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AGGRESSIVE TAX PLANNING AND TAX AVOIDANCE IN THE CONTEXT OF THE "ABUSE OF TAX LAW" CATEGORY

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SUMMARY

The article is devoted to the relevance of the study of the category "abuse of rights" in tax legal relations. The signs of abuse of tax law are named. International legal acts on the application of the concept of "abuse of tax law" are analyzed. In the context of the study of this topic, particular attention is paid to derivative categories such as tax avoidance and aggressive tax planning. In particular, the emphasis is placed on their similar nature, yet fundamental differences. As a result, the necessity of paying the attention by legislators, scientists and practitioners to the in-depth study of abuse of tax rights is substantiated. The appropriateness of addition to the Tax Code of Ukraine with the terms of "aggressive tax planning", "tax avoidance" is noted.

Key words: abuse of tax law, abuse of tax treaties, OECD, BEPS plan, aggressive tax planning, tax avoidance, SAAR, GAAR.

АГРЕССИВНОЕ НАЛОГОВОЕ ПЛАНИРОВАНИЕ И ОБХОД НАЛОГОВ В КОНТЕКСТЕ КАТЕГОРИИ «ЗЛОУПОТРЕБЛЕНИЕ НАЛОГОВЫМ ПРАВОМ»

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АННОТАЦИЯ

В статье обосновывается актуальность исследования категории «злоупотребление правами» в налоговых правоотношениях. Называются признаки злоупотребления налоговым правом. Проводится анализ международных правовых актов по поводу применения концепта «злоупотребление налоговым правом». В контексте исследования данной темы особое внимание уделяется производным категориям, а именно обходу налогов и агрессивному налоговому планированию. В частности, делается акцент не только на их похожей природе, но и принципиальных различиях. В итоге обосновывается необходимость обратить внимание законодателей, ученых и практиков на углубленное исследование злоупотребления налоговыми правами. Отмечается уместность дополнения Налогового кодекса Украины понятиями «агрессивное налоговое планирование», «обход налогов».

Ключевые слова: злоупотребление налоговыми правами, злоупотребление налоговыми договорами, ОЭСР, план BEPS, агрессивное налоговое планирование, обход налогов, SAAR, GAAR.

Formulation of the problem. Abuse of tax law is one of the most controversial and important categories of tax law that are currently being studied in the world. Its existence is conditioned by the imperative nature of the tax law. At the same time, the attention to this category has started to be given only recently. The shifting emphasis on the study of tax abuse is due to modern tendencies. Thus, the current economic and legal analysis of tax and legal relations shows that the multi-billion dollar non-payment of proper tax payments to the budgets of countries is due to such abuse. Hence, discussions on tax avoidance and aggressive tax planning that are generated by abuse of rights are taking place.

Relevance of the research topic. The legal regulation of tax relations in today's globalized world cannot effectively exist without taking into account the category of "abuse of rights".

Status of the research. Unlike the world trends aimed at the active research of abuse of tax law, Ukraine does not have a legislative definition of such a concept. Discussions exist only in scientific circles and among practitioners who take into account mentioned above foreign experience.

Purpose and task of the article is in-depth study of the category of "abuse of tax rights"; the search for logical, substantiated constructions, which characterize these categories and can be put into effective counteraction to them.

The presentation of the main material. The category of "abuse" in relationship of the reduction of the taxpayer's tax liability is applied in two cases: a) as a precondition for tax avoidance; b) as the doctrine, aimed at combating tax evasion. Let's try to figure out the category of abuse in tax law. We are impressed with the general definition given by O. Malinovsky, the realization of a person's right counter to its purpose, which causes harm to social relations [10, p. 157]. Thus, the scientist identifies two main features of abuse:

1) harm that may occur in the following cases:

– non-payment of taxes;

– violation of the principle of equality of subjects of business in case of one obtaining unreasonable benefits compared to others;

– violation of nomocracy in the tax area, in case when the legal registration of relations does not coincide with their actual content.

2) realization of the right contrary to its purpose, which may be expressed in the such actions of the taxpayer:

– satisfaction of one's interest, guaranteed by his subjective right, by the implementation of another subjective right;

– satisfaction of their interest without taking into account state and public interests guaranteed by law;

– realization of the right of the taxpayer in spite of the purposes of taxation;

– realization of the rights of the taxpayer contrary to the general and branch principles of law;

– realization of the right of the taxpayer in spite of the authority of empowering rule of law without correlating their behavior with the aim of such a norm;

– realization of his/her right in way of non-fulfilment of his/her legal duty;

– improper realization of their right [10, p. 157].

Attention to the analysis of the category of abuse of rights in tax law is widely paid in legislation and science both in different countries of the European Union.

Thus, in the Final Act of the CFE Task Force, the ECJ, on the basis of European Court of Justice practice, has ruled on the concept of abuse, which is characterized as formal compliance of the tax law, the taxpayer essentially uses an exemption that conflicts with the purpose of the tax rule. At the same time the EU Court points out that the fact of abuse can be established by analyzing a particular situation, the essence of which is the purpose of the agreement – the exclusive receipt of the tax exemption [10, p. 160]. Also, as a result of the numerous examinations by the Court of Justice of EU cases of abuse of the right in tax relations, it formulated some main points of abuse of taxpayer in material law:

– actions of the taxpayer aimed at obtaining a tax benefit formally comply with the provisions of European and national legislation;

– receiving tax exemptions is contrary to the purposes of European and national tax laws;

– the actual circumstances of a particular situation indicate the main purpose of the taxpayer's actions – obtaining a tax benefit [9].

Most European tax scientists find abuses as a central category in the practice of tax evasion. At the same time they mention that it has some specific features. These include: a) receiving ineligible tax benefits; b) a confrontation between the meaning of the tax rate and the benefit received from the application of such a norm; c) the absence of a real commercial purpose [7, p. 47–98]. It should be noted that the results of research of European scientists today have numerous implementations in EU legislation and are widely used in the relevant practice. Thus, although the Dictionary of the Organization for Economic Cooperation and Development (OECD) contains an identification of abuses only in the context of the doctrine, by which the controlling authorities are able to ignore the form of a civil law contract, which is not confirmed by the economic base [6], the term "abuse" is vital in the BEPS report, where it is assimilated with the tax evasion in part of the purpose [3].

P. Pistone agrees with the fact that abuse determines the existence of tax avoidance [11, p. 381–391]. The scientist emphasizes that the actual legal dimension of abuse in tax law partly depends on how it is influenced by the legal order. On account of that [3] according to the OECD standpoint the most relevant methods of combating abuse in the internal tax systems include:

– general rules and doctrines of avoiding tax evasion;

– control of foreign companies;

– a fine capitalization rule and other rules limiting the calculation of the percent;

– rules established in bilateral tax contracts to reduce the risk of contract abuses by beneficiaries, for example through the use of conduit companies [7, p. 57].

As we see from all of the foregoing, the strong attention is paid by scientists and legislators of the EU towards the study of tax avoidance, its backgrounds, reasons and sense. This once again demonstrates the importance of the considered categories and the need for their implementation in domestic legislation. We would like to focus on the cutting-edge trends in tax law of the EU regarding tax planning and tax evasion. So, a recent study by leading European scientists demonstrates an approach of using the category of "aggressive tax planning" along with tax evasion. This legal concept, which is adjacent to tax avoidance, displays the same type of relationship, but has specific features.

In an era of total globalization cross-border tax planning has not only an international significance, but also an international concern. This is connected with the situations in which the result of international transactions is the fake change in profit for tax purposes, which does not necessarily suit the existing criteria of abuse of tax or tax evasion. In this way, we are increasingly faced with political statements, legal documents and scientific studies, which along with terms "tax planning" and "tax evasion" use the term "aggressive tax planning". Our task is to find out whether these concepts are synonymous and overlap and whether aggressive tax planning is an independent legal entity that requires a special attention not only in scientific discussions, but also in the legislation. It should be noted that, as of today, the term "aggressive tax planning" is found in the St. Petersburg Declaration of the G20 Leadership, dated September 2013 [8], as well as in the European Commission Recommendation 2012/772 / EC on Aggressive Tax Planning, dated December 6, 2012 [12].

Aggressive tax planning is also used in the text of BEPS rules, soft law instruments OERS and the EU as a clearly undefined concept, in the context of calls for new developments and coordinated scientific actions. Usually aggressive tax planning is described as a kind of behavior of transnational corporations aimed at reducing its tax burden due to the interaction of tax rules in different jurisdictions [1, p. 258]. As we see, such an approach to the definition of aggressive tax planning does not clearly reflect its unique nature and provides wide opportunities for manipulating and identifying it as similar to such concepts as tax planning and tax avoidance.

Let us try to understand the nature of such a legal entity as aggressive tax planning, in particular through the concept of abuse of tax law. According to P. Piantavigna, abuse of tax law is characterized by its dual nature: it is necessary to distinguish between abuse of rights and abuse of law [7, p. 59]. We agree with this position, because there are a plenty of cases when the actions of the payer are aimed at abusing their right to benefit and when the aim is to manipulate the law in order to circumvent the law. The OECD has also taken into account the difference in such types of abuse, as practice shows that more and more States prefer detailing the term of abuses. This is the difference in the judging of cases involving abuses of the convention, international agreements [5] and domestic law [4].

Consequently, the abuse of international agreements differs from the abuse of domestic law. Describing the nature of the abuse of international agreements, the OECD in its final report on measure 2, in the framework of the counteraction to BEPS, notes that hybrid instruments, organizations (including dual resident organizations) should avoid excessive use of the international treaties for having benefit [3]. The criterion for determining the excessive use of international agreements is unclear. Citing the OECD statements regarding the abuse of taxpayers of intergovernmental agreements, which appear to be "a series of measures by which

a person who is not a resident of a treaty country may not properly receive tax benefits that bilateral treaties must foresee on a reciprocal basis by the respective applicants" [2]. P. Piantavigna rightly notes that the term "abuse of contracts" is used inconsistently, because the OECD uses ambiguous wording [7, p. 59]. As a result of inaccurate interpretations, we are confronted with a situation where aggressive tax planning and tax avoidance overlap, moreover, in the context of tax evasion, aggressive tax planning can be regarded as fully legitimate tax planning.

Thus, we are faced with a situation where taxpayers, in particular, international enterprises (due to their activity) have broad opportunities for using cross-border agreements to avoid double taxation, the granting of exemption, etc. Such companies can take advantage of these opportunities in order to reduce their tax burden. In that case, the influence of national legislation is possible only in the context of the establishment of exemptions and tax benefits, however, in no way to prevent such exemptions and benefits being obtained simultaneously in many countries. The OECD and the BESA plan, which is currently leading in the sphere of prevention of tax avoidance and aggressive tax planning, in its final report on action 6 simply suggested general declarations that interstate tax agreements are not intended to be used for double non-taxation purposes [4].

In comparison, the second category of abuse of tax law has significant differences. In this case, the taxpayer intends to circumvent the rules of domestic law. It is logical that this situation is influenced by the domestic legislation. Many European countries (including Austria, Belgium, Bulgaria, Denmark, France, Germany, Greece, Ireland, Italy, Luxemburg, Malta, Portugal, Spain, Great Britain) have followed this in the General Tax Code (GAAR) and special tax avoidance rules (SAAR).

Thus, agreeing only partially with the approach common in the post-Soviet countries, which mentions that besides tax planning and tax evasion there is an intermediate tax avoidance category, we are in favor of a newer European approach. According to it abusing in tax disputes generates two intermediate categories at the same time: tax avoidance (more acceptable to circumvent domestic legislation) and aggressive tax planning (characterizes the abuse of international tax treaties).

The final distinction dividing the evasion of taxes and aggressive tax planning is intended to be done with the results of research by P. Pistone. In order to demonstrate the significant differences between these categories he gives the characteristic features of each.

Thus, in the opinion of the scientist, tax evasion is characterized for the most part by four main elements:

– discrepancy between the form and the essence of the transaction, on the basis of which the taxpayer receives a tax benefit;

– fake agreements that do not have real economic ones;

– intention to avoid tax is duly reflected in the elements of the agreement;

– causes the existence of abuses in general.

Regarding the aggressive tax planning, its main characteristics are:

– exploitation of cross-border disparities in order to obtain bilateral tax benefits (causal link with external non-compliance of interstate agreements to each other);

– discrepancy between the necessary tax pressure and the final tax benefit;

– in some cases there is an unintentional tax benefit from the rules against double taxation;

– it cannot exist within a single tax system.

We agree with P. Pistone's point of view. It should be noted that the fore mentioned separation between aggressive planning and tax evasion once again shows a shaky and uncertain difference not only between these two categories, but also between aggressive tax planning and regular tax planning. However, such uncertainty cannot be a reason for ignoring the differences and avoiding paying attention to the study of these three categories. First of all, the failure of the states to recognize the concept of aggressive tax planning and the failure to take appropriate measures to counteract it will lead to huge non-payment to the budgets of the states.

In view of everything above mentioned, we insist on the unconditional need to pay lawmaker's attention to tax planning, aggressive tax planning and tax avoidance. We should note the total need to consolidate the concepts of these definitions at the legislative level.

Therefore, we propose the introduction of amendments to Article 14 of the Tax Code of Ukraine in connection with its addition to the definitions of tax planning, aggressive tax planning and tax avoidance as follows:

1) Tax planning is an activity aimed at developing a strategy and its further compliance with the reduction of tax deductions in order to achieve its business purpose, using legal methods allowed without violating the requirements of Ukrainian and international tax laws.

2) Tax avoidance is the taxpayer's actions that formally fall within the requirements of the tax law but have elements of abuse, fraud, and mismatch with the business purpose of the activity in order to obtain a tax benefit or reduce the amount of appropriate tax deductions.

3) Aggressive tax planning is the actions of taxpayers who operate their activity by the use of several tax jurisdictional rules as well as interstate agreements, which result in obtaining an improper tax benefit or non-payment of the required tax payments [11, p. 384].

Conclusion. It should be noted that the above separation between aggressive tax planning and tax avoidance once again shows a shaky and uncertain difference not only between these two categories, but also between aggressive tax planning and regular tax planning. However, such uncertainty cannot be a reason for ignoring differences and diverting attention from the study of these three categories. First of all, the failure of the states to recognize the concept of aggressive tax planning and the failure to take appropriate measures to its counteraction will lead to huge non-repayment to the budgets of the states.

In view of all the above, we insist on the unconditional need to pay attention by legislators to the abuse of tax rights, which generates tax avoidance and aggressive tax planning. We emphasize the total need to consolidate the concepts of "tax avoidance" and "aggressive tax planning" at the legislative level. Thus, we propose the introduction of amendments to Article 14 of the Tax Code of Ukraine by supplementing it with relevant points.

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ОТДЕЛЬНЫЕ ВОПРОСЫ ИСКОВОГО ПРОИЗВОДСТВА ПО ДЕЛАМ, ВОЗНИКАЮЩИМ ИЗ ЛИЧНЫХ НЕИМУЩЕСТВЕННЫХ ПРАВООТНОШЕНИЙ

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АННОТАЦИЯ

В статье рассматривается правовая природа иска как процессуального средства защиты нарушенного личного неимущественного права. Исследуются научные подходы и нормативное регулирование вопроса об отдельных способах защиты личных неимущественных прав, составляющих предмет иска.

Ключевые слова: личные неимущественные права, гражданский процесс, иск, исковое производство, истец, ответчик.

THE QUESTIONS OF ACTION PROCEEDING IN CASES THAT ARE ARISING FROM INDIVIDUAL NON-PROPERTY RIGHTS

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SUMMARY

The article deals with the legal nature of the claim as a procedural remedy for the protection of violated individual non-property rights. The scientific approaches and normative regulation of the issue of certain ways of protecting individual non-property rights that constitute the subject of a claim are investigated.

Key words: individual non-property rights, civil process, claim, lawsuit, plaintiff, defendant.

Постановка проблемы. Гражданское процессуальное законодательство не дает определения понятия «исковое производство», чего нельзя сказать о науке гражданского процесса. В правовой науке исковое производство рассматривается как производство по решению споров о «субъективном праве гражданском» и направлено на защиту нарушенного или оспоренного субъективного гражданского права граждан и организаций [1, с. 117]. Основным процессуальным средством защиты нарушенного личного неимущественного права в исковом производстве является иск, понятие которого в общем чрезвычайно дискуссионное в науке, причем не только в науке гражданского процесса, и рассматривается как его основная категория.

Актуальность темы исследования подтверждается степенью нераскрытости вопроса искового производства по делам, возникающим из личных неимущественных правоотношений и проблем, возникающих на практике при попытке защитить вышеуказанные права.

Целью и задачей статьи является исследование искового производства в гражданском судопроизводстве Украины под углом защиты нарушенного личного неимущественного права.

Изложение основного материала. Исковое производство является главным видом производства в гражданском судопроизводстве, в котором осуществляется рассмотрение подавляющего большинства сложных гражданских дел. Фактически речь идет о специальной исковой форме, для которой характерно: 1) наличие правового требования, вытекающего из нарушенного или оспариваемого права, которое по закону должно быть рассмотрено