою статті* є з'ясування змісту вини платника податків як одного з елементів податкового правопорушення та як однієї з умов притягнення до фінансової відповідальності у випадках, що передбачені Податковим кодексом України.

**Методи дослідження.** У дослідженні використано як загальнонаукові (аналіз, синтез), так і спеціальні (історико-правовий, порівняльно-правовий) методи наукового пізнання.

**Результати.** У роботі охарактеризовано концепції вини в теорії права та констатовано, що на сьогодні вина платника податків у податковому праві узгоджується з концепцією поведінкової (об'єктивної) вини. Наголошується на тому, що свідченням вини у вчиненні податкового правопорушення є можливість дотримання платником податків правил і норм, за порушення яких у Податковому кодексі України передбачена відповідальність, однак не вжито достатніх заходів щодо їх дотримання через діяння, які можуть бути кваліфіковані як нерозумні, недобросовісні та без належної обачності, за умови доведення цього контролюючим органом. Проаналізовано передумови законодавчого закріплення оцінних понять, які є критеріями доведення контролюючим органом вини платника податків. Розглянуто використання понять розумності, добросовісності, належної обачності в судовій практиці.

**Висновки.** Вина як елемент податкового правопорушення виражається в моделі поведінки порушника та характеризує його діяння як такі, що не відповідають встановленим критеріям у конкретних випадках, передбачених Податковим кодексом України, що співвідноситься з концепцією поведінкової (об'єктивної) вини. Під час доведення контролюючим органом вини платника податків мають значення об'єктивні обставини вчинення податкового правопорушення, а не суб'єктивне ставлення платника податків до вчиненого правопорушення. Сукупність пов'язаних між собою понять «розумність», «добросовісність» і «належна обачність» є підставою для висновку контролюючого органу про те, що платник податків вжив достатніх заходів для запобігання вчиненню правопорушення, у разі доведення його вини.

**Ключові слова:** вина платника податків, концепції вини, розумність, добросовісність, належна обачність.

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