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## RIGHTS OF PARTICIPANTS OF THE SHARE INVESTMENT FUND

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### SUMMARY

The rights of participants of the share investment fund are analyzed in article. It was established that participants of the share investment fund are collective investors, since they invest the money, which belong to them into the objects of investment activity using services of a professional subject – asset management company. The investment portfolio, which was created using the money of the participants of the share investment fund, belongs to such participants on a common shared property right. Peculiarities of exercising the rights of participants of the share investment fund in particular the common shared property right to the assets of the share investment fund were characterized. Proposals aimed at improving the legislation, which regulates the procedure of exercising the rights of participants of the share investment fund were made.

**Key words:** share investment fund, participants of the share investment fund, asset management company, common shared property to the assets of the share investment fund, redemption of the investment certificates of the share investment fund.

## ПРАВА УЧАСТНИКОВ ПАЕВОГО ИНВЕСТИЦИОННОГО ФОНДА

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В статье проанализированы права участников паевого инвестиционного фонда. Установлено, что участники паевого фонда являются коллективными инвесторами, поскольку вкладывают принадлежащие им денежные средства (инвестиции) в объекты инвестирования с использованием услуг профессионального субъекта – компании по управлению активами, а сформированный за счёт привлечённых средств портфель инвестиций принадлежит таким участникам на праве общей долевой собственности. Охарактеризованы особенности осуществления участниками паевого фонда их прав, в частности права собственности на активы паевого фонда. Сформулированы предложения по совершенствованию законодательства, регламентирующего порядок осуществления участниками паевого инвестиционного фонда их прав.

**Ключевые слова:** паевой инвестиционный фонд, участник паевого инвестиционного фонда, компания по управлению активами, право общей долевой собственности на активы паевого инвестиционного фонда, выкуп инвестиционных сертификатов паевого фонда.

**Formulation of the problem.** Development of the investment processes makes it necessary to carry out profound scientific research of the legal nature of the relations, which exist in this sphere. From the scientific point of view it is important to explore the peculiarities of realizing investments using a share investment fund scheme (hereinafter – share fund) since the model of a share fund as a legal form of realizing investments lacks complex research in the national legal science.

According to the data, published on the official web-page of UAIB (Ukrainian Association of Investment Business),

the number of the registered collective investment schemes is constantly increasing. For example, in 2017 there were 1676 registered collective investment schemes [1] and in the first half of the 2018 this figure increased to 1713 [2], which is owing to the increase of number of the venture investment funds. These figures demonstrate that the market of collective investing is developing quite rapidly. At the same time the drawbacks of the legislation, which regulates the legal status of the share fund participants shows the necessity to develop scientific recommendations aimed at improving the legal base in this sphere.



**Relevance of the research topic.** Investors usually play an important role in the process of carrying out of investment activity using the share investment fund scheme. This is because the investors dispose of their own money, chose the appropriate investment scheme and acquire the rights to the share fund's certificates. Although, the analysis of the national laws, which regulate the legal status of investors of the share investment fund, demonstrated that there are quite a lot of disputable questions, which need to be resolved as well as relevant recommendations aimed at improving the national laws in this sphere are to be made. Further development of the investment activity, which is conducted by using the share fund scheme depends on the availability of proper legislative guarantees as well as the clear legal status of the investor of the share investment fund.

**State of the research.** In the legal doctrine there are mainly scientific researches, dealing with the property and assets management relations in general, but little attention was paid to civil-law aspects of investment activity by using the share fund scheme. The following scholars researched only some of the peculiarities of carrying out investment activity in the form of a share investment fund: O. Hnativ, I. Polianska, O. Slobodian, O. Yavorska and others. At the same time these scholars paid a little attention to the rights of the share investment fund's participants and legal status of these subjects of investment activity in general. Peculiarities of the subjects' composition of the relations dealing with the realization of investments in the form of a share fund, procedure of exercising common shared property to assets of the share fund by its participants, peculiarities of protection of the rights and interests of the share fund's participants were not researched in detail. The legal status of the investor of the share fund, which in scientific literature is called a "weaker party" of the relations, was not a subject of a detailed research as well.

**The purpose of article.** The purpose of the research article is to investigate the peculiarities of the rights of the share fund participants. The main tasks of the research are: to analyze the notion of the share fund participant, research the rights of the share fund's participants and peculiarities of their realization; to clarify the peculiarities of rights and interests of the share fund's participants; to formulate proposals concerning the improvement of the national laws in this sphere.

**Presentation of the main material.**

Basic legal act, which regulates the procedure of carrying out investment activity using a share fund scheme, is the Law of Ukraine "On Institutes of Collective Investing" of 5 July 2012 No. 5080-VI [3] (hereinafter – Law of Ukraine on ICI of 2012). According to Article 41 of this law a share fund is an aggregate of assets, which belong to the participants of the share fund on a common shared property right and are managed by the assets management company and accounted by the company separately from the results of the company's commercial activity.

In the legal literature scholars suggest classifying the investments into *direct*, which foresee a direct participation of the investor in choosing the object of investment activity and the investor is taking part in all stages of the investment process and *collective* investments (sometimes called portfolio investments), according to which realization of investments is conducted by using the services of an agent, which accumulate and allocate the attracted financial resources by themselves [4, c. 37]. In our opinion, the peculiarity of the joint (collective) investing is to accumulate the attracted financial resources into a single fund and further investing of the fund's assets in the objects of investment activity according to the main directions of the investment activity as it is foreseen in the investment declaration. Collective investing foresees existence of a financial agent between an individual investor and object of the investment activity. Such agent realizes the investments using the share fund scheme by himself. Presence of an agent, which is the asset management company, shows the procedure of realizing investments by a natural person or a legal entity, which becomes a participant of the share fund by acquiring certificates of such fund. Hence we can make a conclusion, that the participant of the share fund is a subject of the investment process and is the investor, who allocates his money into a share fund, which are further being invested. In scientific resources participants of the share investment schemes are called collective investors. Under the notion "collective investor" it is suggested that one understand a natural person or legal entity, who invest their money using one of the collective investment schemes in order to gain profit [5, p. 48; 6, p. 46]. Such definition needs to be specified that the investing can be

aimed not merely at gaining profit, but also at achieving some social effect.

We consider such a scientific approach, which suggests a category of a collective investor to be a correct one since in the relations of the realization of investments through the share fund scheme there is another investor – asset management company. Such a company shall be defined as an institutional investor. According to the provisions of paragraph 4 part 2 of Article 2 of the Law of Ukraine "On Securities and a Stock Market" institutional investors are institutes of collective investing (share and corporate investment funds), mutual funds of the investment companies, non-state pension funds, insurance companies and other financial institutions, which carry out operations with the financial assets in the interests of the third parties on their own account or the account of such persons and in cases foreseen by the legislation also on the account of the financial assets attracted from other persons in order to gain profit or to preserve the real value of the financial assets. Since the share fund is not a subject of any legal relations, we consider that it is not correct to include such a fund to the category of institutional investor, since in such case it is the asset management company of such fund, which performs the functions of an institutional investor. In this respect the majority of scholars are unanimous [7, p. 10; 4, p. 44; 8, p. 110].

Therefore we can define two main subjects of the investment activity, connected with realization of investments through the share fund. These are the *collective investors* – participants of the share fund and *institutional investor* – asset management company of the share fund. Under the notion "collective investors" we understand natural persons or legal entities, which invest their money and property values using one of the collective investment forms in order to gain profit and/or achieve a social effect.

It is important to define the moment a natural person or a legal entity acquires the rights of a share fund's participant. According to Article 45 of the Law of Ukraine on ICIC of 2012 a natural person or a legal entity, who owns the investment certificate of the share can be a participant of such a fund. Also according to part 4 of Article 51 of the same law a person, who acquires the securities of the collective investment institute from their issuer, shall pay for such securities during the term foreseen in



the prospectus of securities of such collective investment institute, but not later than three working days since the sale-purchase agreement of securities was concluded. Non-documentary securities of the collective investment institute, which were paid, shall be credited to the investor's account, which was opened by a custodian of the securities upon a relevant order of the issuer of such securities. Taking this into account we can come to a conclusion that a person becomes a participant of the share fund since the moment the non-documentary investment certificates to the investor's account, which was opened by a custodian.

Current national laws, which regulate the procedure of carrying out investment activity, distinguish two types of investors: qualified investors and non-qualified investors. The notion "qualified" is considered to be improper when we speak about different categories of investors, since the word "qualification" relates mainly to the sphere of labor relations. For instance, provision of part 4 of Article 34 of the Law of Ukraine "On Securities and Stock Market" foresee a procedure of making a public offer of the securities to qualified and non-qualified investors [9]. At the same time, the essence of both of these terms is not clear, which shows the analysis of the national laws. The term "qualified investor" is used in the laws of many countries. The legislation of Lithuania distinguishes a "professional investor", which means a participant of a collective investment scheme, under which the minimal size of the investment exceeds 50 thousand Euros [10]. The law of the Slovak Republic "On collective investing" distinguishes a qualified investor [11]. Dividing investors into two types – qualified and non-qualified investors is caused by the availability of different collective investment forms and financial instruments of a high risk. Hence in order an investor can make a correct decision concerning investment activity through one of the collective investment schemes of a high risk, such investor should possess a certain complex of knowledge and skills, which can help evaluate such risks. By distinguishing qualified investors and share funds for qualified investors the lawmaker makes an attempt to foresee different requirements concerning participation in such funds in order to secure the best interests of investors. According to part 2 of Article 4 of the Law of Ukraine on ICI of 2012 a natural person can become a participant of a venture share fund in case he or she purchases the invest-

ment certificates of such fund in quantity, which by its nominal value of such securities, exceeds the sum, which is not less than 1500 minimum wages in a monthly size as of 1 January 2014. At the same time, a natural person can be a participant of qualified share fund in case he or she purchases the investment certificates of such fund in quantity which by its nominal value of such securities, exceeds the sum, which is not less than 100 minimum wages in a monthly size as of 1 January 2014 [3].

Among the rights of participants of the share fund we can list the following:

- right to common shared property to the assets of the share fund;
- right to redemption of investment certificate of the share investment fund, which belong to the investor;
- right to have investment certificates of one share fund converted into investment certificates of another share fund;
- right to information about functioning of a share fund.

As it was noted before, assets of the share fund belong to participants of such fund of the right of common shared ownership. At the same time, neither the Law of Ukraine On ICI of 2012 nor the by-laws, which were adopted to enforce this law, do not foresee mechanisms for investors to fulfill their right to common shared ownership to the assets of the share fund. When we analyze the legal status of the investor of the share fund, the common share property right to the assets raises debates among scholars. Although this right shall be considered as a basis of the legal status of the investor of the share fund.

Analysis of the scientific resources, which are dedicated to the issues of share funds legal regulation enables us to ascertain that the majority of scholars share the same opinion, that application of the common shared property regime to the assets of the share fund contradicts basic provisions of common shared property right, since in reality the owner of the assets is the asset management company of the share fund. This group of scholars includes the following: O. Yavorska, O. Hnativ, V. Vitrianskyi, N. Lopatenkova, D. Stepanov, Z. Makarchuk, K. Ivanova, M. Pliushev and others. At the same time O. Zaitsev supports the idea that participants of the share fund shall be the owners of the fund's assets and the application of the common shared property provisions in this case is in conformity with

the civil laws, which regulate common shared property.

When applying the provisions of a common shared property to the assets of a share fund, then we need to resolve a question concerning the scope of powers of the owners of such assets as well as ways they can use to fulfill their property right to the assets of the share fund. Another problematic issue in this case is to clarify the scope of powers of the asset management company, which activity is mainly connected with a disposal of the assets of such fund.

In the opinion of O. Yavorska, besides the fact that there is a specific provision in the legislation about the common shared property regime, there is no fact of law, which should give raise to the establishment of such a regime. Persons, who become participants of the share fund by purchasing investment certificates of such fund do not interact with each other and their actions are not directed at gaining the common property right, says O. Yavorska [12, p. 4]. If we mention the provisions of the current Civil Code of Ukraine, which fix such rights of the co-owner as the right to allocate their stake in kind, the pre-emptive right to purchase a share in the right of common shared property, then the current Law of Ukraine on ICI of 2012 does not foresee any clauses at all. A. Tsykunov states that provisions of a common shared property cannot be applied to the legal relations of property to things, which are part of the share fund's assets, since the parts were defined beforehand and owners cannot improve their property because of the fact that the asset management company possesses and disposes of fund's assets [13].

At the same time O. Zaitsev, who supports the idea that provisions of common shared property can be applied to the assets of the share fund, states that it is typical for the common shared property right that possession, use and disposal of is conducted *in a way that was fixed* by the co-owners and not necessarily by the co-owners themselves. The scholar also points that the only objective to create a common shared property regime to the assets of the share fund is to transfer such property into trust of the asset management company. Because of this participants of the share fund do not suffer from their inability to change or terminate their agreement as of the co-owners and in case the co-owner does not longer want to participate in the share fund he can dispose repurchase his certificate, notes O. Zaitsev.



D. Stepanov expresses another opinion. He notes that collective investing foresees the transition of the right of disposal of property, which is a part of the property pool, to the asset management company. In his opinion, transferring the property into trust of the share fund's asset management company also foresees the transition of the title to the property, since the asset management company needs to dispose of such property.

Application of the common shared property regime to the assets of the share fund has its objective, which is to unite the costs of participants of the share fund, which were received as a price for the purchasing the investment certificates of the share fund, and further investing of such costs into objects of investing, as they are foreseen by the documents of the share fund and current laws of Ukraine. Since in case of the share fund, unlike a corporate fund, a new subject of law – legal entity is not created, the assets of the share fund belong to the participants of such fund on the right of a common shared property. We share the opinion that in case the investor purchases investment certificates of the share fund, his right of ownership over the costs, which were transferred to the share fund is turned into a right of ownership over the part in a common property (assets of the share fund), which is certified by the investment certificate.

When we analyze the powers of the asset management company of a share fund under the contract of management of the share fund, we can come to a conclusion that by disposing of the assets of the share fund, which belong to participants of such fund on the right of common shared property, the asset management company only fulfills its obligation to manage the assets on a professional basis. The asset management company is not the owner of the assets of the share fund, since the right of ownership to the assets of the share fund is not transferred to the asset management company. Investors continue to own the assets of such share fund. By purchasing investment certificates of the share fund the participant of the fund acts at his or her own discretion as the owner of such costs and agrees that such costs are united with the costs of other investors and that the asset management company fulfills the obligations concerning disposing of assets of the share fund.

We agree with the opinion of scholars that by its nature the right of common shared property to the assets of the share fund is a fiction, since there are no concrete

legislative mechanisms and ways of how to realize this right to the share in property. When analyzing national laws we consider that rule of part 1 of Article 41 of the Law of Ukraine on ICI of 2012 can exist, only if such rule is a special one in relation to relevant rules of the Civil Code of Ukraine, which regulate the common shared property relations and are general. Under such circumstances the common shared property regime of the participants of the share fund will be in conformity with the rules of Article 356 of the Civil Code of Ukraine, which fixes the essence of the common shared property right. At the same time the rules of Article 358 of the Civil Code of Ukraine, which foresee the peculiarities of realizing the common shared property right by the co-owners will not be applicable since relevant rules of the Law of Ukraine on ICI of 2012, which are special and foresee that the asset management company performs the activity of professional management of assets of the share fund, will be applied. Actually when investing the money in exchange of the investment certificates of the share fund, participants of such fund preserve their common shared property right to the assets of the share fund and transfer to the asset management company the powers, which comprise the essence of the common shared property right and consist in professional management of the share fund's assets, which can be performed only by the authorized subject.

If we support the idea that the model of the common shared property of the participants of the share fund to the assets should exist, we have to answer the question concerning performing of powers aimed at protection of this right. According to part 2 of Article 45 of the Law of Ukraine on ICI of 2012 participants of the share fund cannot influence the activity of the asset management company. The analysis of such legislative provision enables us to ascertain that participants of the share fund de-facto cannot effectively realize the power to protect their right of property to assets of the fund. Who in such case should fulfill such an obligation to protect? Since current Law of Ukraine on ICI of 2012 does not explicitly fix the power of the asset management company to be a plaintiff or a respondent in the court and represent the interests of the share fund's participants. For instance in the decision of the Commercial court of the city of Kyiv of 9 November 2010 in case No. 4/207-47/44509.11.10 one

of the reasons that claims of the plaintiff were declined, as it was stated by the court, was that the plaintiff – asset management company of the share fund, did not provide evidence that it had the powers to apply to the court in the interests of the share fund's participants. The court noted the following, "Neither Regulation of 5 February 2008, nor the Law of Ukraine "On collective investment institutes (share and corporate investment funds) of 15 March 2001 No. 2299-III did not contain a provision under which the plaintiff as a person, who only performs a professional management of the fund's assets, is entitled to apply to the court on behalf of investors and claim for protection of property rights and interests to costs of the fund, which belong to the fund's participant on the common shared property right. The plaintiff did not provide evidence that investors gave it the powers to represent their interests in the court as well [14]. Despite this court decision was soon repealed by the court of appeals and the case was heard according to the rules of the Law of Ukraine on ICI of 2001, this question still remains unresolved even today, since neither from the essence of the activity dealing with management of assets, nor the content of the collective investment activity one can ascertain that the asset management company is entitled to apply to the court on behalf of the share fund's participants. In this regard we suggest adding to Article 43 of the Law of Ukraine on ICI part 5 in the following wording:

"Asset management company of the share fund has the right to apply to the court in case of violation of the rights and interests of the share fund participants while carrying out activity dealing with professional management of the share fund's assets".

The abovementioned legislative provision will enable the asset management company not only to professionally manage the assets of the share fund but also to protect legal rights and interests of the investors in the court, in particular their right to property of the share fund's assets.

According to rule of part 3 of Article 45 of the Law of Ukraine on ICI of 2012 participants of the share fund shall not be responsible for the obligations of the share fund and share the risk for losses, connected with the activity of the share fund only within the limits of the investment certificates they own, besides participants of the share fund, which assets include bank



shares, and who are responsible for the obligations of the bank according to the law.

Right to redemption of the investment certificates, which belong to the investor, is realized by the investor by way of concluding a contract of redemption of investment certificates of the share fund. Redemption of investment certificates of the share fund is one of the powers, which the investor has in terms of his realization of the right of common shared property to the fund's assets. After redemption of the investment certificates the investor ceases his participation in the share fund. By its legal nature a contract of redemption of investment certificates is based on the civil law contract of sale and purchase.

The asset management company can manage the assets of several share funds, which were established by such company. It is the investor's prerogative to choose the form of collective investment and the investment strategy, which is most suitable for such investor. Therefore the investor, who decided to change the investment strategy, which was fixed in the investment declaration of the share fund, can change it into investment strategy of another share fund. Such change can be performed by way of conversion of all or some of the share fund certificates, which belong to the investor. Such right foreseen by Article 60 of the Law of Ukraine on ICI of 2012. Such conversion can be performed by the investor notwithstanding the type and kind of the share fund. The Law of Ukraine on ICI of 2012 prohibits only the conversion of the venture fund investment certificates into investment certificates of other funds as well as conversion of the share fund investment certificates into certificates of the venture fund. Quite important is the right of the investor to information about the share fund's functioning. According to part 4 of Article 45 of the Law of Ukraine on ICI of 2012, a supervisory board shall not be created. This means that participants of the share fund cannot influence the activity of the asset management company through the independent body or receive information about the fund's function owing to such a supervisory board. At the same time investor's right to information about the fund's functioning evolves from the corresponding obligation of the asset management company to publish the scope of information about the fund's functions as it is foreseen by the law. For instance, the asset management company shall publish the annual report

about the functioning of a share fund, availability of the web-page of the asset management company, where a relevant information shall be published according to the law.

**Conclusions.** The scope of rights of the participant of the share fund is caused by the sole construction of the share fund as a form of collective investing. The list of rights of a participants of the share includes the following: right to common shared property to the assets of the share fund; right to redemption of investment certificate of the share investment fund, which belong to the investor; right to have investment certificates of one share fund converted into investment certificates of another share fund; right to information about functioning of a share fund. The basis of the legal status of the share fund participant is the common shared ownership right to the assets of the share fund. Exercising the common shared ownership to the assets of the share fund has its special legal regulation, namely by provisions of the Law of Ukraine on ICI of 2012, therefore provisions of the Civil Code of Ukraine on common shared property will not be applied. When investing the money to the share fund, participants of such fund retain their common shared property right to the assets of the share fund and transfer to the asset management company the powers, which comprise the essence of the common shared property right and consist in professional management of the share fund's assets, which can be performed only by the authorized subject.

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## ТЕОРЕТИКО-ПРАВОВЫЕ ПРОБЛЕМЫ ПОГАШЕНИЯ НАЛОГОВОГО ДОЛГА ПРЕДПРИЯТИЯ, ПЕРЕДАННОГО В КОНЦЕССИЮ

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#### АННОТАЦИЯ

В статье проводится теоретическое исследование правового регулирования особенностей уплаты денежных обязательств и погашения налогового долга государственных и коммунальных предприятий, целостный имущественный комплекс которых передан в концессию. Осуществляется анализ налогового и концессионного законодательства Украины, а также имеющейся практики его применения. В статье раскрывается сущность отношений погашения концессионером налогового долга государственных и коммунальных предприятий, целостный имущественный комплекс которых передан в концессию, демонстрируется правовая природа данных отношений, что позволяет определить ключевые недостатки и коллизии действующего законодательства, а также предложить соответствующие способы его усовершенствования.

**Ключевые слова:** погашение налогового долга, уплата денежного обязательства, налогоплательщик, рассрочка и отсрочка денежных обязательств или налогового долга налогоплательщика.

#### THEORETICAL AND LEGAL PROBLEMS OF REPAYMENT OF THE TAX DEBT OF ENTERPRISES TRANSFERRED TO THE CONCESSION

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#### SUMMARY

The article deals with theoretical research of legal regulation of monetary obligations payment and repayment of the tax debt of state and municipal enterprises, the integral property complex of which was transferred to concession. The analysis of the tax and concession legislation of Ukraine, as well as the existing practice of its application is being carried out. The article reveals the essence of relations between the concessionaire's repayment of the tax debt of state and municipal enterprises, whose integral property complex was transferred to concession, shows the legal nature of these relations, which allowed to identify key shortcomings and conflicts of the current legislation, and to suggest appropriate ways to improve it.

**Key words:** repayment of tax debt, payment of a monetary obligation, taxpayer, installment and deferment of monetary obligations or tax debt of the taxpayer.

**Постановка проблемы.** Вопрос правопреемственности в концессионных отношениях, в частности правопреемственности по правам и обязательствам государственного или коммунального предприятия, имущество которого передается в концессию, является одной из фундаментальных проблем правового регулирования статуса концессионера, решение которой способно создать прочную основу для внесения соответ-

ствующих изменений в концессионное законодательство с целью его совершенствования и существенно упростить правоприменение. При этом, учитывая убыточный характер деятельности подавляющего большинства государственных и коммунальных предприятий, особое значение приобретает вопрос урегулирования налогового долга таких субъектов хозяйствования в случае передачи их в концессию.