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LIABILITY OF LEGAL ENTITIES FOR TAX OFFENSES: EXPERIENCE OF FOREIGN COUNTRIES

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Balyshev M. Liability of legal entities for tax offenses: experience of foreign countries.

The article is devoted to highlighting the experience of foreign countries regarding responsibility for tax offenses. It is noted that since the filling of the budget of any state depends on establishing a mechanism of control over the implementation of tax revenues from large taxpayers, namely from legal entities, the question arises of introducing legal responsibility for such entities for violation of established prescriptions. One of the tools to combat tax evasion in Europe is the standard tax justice model, which introduces several sanctions for legal entities that violate tax legislation.

The existence of two approaches is emphasized: American and European. The first is characterized by harsh sanctions for committing tax offenses and the application of combined fines, while the second is more democratic, preventive in nature and establishes fixed amounts of fines depending on the magnitude of the violation and the presence of intent. The main attention is paid to the characteristics of liability that applies to legal entities in Italy and France. It was established that there were indicators for each country separately. The main attention is paid to the characteristics of liability that applies to legal entities in Italy and France. It was established that in 2020, the 'Maturity Model', a set of indicators developed for each country separately as a diagnostic tool for self-assessment, measures the maturity of the investigation of tax crimes, taking into account factors such as the efficiency of law enforcement, the level of cooperation between tax authorities and other law enforcement agencies, and the effectiveness of legal measures against tax offenders.

The conducted study of applying the liability of legal entities of foreign countries for tax offenses gave grounds to conclude that its main types are administrative liability (including 'quasi-criminal') and criminal liability. The following prerequisites for the commission of tax offenses by legal entities are highlighted: imperfect policy on fighting corruption and fraud at the state level, which may include inadequate resources for enforcement, lack of transparency in government operations, or ineffective anti-corruption measures; loopholes in tax legislation, which became the impetus for the development of the shadow economy and, accordingly, the concealment of profits by legal entities, often by prior agreement; lack of a joint financial register of illegal financial flows; an inadequate system of sanctions against intermediaries who help legal entities avoid paying taxes and commit tax fraud.

Key words: liability of legal entities, tax offense, foreign experience, tax evasion, offense, administrative liability, criminal liability

Балишев М.В. Відповідальність юридичних осіб за податкові правопорушення: досвід зарубіжних держав.

Стаття присвячена висвітленню досвіду зарубіжних країн щодо відповідальності за податкові правопорушення. Зазначено, що оскільки наповнення бюджету будь-якої держави залежить від налагодження механізму контролю за здійсненням податкових надходжень від великих платників податків, а саме від юридичних осіб, постає питання запровадження юридичної відповідальності для таких осіб за порушення встановлених приписів. Одним із інструментів боротьби із ухиленням від сплати податків в Європі є спільна модель податкової справедливості, якою запроваджено низку санкцій до юридичних осіб, що порушують податкове законодавство. Наголошено на існуванні двох підходів: американського та європейського. Перший характеризуються жорсткістю санкцій за вчинення податкових правопорушень та застосуванням комбінованих штрафних санк-

ції, а другий - носить більш демократичний, превентивний характер та встановлює фіксовані суми штрафів залежно від величини порушення і наявності наміру. Основна увага приділена характеристиці відповідальності, яка застосовується до юридичних осіб в Італії, та Франції. Встановлено, що для кожної країни окремо у 2020 році було розроблено показники «Моделі зрілості» як інструменту діагностики самооцінки, зрілості розслідування податкових злочинів.

Проведене дослідження практики застосування відповідальності юридичних осіб зарубіжних країн за податкові правопорушення, дало підстави зробити висновок про те, що основними її видами є адміністративна відповідальність (у тому числі «квазікримінальна») та кримінальна відповідальність. Виділено такі передумови вчинення податкових правопорушень юридичними особами: недосконала політика щодо боротьби з корупцією та шахрайством на державному рівні; прогалини податкового законодавства, які стали поштовхом до розвитку тіньової економіки і, відповідно, приховування прибутків юридичними особами, часто за попередньою домовленістю; відсутність спільного фінансового реєстру незаконних фінансових потоків; неналежна система санкцій щодо посередників, які допомагають юридичним особам уникати сплати податків та вчиняти податкове шахрайство.

Ключові слова: відповідальність юридичних осіб, податкове правопорушення, зарубіжний досвід, ухилення від сплати податків, правопорушення, адміністративна відповідальність, кримінальна відповідальність

Problem setting. Tax systems of the countries of the world are formed under the influence of various economic, political and social conditions. At the same time, the efficiency of filling the budget of any state depends on the establishment of a control mechanism in the tax sphere.

Rational ideas, approaches, methods of tax control to prevent such negative phenomena as offenses in the tax sphere are implemented, first of all, thanks to the use of the experience of foreign countries. It should be noted here that a significant percentage of taxpayers, as practical experience shows, are legal entities and the legislative regulation of the institution of responsibility for tax offenses is one of the priority tasks of the tax policy of foreign countries.

According to O. Pugachenko [1, p. 4], the judicial practice of Western countries testifies to the «consensus nature» of tax offenses, i.e., the implementation of the latter by prior agreement of the parties. At the same time, both the imperfection of legislative acts and traditional methods of tax evasion by hiding profits, carrying out complex interbank combinations and multi-channel «promotion» of money to various areas of the shadow economy are used.

Therefore, a necessary feature of any highly developed system of control over compliance with tax legislation is the presence of a comprehensive standard procedure for organizing control checks and a strong legal framework, which provides tax authorities with broad powers in the field of tax control to influence unscrupulous taxpayers [2].

The purpose of the study. The purpose of the article is to highlight the issues of liability of legal entities of foreign states for tax offenses.

The state of problem solving. The foreign experience of liability of legal entities for tax offenses is the subject of active scientific discussions and research. Among the national and foreign authors of works in which the indicated problems are revealed, we can mention such as: M. Bodnarsii, T. Bui, R. Voloshchuk, I. Kovalenko, Yu. Maidan, S. Manacorda, A. Macpherson, O. Pugachenko, S. Vassalli, M. Wilke and others.

Presentation of the main material. Analyzing the problem of tax evasion, a number of European scientists recognized it as a serious problem worldwide. In particular, statistical estimates of the tax deficit of the EU back in 2015 amounted to approximately 825 billion euros per year. And this became the impetus for governments to create a number of tools to combat tax evasion at the national and global levels [3, p. 236].

One of these tools was the introduction of a new common model of tax justice in Europe and, accordingly, the fight against tax evasion, such problems in the tax field as: undermining social policy; tax debt; lack of a joint financial register and monitoring of illegal financial flows by financial control units; an imperfect system of sanctions against intermediaries who help large corporations avoid paying taxes, etc. For example, companies, financial institutions and their intermediaries, which contributed to the avoidance of transparent taxation by the latter, should be threatened with punishment, in the form of exclusion from public procurement, EU investment programs, etc. [4, p. 12].

So, as M. Bodnarsky emphasizes, taking into account the existing problems, today the main tasks related to the tax policy of the EU countries are the fight against tax evasion and tax fraud [5, p. 24].

The formation of the system of liability of legal entities for tax offenses is due to the need for a constructive solution to problems in the field of taxation.

Having studied the practice of foreign countries, we came to the conclusion that the main types of legal liability of legal entities for tax offenses are: administrative (including «quasi-criminal») and criminal liability.

According to Chapter 4 «Administrative approaches to the prevention and resolution of disputes related to transfer pricing» of the OECD Guidelines in the 2010 edition, which contain an overview of the practices of member countries of the world international organization OECD regarding measures to ensure the proper payment of taxes [6, p. 23], administrative responsibility was named as one of the most common tools of this mechanism.

The Western (American) approach [2] is characterized by the harshness of sanctions for tax offenses and involves the application of combined penalties. Thus, providing incorrect tax information entails a fine of 500,000 dollars for legal entities. USA.

The European approach to determining administrative responsibility is more democratic and preventive in nature. For example, Switzerland, Germany and Great Britain set fixed amounts of fines depending on the magnitude of the violation and the presence of intent [7, p. 234]. In the Netherlands, the highest fine for tax evasion is 79,000 euros, while in Ukraine this figure for 2018 was only about 15,000 euros [6, p. 24], which speaks for itself.

In France and Italy, fines are set as a percentage of the amount of underpaid or unpaid tax. At the same time, the amount of sanctions also depends on the presence of intent when committing tax offenses. The maximum amount of the fine in France is 80%, in Italy – 240% [7, p. 234].

In general, the tax legislation of France [2] provides the necessary mechanisms to combat tax evasion based on the study of taxpayers' tax returns or received external information. For large enterprises, general verification and verification of the correctness of accounting systems are used, and small enterprises are provided with assistance in drawing up a balance sheet.

In Italy, the administrative liability of a business entity can coincide with the liability of the same entity for the collection of tax sanctions in the framework of criminal proceedings, because, usually, the latter takes place years after the non-criminal tax proceedings, there is no coherence between these two proceedings in terms of evidence. We are talking about the so-called administrative-criminal («quasi-criminal») liability of legal entities.

Decree № 231/2001 establishes and regulates the sphere of responsibility of entities in connection with a group of administrative offenses that are part of a larger crime when they are committed in the interests of the entity by managers and subordinates. In this case, monetary fines are applied only to the business entity that benefits from the offense [8].

Therefore, in Italy, administrative responsibility consists in the application of monetary sanctions. In particular, administrative fines for tax payments payable by a company or legal entity shall be paid exclusively by the relevant legal entity. From a legal point of view, there is a structural differentiation between – on the one hand – companies and legal entities (as the only parties responsible for administrative tax penalties) and – on the other hand – all other collective entities (eg partnerships). In any case, the responsibility for the amounts payable as a fine is jointly borne by the party that committed the offense and the business entity [8].

Thus, Decree № 231/2001 [9] introduced into Italian law a system of administrative liability (essentially comparable to criminal liability) for legal entities, which is added to the liability of the legal entity that committed the crime, and aims to impose sanctions on legal entities (enterprises and institutions). The administrative responsibility of legal entities for committing any of the crimes provided for by the Decree is added to and does not replace the criminal or administrative responsibility of the person who is the offender, and remains even if the perpetrator of the crime was not identified or if the same crime was extinguished for another reason, than amnesty.

A key aspect of the German model of administration of mandatory tax payments and fees is a rather high and severe financial penalty for tax offenses [10, p. 56].

German law can serve as an example of how a jurisdiction without corporate criminal liability can use functionally equivalent administrative sanctions to combat tax evasion by banks [11]. Such trends in the predominance of administrative sanctions over criminal ones are intended to persuade companies

to implement organizational structures designed to prevent the commission of corporate wrongdoing, as potential sanctions encourage companies to improve their compliance structures to avoid the imposition of these sanctions.

In Sweden, in the case of non-payment or underpayment of taxes, such an act is usually punished by the imposition of a fine in the amount, a multiple of the amount hidden from taxation, and is qualified by the fiscal service as an administrative offense, the statute of limitations for which is four years [12, p. 964].

In the context of the implementation of Directive (EU) № 2017/1371 of the European Parliament and of the Council on the fight against fraud directed against the financial interests of the Union, by criminal law means and Decree No 231/2001 [13], the administrative (quasi-criminal) liability of companies is extended to certain criminal tax offences. The court may levy a monetary fine, which depends on: the severity of the behavior (level of participation of the subject, actions taken by the subject to eliminate or mitigate the consequences of the offense and prevent the commission of criminal offenses); economic and financial condition of the business entity. The maximum fine units for criminal tax offenses range from 400 to 500 units, resulting in maximum fines of between €619,600 and €774,500. However, the amount of the fine can be increased to one-third (maximum amount, respectively, EUR 815,333 and EUR 1,032,666) if the benefit received by the economic entity is of «relevant value».

Sanctions are almost always imposed on particularly large tax evasion cases, and they usually involve a heavy burden of proof on the party alleging such evasion. For example, if a company committed tax evasion, but there may not be an identified person responsible for the crime, but the criminal actions may have occurred as a result of the joint actions of persons representing the company, then by law it is possible to bring the legal entity to criminal responsibility for the crime [6, p. 23].

In order to resolve the issue for each individual country regarding the readiness to implement the OECD document «Fighting Tax Crimes: Ten Global Principles», the «Maturity Model» was developed in 2020 as a diagnostic tool for self-assessment, the maturity of the investigation of tax crimes, based on a set of empirical indicators [15].

At the same time, it is necessary to single out the importance of the PIF Directive (No 231/2001) [16], which remains an up-to-date legislative act taking into account its main purpose: to ensure the liability of legal entities within the framework of criminal law for the most serious crimes against the general system of value added tax and corresponding damages, caused to the financial interests of the EU.

The fact that some countries, including Italy, did not provide for the liability of business entities for tax crimes before the EU adopted the PFI Directive, which introduces the liability of legal entities for serious VAT fraud, became important. Considering that the majority of cases of tax crimes in Italy concern legal entities, the problems of criminalization related, first of all, to the absence of tax crimes as predicate crimes for corporate criminal liability [17, p. 27].

Indeed, before the enactment of Law 157/2019, the tax crimes established by Decree 74/2000 [9] were not directly included in the list of predicate offenses of Decree 231/2001, which may cause corporate liability. Consequently, companies could only be subject to sanctions issued by the tax administration for fiscal violations, or to deal with the consequences of arrests and confiscations arising from offenses committed by their legal representatives.

As a result, in the Italian legal system, issues related to the inclusion of tax offenses as predicate crimes for corporate liability have come to the fore. The 2018 Law on European Representation, which entered into force in 2019, implemented 26 EU directives into Italian law, including the PIF Directive [9].

According to Italian Legislative Decree No 74/2000 [8], among the widespread criminal offenses committed by legal entities, the following stood out: submission of false tax returns based on non-existent invoices, tax evasion, illegal compensation of tax credits, etc.

Sanctions for such crimes consisted of fines of €1.5 million, disqualification measures and confiscation. Forfeiture refers to any amount of money, goods or other goods equal to the value or proceeds of crime. Disqualifications as penalties applicable to companies in addition to monetary sanctions include: a ban on entering into contracts with the public administration; deprivation of benefits, loans, grants or subsidies, etc. These measures can be from three months to two years and are applied if the organization received significant profits and the crime was committed by persons holding a high position or persons with managerial functions; in case of repeated offenses [9].

Conclusions. Studying the experience of certain foreign countries in the field of legal responsibility of legal entities for tax offenses allowed us to make the following generalizations:

1. For the vast majority of the analyzed countries, the common prerequisites for the commission of tax offenses by legal entities were:

1) imperfect policy on fighting corruption and fraud at the state level;

2) loopholes in the tax legislation, which became the impetus for the development of the shadow economy and, accordingly, the concealment of profits by legal entities, often by prior agreement;

3) lack of a joint financial register of illegal financial flows;

4) an improper system of sanctions against intermediaries who help legal entities avoid paying taxes and commit tax fraud.

2. Features of applying administrative liability to legal entities for tax offenses are:

1) the preventive nature of determining the liability of legal entities, which is implemented through the establishment of fixed amounts of fines depending on the amount;

2) establishment of fines as a percentage of the amount of underpaid or unpaid tax;

3) undisputed collections from the taxpayer's accounts in the event of a regular decrease in income;

4) the predominance of administrative sanctions (imposing regulatory fines on a legal entity) over criminal ones, in order to prevent the commission of corporate offenses.

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