

INFORMATION THAT IS IMPORTANT FOR TAXATION AS AN ELEMENT OF THE LEGAL REGIME OF SECRECY IN TAX LEGAL

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Summary. Information that is important for taxation as an element of the legal regime of secrecy in tax relations is considered in the article. A critical assessment of the regimes for the protection of secret and confidential information about taxpayers provided for in the Tax Code of Ukraine is given. Based on the analysis of doctrinal works and domestic legislation the main structural elements of the legal regime of tax secrecy are identified, their content is researched. The main problems of legal support of the institute “information relevant to taxation” are highlighted. It is stated that most structural elements of this regime are not defined by the law and are scattered at the level of a number of regulations of different legal force. The necessity of elaboration and adoption of a normative-legal act, where the conceptual bases of the legal regime of tax secrecy in Ukraine would be determined, is offered. Recommendations on the transition from the prohibitive principle of tax secrecy in terms of openness and public access of information, which operates in Ukraine, to the permissive principle are substantiated. It is proved that the regime of professional secrecy of tax officials of Ukraine is optimal in the context of protection of taxpayers’ rights and development of tax service functions.

Key words: information, tax secrecy, legal regime, taxation, tax legal relations, structural elements, rights of taxpayers

INTRODUCTION

When ensuring the balance of public and private interests in the tax sphere, it is necessary to take into account that the simultaneous increase in the volume and values indicating the taxpayer available to the tax authorities increases the need to protect this information. There is a need for more effective regulation of the institutions of secrecy, which require implementation and protection of the rights of taxpayers adequate to the modern reality, increase of confidence to the tax service, investment attractiveness of the business environment in the country. The above circumstances and the lack of modern theoretical research on the legal regime of secrecy in tax relations have led to the relevance of the study.

1. THE STRUCTURE OF TAX INFORMATION IN THE CONTEXT OF TAX SECRECY

The current regulations on the various secrecy regimes that protect confidential economic information indicate the existence of three main approaches used in legislation to regulate the composition of information in the regimes of various secrets. According to the first of them, all information that constitutes a secret must be directly listed in the legal act. This approach is used to determine the composition of information protected by state secrecy.

According to the second approach, the owner (possessor) of information has the right to determine the composition of the information to be protected. This rule is applied in the mode of commercial and official secrecy.

The third approach does not provide for the establishment of a list of information to be protected, only subjects who are obliged to keep this information confidential are identified. This approach is implemented in the Tax Code of Ukraine, according to which the composition of information protected in the regime of tax secrecy is determined using the construction “everything except listed in.”

A similar approach is used in determining the legal, notary and other professional secrets. The legislation on taxes and fees stipulates that information about the taxpayer from the moment of registration in the tax authority is the information with limited access (hereinafter – tax secrecy), unless otherwise provided by Art. 63 of the Tax Code of Ukraine.¹ In turn, Art. 63 of the Tax Code of Ukraine stipulates that tax secrecy consists of information about the taxpayer received by the tax authority, the National Police, investigative bodies, the state extra-budgetary fund, the customs authority.

In the sense of this rule, the “information received” is not closed, but assumes everything, except for the exceptions, which include information that: a) is publicly available, including the consent of the owner-taxpayer. Such consent is given at the choice of the taxpayer in respect of which information or part of it received by the tax authority in the form, way and in the manner approved by the State Tax Service of Ukraine; b) on the identification number of the taxpayer; c) on violations of the legislation on taxes and fees (including the amount of arrears, fines and penalties debts, if any) and measures of responsibility for these violations; d) is submitted to the tax, customs or law enforcement agencies of other states in accordance with international agreements to which Ukraine is a party, on mutual cooperation between tax, customs or law enforcement agencies in terms of information provided to these authorities, including international automatic exchange of information; e) is submitted to election commissions (in accordance with the election legislation), on the amount and sources of income of the candidate (his/her wife), on the property belonging to the candidate (his/her wife)

¹ Act of 02.12.2010, No. 2755–VI, “Vidomosti Verkhovnoyi Rady Ukrainy” 2011, No. 13–14, 15–16, 17, p. 112.

on the right of ownership; f) is submitted to the Unified State Portal of Administrative Services provided by the Law of Ukraine “On Administrative Services;”² f) on special tax regimes applied by taxpayers, on the participation of the taxpayer in the consolidated group of taxpayers; g) is submitted to local governments in order to control the completeness and accuracy of information provided by payers of local taxes and fees, for the calculation of taxes and fees, the amount of arrears on such taxes and fees; h) on the average number of employees of the organization for the calendar year preceding the year of submitting the specified information on the Internet in accordance with the Tax Code of Ukraine; i) on the amounts of taxes and fees paid by the organization in the calendar year preceding the year of submitting the specified information on the Internet (for each tax and fee); j) on the amounts of income and expenses according to the accounting (financial) statements of the organization for the year preceding the year of submitting the specified information on the Internet; on registration in the tax authorities of foreign organizations in accordance with the Tax Code of Ukraine; k) on registration in the tax authorities of individuals.

Following the reverse logic we can conclude that tax relations affect a large number of restricted information regimes.

In addition to information protected by tax secrecy, tax authorities often receive information that constitutes bank secrecy, audit secrecy, trade secrecy, insurance secrecy, information that is personal data.

The list of information received by the tax authorities is not limited to these types of secrets. The information received by the tax authorities is very multifaceted and diverse.

For example, tax authorities receive information about family secrets. The Tax Code of Ukraine has been amended, according to which the bodies registering civil status of individuals, guardianship and trusteeship bodies are obliged to report to the tax authorities information on marriage, divorce, paternity, establishment and termination of guardianship and custody.

Even information that constitutes medical secrecy is not excluded from the attention of the tax authorities. In particular, this can be illustrated by the example of the verification of the declaration, which states the social tax deductions for the treatment of the taxpayer or a member of his family. The documents attached contain information that is a medical secret.

All information available to the tax authorities it is appropriate to name information relevant to taxation, which means information that is relevant to taxation and which is the basis of tax secrecy and is directly necessary for taxation, i.e. for the correct calculation and timely payment of taxes and fees.

In studying the issue of tax secrecy scientists focused on economic information and singled it out from the totality pointing out that economic information is the basis of information necessary for taxation, i.e. information that is impor-

² Act of 06.09.2012, No. 5203–VI, “Vidomosti Verkhovnoyi Rady Ukrayiny” 2013, No. 32, p. 409.

tant for taxation.

2. INFORMATION RELEVANT TO TAXATION IS AN ELEMENT OF TAX SECRECY

Development of tax legislation over the last decade indicates on its social orientation and the development of the informational function along with the control functions. At present there is an urgent need to adjust the approach to the classification of information relevant to tax information.

In modern conditions there is a tendency to expand the amount of information relevant to taxation. Tax authorities possess a large array of information about taxpayers of a non-economic nature, which is important for the calculation of taxes and fees. This information: personal and passport data; on registration of individuals at the place of residence and registration; on the facts of birth and death; on the composition of the family; on conclusion and divorce, establishment of paternity; on the establishment, termination of guardianship and custody; on the transfer of the child to a foster family; on the state of health, medical care provided, prescribed medications for taxpayers and their relatives; on education of taxpayers and their children with indication of specialties and forms of education, other non-economic information.

Given the lack of a unified approach to the content of the concept of “information relevant to taxation” and the legislative enshrinement of the latter, we consider it necessary to include all (not only economic) information used by tax authorities in the exercise of powers.

Information relevant to taxation should be understood as a set of information concerning the subjects of tax relations, economic and non-economic (private) nature, necessary for the exercise of powers by the tax authorities.

Meanwhile, the term “information relevant to taxation” has not been firmly established in the science of tax law and is mentioned in only a few sources.

In the absence of a definition of this concept in tax legislation, the Tax Code of Ukraine contains a definition of “financial information.” We believe that this definition does not fully reflect the whole set of information received by the tax authorities for the exercise of powers, can be used only to determine the information in respect of which there is an automatic exchange between countries.³

In this regard we consider it appropriate to use the term “tax information,” which should be understood as a set of information relating to the subjects of tax relations of economic and non-economic (private) nature, necessary for the tax authorities to exercise their powers.

In accordance with the Law of Ukraine “On Financial Services and State Regulation of Financial Services Markets” financial information means information on transactions, accounts and deposits of customers, the amount of liabilities of

³ Act of 03.12.2019, No. 323-IKH, “Vidomosti Verkhovnoyi Rady Ukrayiny” 2020, No. 10, p. 51.

the insurer who entered into a voluntary life insurance contract to customers or beneficiaries, the amount of funds and the value of the property of these persons at the disposal of the financial market organization in accordance with the brokerage agreement or trust agreement, the value of the property of these persons, which is accounted for by the financial market organization, depository activities, pension accounts of these persons, central liabilities counterparties to the specified persons, on payments and transactions made in connection with the specified accounts and deposits, the contract of voluntary life insurance, the contract of trust management of property (including the certificates of issue of the investment unit), the contract on brokerage service, deposits agreement, pension agreement, agreement with the central counterparty and other agreements under which the financial market organization accepts from customers funds or other financial assets for storage, management, investment and (or) other operations in the interests of the client or directly or indirectly through client.⁴

For the purpose of exact scientific and legal identification of the tax information and specific definition of its place in system of secrets it is necessary to carry out a ratio of a tax secrecy with a professional secret and an official secret. This issue is quite controversial in legal science. You can find diametrically opposed positions [Zbins'kyi 2016, 22].

For example, some authors consider them identical in relation to the activities of tax authorities. Other researchers believe that the concept of “tax secrecy” is more narrow than the general concept of “official secrecy,” which, in turn includes tax secrecy and is related to it as a general and partial.

In our opinion, tax secrecy is a professional secret of tax officials. However, these concepts are not identical, as the latter is broader and includes tax secrecy as one of the subtypes of professional secrecy. A similar position is taken by a number of other authors.

For example, O. Mandzyuk comes to the conclusion about the expediency of distinguishing the following types of secrets: private (personal, family, correspondence, telephone conversations, postal items, confessions, personal data, etc.); professional secrecy (banking, lawyer's, journalists', tax, etc.); trade secrecy (confidential information of commercial value, know-how); state secrecy (state secrecy, official secrecy) [Mandzyuk 2014, 15].

Neither tax nor professional secrecy in general should be equated with official secrecy. Employees of tax authorities in their activity face two types of secrets: information about the taxpayer and his/her activities, which were accessed by an official of the tax authority in connection with the performance of official duties that constitute a professional secrecy (in this case – tax); information related to the activities of the state body (orders, regulations, guidelines, letters, etc.) where the employee works, higher and subordinate bodies the distribution of which is limited (for example, marked “For Official Use”), which is an official secret. This

⁴ Act of 12.07.2001, No. 2664–III, “Vidomosti Verkhovnoyi Rady Ukrainy” 2002, No. 1, p. 1.

is usually information on the procedure for tax control measures or the procedure of information exchange and interaction between tax authorities and structural units.

To differentiate the information that constitutes a secret of different types, to determine to which type of secrecy this information belongs, it is necessary to define the object of the secrecy (the information itself, data), the subjects of the secrecy (the person who is obliged to keep the secrecy, the person who is the owner of information that is protected in the mode of secrecy and has the right to demand its preservation), to determine under what circumstances the information becomes known to the person.

For example, the difference between official secrecy and professional secrecy is the lack of identity in the subjects of property rights to information that is protected by secrecy.

The owner of information protected by official secrecy is a public authority or local government to which this information has been entrusted for the performance of official duties. And the owners of information protected by professional secrecy are individuals and legal entities who have entrusted this information to the authority or organization with which they entered into legal relations, or who have provided such information in accordance with the statutory obligation.

Confidential information held by the tax authority is divided into two major parts: official secrecy (information about the activities of the authority), tax secrecy (information about the taxpayer). In law enforcement practice it is often difficult to differentiate information and documents into components that have or do not have tax secrecy due to the lack of clear legal criteria for legal identification.

This fact is significant in the context of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Stimulation of Investment Activity in Ukraine.”⁵ These circumstances are also pointed out by Yu. Kasperovych, a representative of the National Institute for Strategic Studies under the President of Ukraine [Kasperovych 2019, 15].

In view of this, it is proposed to introduce an additional restrictive mark on the documents “Tax Secrecy.” This mark will act as an additional guarantee of compliance with the rights of taxpayers, will accurately qualify the illegality of the actions of tax authorities officials who have violated the obligation to maintain tax secrecy.

CONCLUSIONS

The study of information relevant to taxation has revealed the versatility of the problem in the conceptual framework and in regulation of this issue. Improving the legal regulation of the legal regime of secrecy in tax relations will solve

⁵ Act of 20.09.2019, No. 132–IKH, “Vidomosti Verkhovnoyi Rady Ukrainy” 2019, No. 46, p. 299.

a number of practical difficulties and increase the effectiveness of legal instruments aimed at protecting secrecy in tax relations and ensuring the rights of individuals and legal entities involved in these legal relations. It is necessary to give information that is important for taxation a special status, highlighting the number of professional secrets. The institution of tax secrecy, which includes information relevant to taxation is an independent legal institution of tax law, as it regulates a certain type of public relations, is a stable group of legal norms, has its own subject of legal regulation, the subject composition entering into legal relations related to tax secrecy, legal mechanisms to protect the rights and interests of subjects of such legal relations. This requires additional legal regulation by supplementing Art. 63 of the Tax Code of Ukraine by missing legal norms. It is expedient to envisage in the legislation stricter requirements for the circulation of information constituting tax secrecy, increased liability for violation of its protection requirements.

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INFORMACJE ISTOTNE DLA OPODATKOWANIA JAKO ELEMENT TAJEMNICZY PODATKOWEJ W SYSTEMIE PRAWNYM PRAWA PODATKOWEGO

Streszczenie. W artykule scharakteryzowano informacje, które są istotne dla opodatkowania jako elementu prawnego tajemnicy w prawie podatkowym. Podano krytyczną ocenę systemów ochrony tajnych i poufnych informacji o podatnikach przewidzianych w ukraińskim kodeksie podatkowym. Na podstawie analizy prac doktrynalnych i ustawodawstwa krajowego zidentyfikowano główne elementy strukturalne reżimu prawnego tajemnicy podatkowej, ujawniono ich treść. Podkreślono główne problemy związane z obsługą prawną instytucji „informacje istotne dla opodatkowania”. Stwierdzono, że większość elementów strukturalnych tego reżimu nie jest określona przez prawo i jest rozproszona na poziomie szeregu przepisów o zróżnicowanej mocy prawnej. Konieczne jest opracowanie i przyjęcie aktu prawnego, w którym określone zostaną podstawy koncepcyjne reżimu prawnego tajemnicy podatkowej na Ukrainie. Uzasadnione są zalecenia dotyczące przejścia od zakazującej zasady tajemnicy podatkowej w zakresie otwartości i publicznego dostępu do informacji, obecnej na Ukrainie, do zasady dopuszczalności. Udowodniono, że reżim tajemnicy zawodowej urzędników podatkowych Ukrainy jest optymalny w kontekście ochrony praw podatników i rozwoju funkcji organów podatkowych.

Słowa kluczowe: informacja, tajemnica podatkowa, reżim prawny, podatki, zobowiązania podatkowe, elementy strukturalne, prawa podatników

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