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Research Article

PROBLEMS OF VAT IN UZBEK TAX LAW: DUE DILIGENCE AND ABUSE OF RIGHTS

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ABSTRACT

The article discusses the problems of applying innovations (Articles 14-15 of the Tax Code) in the Tax Code of the Republic of Uzbekistan: the application of the concept of due diligence and abuse of the right. The State Tax Committee believes that the very fact of a transaction with "unscrupulous" taxpayers is not a manifestation of due diligence (Article 15 of the Tax Code) and will have to pay taxes for unscrupulous counterparties or prove the legality and validity of the transaction (operation). Thus, the tax authority replaces due diligence with the presumption of knowledge. In the author's opinion In fact, a taxpayer can be recognized as having acted without due diligence only if he knew or should have known (for example, due to affiliation) about violations. the presence of a transaction with an unfair counterparty does not in itself mean that the taxpayer abuses the right to receive tax benefits and fails to exercise due diligence. Quite often, the taxpayer himself becomes a victim of the counterparty's deception, and the head of the (unscrupulous) counterparty deliberately misleads the tax authorities that he knows nothing about the organization. Even if the taxpayer does not exercise due diligence, it is impossible to impose on him the obligation of another unscrupulous counterparty (as shown by foreign experience). The author proposes a number of measures for the correct application of the concept of due diligence and its limits, as well as the standards for proving the abuse of taxpayer rights.

KEYWORDS

Due diligence, Uzbek Tax Law, Problems of VAT.

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INTRODUCTION

Recently, a heated dispute erupted on the topic of adjusting or canceling the amount of the VAT credit for abuse of the right (Article 14 of the Tax Code of Uzbekistan). The State Tax Committee (hereinafter referred to as the State Tax Committee) stated that organizations that had financial transactions with unscrupulous taxpayers carrying out dubious operations (engaged in "cashing out") the amount of the VAT credit was adjusted or canceled. [1]

It turns out that the State Tax Committee believes that the very fact of a transaction with "unscrupulous" taxpayers is not a manifestation of due diligence (Article 15 of the Tax Code) and will have to pay taxes for unscrupulous counterparties or prove the legality and validity of the transaction (operation). Thus, the tax authority replaces due diligence with the presumption of knowledge. Despite the lack of sufficient legal grounds (on the interpretation of Articles 14-15 below), it turns out that taxpayers are liable for non-payment of taxes by other persons due to "negligence in choosing a counterparty".

Such liability in legal science is called liability without establishing fault – "strict liability". [2] But Art. 14-15 do not provide for such liability, but only states the priority of the economic content of the transaction over the form. And the question of responsibility requires a thorough examination of the circumstances. In fact, the essence and main purpose of Art. 14-15 - prevention of obtaining unjustified tax benefits through abuse of the right: to conclude a deal without the intention of creating legal consequences (for example, to receive money instead of a product or an intentional reduction in the price of a product, etc.).

However, the actions of the tax authorities indicate a lack of a correct understanding of unjustified tax benefits and create unnecessary problems: unfair distribution of obligations, unnecessary intrusion of commercial activities of business entities, etc. The solution to this problem is only in the legal field, namely, in the correct distribution of the burden of proof and the provision of a fair mechanism for determining the violation.

Taxes perform especially important functions in the life of society and the emerging (already arisen) conflict of public and private interests can lead to various forms of resistance - like open indignation of entrepreneurs (which has already happened https://www.youtube.com/watch?v=i1GoB3aswyA&feature=youtu.be) and covert, such as evading or giving the appearance of fulfilling a duty. [3]

Everyone is responsible only for his own obligations.

According to the generally recognized principle of tax benefit (Benefit Principle), the amount of the tax liability must correspond to the economic benefit received by the taxpayer (value added, profit, income of individuals, etc.). [4] Also, based on the general principles of law (fairness), each taxpayer - participant in transactions bears only his share of the tax burden. Accordingly, the taxpayer is not responsible for the actions of other persons participating in the multi-stage process of paying and transferring taxes to the budget. In addition, tax legislation is based on the presumption of honesty of taxpayers, and each taxpayer is recognized as being in good faith until proven otherwise. Thus, it is possible to shift the tax

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liability of unscrupulous persons to the taxpayer only in case of proven abuse of the right.

Abuse of the right and dishonest taxpayers

In its appeal, the State Tax Committee began to use the term "unscrupulous taxpayers". [5] Bad faith is like the reverse side of good faith, expressed in the abuse of the right (use the right against goals, circumvention of the law, etc.).

Tax abuse (right) is a function of the civil law institution abuse of the right, which is expressed in the deliberate distortion of the size of the actual size of the tax obligation by creating the appearance of compliance with the requirements of the law, in the exercise of the right in contradiction with its purpose (the use of the right is not for good, but for evil) or to harm others.

For example, obtaining a legitimate tax benefit is considered as the right of the taxpayer (the Tax Code provides the taxpayer with the opportunity (right) to take into account certain expenses and deduct VAT (Article 266 of the Tax Code). However, the taxpayer entering into sham transactions (without the intention to create the consequences specified in the contract, for example, not to buy goods, but to receive cash - “cashing out”, etc.) abuses this right. In this case, the tax authority may not take into account the form of the transaction and adjust the amount of tax.

To counter the abuse of the law, the legal order has various mechanisms such as recognizing certain transactions as invalid, disregarding them and applying rules related to the transaction that the parties really had in mind, compensation for harm caused, etc.

Recognition of the transaction as invalid solely for the purpose of determining the actual amount of the tax liability will lead to the destruction of civil law relations that do not belong to the field of tax administration and violate the stability of commercial activity. In the end, it is not the fact of the conclusion of the transaction that is taxed, but also the consequences, actions, property, legal facts, etc. Also, according to experts, in the fight against tax abuses, it is necessary to use more prompt and effective administrative measures, therefore, it is not enough just to go to court with a claim to recognize the transaction as invalid. [6]

Due diligence and the presumption of knowledge in Tax Law

To prevent tax abuses, the Tax Code provides for the doctrine of the inadmissibility of obtaining unreasonable tax benefits (by abusing the right) and for tax purposes recognizes the principle of the priority of economic content over the form of a transaction (operation) (Part 1, Article 14 of the Tax Code). This instrument has been used since the beginning of the last century in Australia (1915), Germany (1915), Holland (1930). [7]

But the tax authorities misinterpret the norm of Art. 15 of the Tax Code, expanding it to the impracticable, although this obligation is valid only within the framework of the principles of reasonableness: In tax relations, taxpayers are required to exercise due diligence when choosing counterparties, checking whether they are registered with the tax authorities as taxpayers, business reputation, the availability of a production base and personnel, financial condition, ability to fulfill obligations under the transaction.

The obligation to check counterparties, presenting sometimes impossible requirements and conditions to potential counterparties, while collecting a huge amount of information in civil relations, is associated with an inevitable intrusion into the sphere of trade secrets and personal data of entrepreneurs. Fixing the

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verification of counterparties as an obligation of the taxpayer is the result of inefficient tax administration.

It should be noted that the doctrine of unjustified tax benefit and due diligence can work effectively in conditions of high efficiency of tax administration and ensuring a high level of information disclosure..

Also, the actions of the tax authorities mean that due diligence has already been replaced by the principle of strict liability: refusal to recognize the right to a tax benefit due to the counterparty's bad faith, regardless of the taxpayer's fault. This position is absolutely wrong and unfair (contradicts the principles and foundations of law, including the Tax Code).

And the doctrine of due diligence essentially comes from the (private law) principle of reasonableness and good faith, or rather is their function. It operates on a presumption of knowledge (due diligence itself is not a presumption). It should be noted that in this case, the knowledge (guilt) of the taxpayer is presumed, and not liability or violation. After all, until the tax authority has proof of a specific violation (abuse, for example, the absence of a business purpose in transactions), accordingly, the presumption cannot work.

A presumption is the rule that courts must draw a certain conclusion from a particular fact or from particular evidence, until the validity of that conclusion is rebutted. [8]

However, provided for in Art. 15 due diligence (although it is stated as a duty of the taxpayer) works when the fact of violation (abuse) is already proven. And the fact of concluding a transaction with an unfair counterparty is not sufficient to recognize the benefit as unreasonable and its actions as a violation using the due diligence doctrine as a presumption. It is refuted by the principles of rationality and good faith of taxpayers and the presumption of innocence of offenders (Article 212 of the Tax Code). Moreover, if the party entered into a deal (since these are civil law relations), then the good faith, reasonableness and fairness of the actions of participants in civil legal relations are assumed (part 3 of article 9 of the Civil Code).

In fact, a taxpayer may be deemed to have acted without due diligence only if he knew or should have known (for example, due to affiliation) about violations.

However, the existence of a transaction with an unfair counterparty does not in itself mean that the taxpayer abuses the right to receive tax benefits and fails to exercise due diligence. [9] Often, the taxpayer himself becomes a victim of counterparty fraud, and the head of the (unscrupulous) counterparty deliberately misleads the tax authorities that he knows nothing about the organization.

Even if the taxpayer does not exercise due diligence, it is impossible to impose on him the obligation of another unscrupulous counterparty (as shown by foreign experience). After all, the fact that a taxpayer's counterparty violates its tax obligations is not in itself proof that the taxpayer has received an unreasonable tax benefit. A tax benefit may be recognized as unjustified if the tax authority proves that the taxpayer acted without due diligence and caution and he should have known about the violations committed by the counterparty, in particular, due to the relationship of interdependence or affiliation of the taxpayer with the counterparty.

Due Diligence Standards of Evidence

Thus, the tax authority has the right to impose the tax liability of an unfair counterparty on the taxpayer

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(bring the taxpayer to joint and several liability) if the taxpayer knew or should have known (for example, due to affiliation) about violations of the unfair counterparty.

Although, according to part 7 of Art. 212 of the Tax Code of the Tax Code, the burden of proving the facts of tax offenses is assigned to the tax authorities, the distribution of the burden of proof in case of tax abuse is quite difficult. After all, usually in such disputes there are negative facts (lack of documents and a real economic goal), which is illogical to put the burden of proof on the tax authorities.

Also, due to the presumption of honesty of taxpayers, the initial burden of proving the fact of a violation (the transaction does not pursue a business goal (cash out) or price reduction, etc.) lies with the tax authority. [10] He must prove the existence of an unjustified tax benefit as such and its amount, as well as at least one of the following circumstances:

- signs of unreality of business transactions;
- signs of lack of business purpose;
- controllability of a defective participant in a business transaction, i.e. "one-day firms", to the taxpayer.
- In turn, the taxpayer, in response to the claims of the tax authority, has the right to prove that:
- there is no tax benefit or it is less;
- operations are real;
- there is a business purpose, etc.

Foreign experience. The fight against tax abuses and various fraudulent schemes has been one of the urgent problems in the countries of the European Union. In order to combat such schemes at the EU level, the rule of joint liability (joint liability) has been developed and enshrined. Art. 21 (part 1) provides for the joint and several liability of certain persons together with the taxpayer. [11] It should be noted that in the EU, the tax authorities work quite efficiently and the quality of tax administration is at the highest level, and accordingly, such a mechanism is appropriate.

Disputes on the application of joint liability for VAT tax liabilities have been repeatedly considered by the European Court of Justice. In particular, in the case of Federation of Technological Industries and Others, the court held that a person could be liable to pay tax if such person "knew or had reasonable grounds to believe" that the supplier would not pay VAT. The European Court of Justice noted that this provision of the directive is applied subject to the principles of legal certainty and proportionality (cases: C-354/03, C-355/03 & C-484/03, paragraph 29 of the judgment). [12]

Also, the court recognized the refutable presumption of the informed taxpayer: the fact of violation is revealed and proved by the tax authority and then we assume that the taxpayer knew about the violations and made a deal. The Court specifically noted that, from the point of view of the general principles of law, this presumption should be applied in such a way that their rebuttal (principle of proportionality and fairness) is not excluded. Thus, according to European legislation and judicial practice, the fact of non-payment of tax by the counterparty in itself is not a basis for refusing to deduct input VAT to the taxpayer (as our authorities do), this fact does not indicate an abuse of the right. [13]

Absurdity and invasion. The rule on changing the legal qualification of a transaction for tax purposes should be excluded from Art. 14 of the Tax Code due to the absurdity and impossibility of such interference in the private law relations of participants in civil circulation. It should be noted that the revision of the tax consequences of a transaction is always a significant intrusion into the commercial (private) activities of a

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business, a restriction of the principle of freedom of contract and discretion of the entrepreneur. Therefore, a special procedure for reviewing tax consequences is needed, which forms a mechanism of checks and balances and guarantees tax security and business sustainability.

Thus, the practice of tax authorities to hold taxpayers liable for the actions of third parties, which is not based either on the Tax Code or on the general principles of law and presumptions, only due to the fact of bad faith of the counterparty, regardless of the fault of the taxpayer, shows the inconsistency and inefficiency of tax administration, also demonstrates the neglect of the rights and legitimate interests of taxpayers. Often this insolvency is justified by pathos and public interests (to replenish the budget). However, such inefficiency in tax administration will lead to legal uncertainty for entrepreneurship and higher costs. Shifting their functions to taxpayers (identifying the facts of a tax offense and holding them accountable) is the same as assigning damages to the victim of a robbery for not showing due diligence and offering to hire personal security guards. There is no doubt that such an incorrect interpretation and application of the norms by the authorized bodies increases the losses of society as a whole a thousandfold and leads to the inefficiency of the entire economic and legal system.

What to do?

Despite the fact that this problem has long been solved in other legal orders, our authorized bodies have not learned the corresponding lesson. Also, the court is silent, which has the right to give clarifications on the application of the law.

Comply with the law (TC) and general legal principles of law, which absolutely does not allow paying VAT for third parties without proving abuse. Moreover, objective imputation is not allowed in the framework of similar offenses, due to the complexity of market relations.

1. Adopt a resolution of the Plenum of the Supreme Court to ensure the unity of the practice of applying by courts of evidence of the validity of the occurrence of a tax benefit for a taxpayer (the provisions of Articles 14-15 of the Tax Code) in relation to an unjustified tax benefit, including those providing for the following;

2. Refuse liability without establishing fault, but establish liability for abuse (through negligence), due diligence is not a presumption and it works together with the presumption of knowledge and the principle of reasonableness.

3. In cases of transactions with dishonest counterparties:

The mere fact of a transaction does not mean abuse or other wrongdoing,

The burden of proof for abuse (reduction in prices, volume or lack of business purpose (cash out) lies with the tax authorities,

After identifying signs of abuse, “due diligence” begins to work,

The burden of proof is placed on the taxpayer to refute the abuse (submit documents proving the reality of the transactions),

And only in the case of proving signs of abuse and not proving by the taxpayer his good faith will refuse the latter to deduct VAT (he pays for his unscrupulous counterparty).

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