**Appearance of presumptions and fictions in tax law**

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**Abstract:** The appearance of presumptions and fictions in law is associated with such property as formal certainty. For tax law, formal certainty is of particular importance. This is due to the fact that tax law is a public branch of law, which is characterized by complexity and dynamism, regulates highly politicized and conflicting relations regarding the financial support of public entities. Presumptions and fictions as a means of legal technique help to achieve certainty in tax law in cases where this cannot be achieved by other means of legal regulation.

**Keywords:** appearance in law, presumption, fiction, tax law, formal certainty of law.

Presumptions and fictions as means of legal regulation have been used in law for many millennia. They were actively used by the lawyers of ancient Rome to overcome the excessive conservatism and formalism of Roman law[[2]](#footnote-2). Some authors find the presence of these technical and legal means even earlier - in the legal monuments of the Ancient East. Z.M. Chernilovsky notes that "legal presumptions are much older in origin than Roman law and Latin itself"[[3]](#footnote-3). According to E.Yu. Marokhin, "categories of fiction and presumption in law have a long history, comparable in duration to the history of law itself"[[4]](#footnote-4). S.V. Guseva makes an even bolder conclusion that “the presumptions in force in law arise before the legal system itself, the legal system is built on the system of presumptions operating in the public consciousness”[[5]](#footnote-5).

The use of presumptions and fictions in law is due to such property as formal certainty. Issues of legal certainty are relevant to all areas of both national and international law. But in some areas of legal regulation, certainty is of particular importance. Without exaggeration, this problem is one of the main ones in tax law. To a greater or lesser extent, most scholars in the field of tax law have turned to it[[6]](#footnote-6).

Increased attention to certainty in the field of taxation is due, first, to the public law nature of tax law. Taxes are an unconditional attribute of the state, the main purpose of which is to financially ensure the implementation of domestic and foreign policy, ie to ensure the normal functioning of society[[7]](#footnote-7). The public-law nature of tax law determines a special sectoral regime, which contains the target priority of the so-called common good while maintaining a reasonable balance of public and private interests; attributive participation of the state in the face of the authorities of tax law; authoritative and subordinate nature of tax relations; predominance of prohibitions and obligations over permits; permitting the type of legal regulation; insignificant share (in comparison with branches of private law) of dispositive and relatively defined norms; use of contractual forms only as exceptions expressly provided by law. Such a legal regime, characterized by significant restrictions on the rights and legitimate interests of individuals, requires certainty and clarity of legal requirements.

Secondly, tax law, compared to other branches of law, is characterized by increased complexity and dynamism[[8]](#footnote-8). This is due to the intersectoral nature of the object of tax regulation, which covers primarily economic interactions, objectively prone to progressive improvement and permanent transformation. In modern conditions, the "amplitude" of these transformations is accelerating, continuously producing risks of insufficient legal regulation and adequacy of the regulatory model of relations that are actually developing. The desire of the legislator to ensure compliance of tax norms with socio-economic interactions, which is developing rapidly, leads to continuous tax reforms, often of a revolutionary nature. The latter creates significant tensions in terms of legal certainty, stability and predictability of tax regulation.

Third, the increased attention to the certainty of tax law is due to the high politicization and conflict of tax relations. In most branches of law and institutions, conflict is a possible, potentially permissible state. Another thing in the field of taxation. The sense of ownership is one of the oldest human instincts, and the instinct is innate, not acquired in the process of social adaptation[[9]](#footnote-9). Along with the instincts of self-preservation and procreation, the instincts of property determine the essence of Homo sapiens. Thus, the effort to form, accumulate and protect their property is rooted in each person at the subconscious level. Certain internal defence mechanisms force a person to oppose the encroachment on his property by anyone, including the state. Therefore, a person instinctively opposes taxation, which is a unilateral and individually gratuitous seizure of property. Such conflict and contradiction of interests between the taxpayer and the state produces a different assessment and interpretation of tax law and taxable situations. As a rule, such estimates are diametrically opposed. In these circumstances, any uncertainty in the sources of law - whether it was purposefully programmed by the legislator or formed as a defect-omission, will be interpreted by the person concerned in their favor.

Fourth, tax law is an area where the procedural component is important. Taxation, in essence, always involves extrajudicial restriction (deprivation) of property rights. This is a severe restriction of basic human rights, which is associated with such institutions as accounting, control, property penalties, prosecution for tax offenses. The state cannot rely on a sense of duty, conformism, conscious awareness of individuals of the need to pay taxes, and other internal sources of incentive motivation. The possibility of applying measures of state coercion is a necessary condition for the lawful and conscientious implementation of tax and legal norms. At the same time, the more detailed and clearly regulated the procedure for the application of state coercion, the more realistic is the legal guarantees of human rights and freedoms[[10]](#footnote-10). The inherent conflict of tax relations, associated with the unilateral transfer of income from the taxpayer to the state, dictates increased requirements for the detailed formalization of all stages of taxation, their regulatory fixation, strict compliance in practice. As a result, the importance of the certainty of tax law is growing, which guarantees the uniformity of their understanding and application by the relevant recipients.

Traditionally, a legal norm means a universally binding rule of conduct originating from the state and protected by it, which gives participants of public relations of this type legal rights and imposes legal obligations on them. That is, by means of a legal norm the external behavior of the person is regulated. But in some cases, the law also tries to regulate the inner sphere of a person, because it is related to his external actions. For example, the requirement of conscientious performance of the functions assigned to the supervisory authorities, which is required by paragraph 21.1.2. Article 21 of the Tax Code of Ukraine from officials of regulatory authorities, is an attempt to regulate the internal relationship of the subject to certain external circumstances. In some cases, the circumstances relating to the subjective sphere of the person (guilt, honesty, good faith, reasonableness…) are difficult to establish, but the law has important legal consequences with them. On this basis, the law will always apply presumptions - probable judgments about the presence or absence of circumstances based on other established circumstances. In legal regulation, the purpose of the legislator is to protect a particular social interest, certain social relations. In some cases, the most effective means of achieving this goal is a legal presumption. Legal presumptions are considered as a way to influence the sphere of thinking of a person in order to achieve as a result of such influence the conclusions required by the legislator.

These features of the legal presumption allow us to speak of it as a norm of law, i.e. as a universally binding norm of conduct. But a legal presumption has significant features - it is a kind of rule of the internal behaviour of a person, i.e. a rule that requires a certain conclusion about the existence of a presumptive fact. The norm of law is a generic concept, and the legal presumption is a specific one. In this regard, we can speak of a legal presumption as a specific normative provision that establishes the obligation of judgment about presumptive fact in the presence of grounds for presumption[[11]](#footnote-11).

A tax-legal presumption is a directly or indirectly enshrined in tax law mandatory judgment, which has a probable nature, about the presence or absence of normative or factual grounds for the emergence, change, or termination of rights and obligations, aimed at achieving the goal of legal regulation.

The essential properties of the presumption are:

1) presumption is a legal and technical means used in law-making and law enforcement;

2) presumption is a probable assumption, but the probability of its truth can be both relatively high and close to absolute zero;

3) the use of presumptions in law is due to the purpose of legal regulation;

4) presumptions are a kind of general assumptions; the difference is mainly that the presumptions are enshrined (directly or indirectly) in legal norms;

5) presumptions are related to the presence or absence of certain circumstances that have legal significance and entail legal consequences, i.e. legal facts;

6) many presumptions act as principles of law, fundamental, guiding principles of legal regulation established by the state. They show the attitude of the state to man (for example, the presumption of innocence, the presumption of good faith, the presumption of knowledge of the law, and others). Thus, Article 4 of the Tax Code of Ukraine as one of the main principles of the tax legislation of Ukraine highlights the presumption of legality of decisions of the taxpayer in case of conflict of tax legislation.

Classification of tax-legal presumptions is possible on various grounds: on the fact of legal consolidation (legislative, factual); if possible refutation (refuted, not refuted); depending on the role in legal regulation (material, procedural); by scope (general legal, intersectoral, sectoral); depending on the elements of the legal structure of the tax, in the formation of which presumptions are used (presumptions used in determining the taxpayer, the object of tax, the tax base…)[[12]](#footnote-12); depending on the functions performed by them (presumptions are enshrined in the rules of tax obligations law, tax procedural law, tax tort law) [[13]](#footnote-13).

The juridical construction of the real tax is based on the irrefutable presumption, according to which property (estate) brings income. The presumption is based on the fact of possession of certain property (object of taxation of real tax), which gives the legislator the right to attribute to the payer the receipt of average income (sources of payment of real tax) [[14]](#footnote-14). The use of this presumption in the juridical construction of real taxes can be shown by the example of land tax. Article 271 of the Tax Code of Ukraine stipulates that the amount of land tax does not depend on the results of the economic activity of landowners and land users. This tax is set in the form of stable payments per unit of the land area of agricultural land and land of settlements per year. The application of this presumption to other property taxes are similar: real estate tax other than land tax and transport tax.

In the system of personal taxes paid by taxpayers, it is necessary to distinguish industrial taxation, which is based on the presumption that every employee or worker, every machine or engine, every industrial or commercial premise in enterprises of this kind and in this area is equivalent to a certain amount of estimated profit[[15]](#footnote-15). The presumption, which is the basis for industrial taxation, can be both factual (the basis for determining the amount of taxation) and legislative. In the latter case, the legal norm must specify that it is the income determined on the basis of external features that are taxed. The legislative presumption, in turn, maybe not be rebutted or rebutted when the taxpayer retains the right to submit documents or otherwise justify that in reality the profit is not received in the expected amount. The simplified taxation system has the properties of industrial taxation[[16]](#footnote-16).

The use of the method of taxation according to the system of external features and presumptions: "property (estate) brings income" and "receipt of certain income in certain economic conditions" on which it is built, in the construction of direct taxes due to the specifics of direct taxes and low administration. This is explained by the insufficient level of development of the fiscal apparatus, the inability to control all objects of taxation of certain categories of taxpayers, the complexity and material cost of this process. In trying to solve this problem, the legislator identifies external features that are easy to identify and obliges the law enforcer to conclude that the taxpayer has the subject of taxable tax[[17]](#footnote-17).

Depending on the scope, the classification of legal presumptions into general legal and sectoral is widespread. At the same time, acting within one or another branch of law, general legal presumptions are inevitably enriched with new content due to branch specifics. In this regard, is interesting the opinion of S.A. Mosin that "any appearance of a general legal presumption in any branch of law inevitably leads to the appearance of an independent sectoral presumption"[[18]](#footnote-18). In the sphere of tax law, there are general legal presumptions of knowledge of laws, the legality of legal act, and a number of others. By connecting to the regulation of tax relations, each of them is transformed, acquires new meaningful elements. For example, the active application of the presumption of knowledge of laws in the sphere of taxes and fees has led to its filling with new categories and imperatives, such as "tax clarification", "tax advice" and many others. At the same time, tax law is characterized by the presence of presumptions that are used to regulate only tax relations. In particular, the presumption of the market price of the transaction, the presumption underlying real taxes, industrial taxation, and others.

Legal fiction is a means of legal technique by which a knowingly non-existent provision (relationship or state) is constructed, recognized as existing and possessing imperativeness, plays the role of a missing legal fact in a situation of unfilled uncertainty, enshrined in law[[19]](#footnote-19). Legal fiction has the following features:

1) the construction of legal fiction is a logical denial of existence (one of the forms of non-existence). The categorical nature of fiction deliberately denies the possibility of realizing the situation constructed with its help, regardless of the real state of affairs;

2) legal fiction is conditionally arbitrary. It is formed arbitrarily by the legislator, in contrast to the legal axiom or presumption, which are based on certain grounds, but the arbitrariness of fiction is conditional because the very use of fiction is determined by the expediency, the need to regulate relations in this way;

3) the legal decision formulated in the norm-fiction is constructed by means of idealization (a kind of categorical abstraction). Fiction is not the result of generalization; it is used to model a conditional object or relationship. Legal fiction has no referents in reality;

4) legal fiction, categorically asserting or denying something, always appearance itself obviously. Legal fictions, as a means of legal technique, are not characterized by concealment or conjecture;

5) legal fiction has the ability to overcome uncertainty in legal regulation, performing the function of a missing legal fact;

6) legal fiction is formal. It is one of the means of formalizing the normative material and simplifying the structure of the actual compositions. The formality of fiction determines the possibility of its use in legal proceedings only as a formal proof, which is not important for the knowledge of objective truth, but necessary for the purpose of the procedural economy;

7) legal fiction is enshrined in the norm of law and is universally binding.

Today, the issue of fiction is extremely relevant for tax law. The legislator tries to regulate tax relations clearly, concretely, and definitely. The introduction of fictions in the tax legislation, according to M.V. Karaseva, is dictated by two reasons. First, the legislator's efforts to make the relationship between the taxpayer and the state as definite as possible, such that the interests of the taxpayer and the state are taken into account as much as possible, and thus to minimize the free discretion of the state as an authoritative subject in tax relations. Secondly, the introduction of fictions is dictated by the state's efforts to meet its ever-increasing fiscal requirements, not by increasing tax rates and expanding the tax base, which is politically unpopular, but by "improvements" in the field of legal techniques that allow "bypassing" obstacles to the movement of financial flows from the taxpayer to the state” [[20]](#footnote-20). According to the same scientist, fictions in the tax legislation are designed to perform the following functions: “a) to eliminate legal uncertainty in the relationship between the taxpayer and the tax authority; b) to ensure the optimization of legal practice, i.e. to simplify the approach to rather complex phenomena on the part of law enforcement entities"[[21]](#footnote-21).

At the same time, uncertainty in tax legislation has been growing recently. Uncertainty of tax legislation is the possibility of its different understanding and application. Uncertainty of tax legislation expands the discretion of the law enforcer (controlling body, court), allows the law enforcer to differently solve certain tax issues for different taxpayers in similar situations. Tendencies to increase the uncertainty of tax law, as noted by D.M. Shchokin, are manifested both at the level of legislation on taxes and fees, and law enforcement practices[[22]](#footnote-22). The most striking example of the growing uncertainty of tax legislation is the increase in tax disputes between taxpayers and tax authorities. Uncertainty of tax legislation has many manifestations. One of them is the excessive use of fiction.

Here are some examples of legal fictions in tax law. According to sub-clause 164.2.12. paragraph 164.2. Article 164 of the Tax Code of Ukraine to the total monthly (annual) taxable income of the taxpayer includes funds or property (intangible assets) received by the taxpayer as a bribe, stolen or found as treasure, not handed over to the state in accordance with the law in amounts, which are determined by a guilty verdict of the court, regardless of the sentence imposed by him. This example is an illustrative role of legal fiction. Legal fiction in a certain area of legal regulation using a misjudgement (illegally obtained funds, material resources are recognized as income), ultimately allows realizing the truth in legal regulation, i.e. to involve actual income in taxation.

An example of the disproportionate use of legal fiction is contained in paragraph 187.1. Article 187 of the Tax Code of Ukraine, according to which the date of occurrence of tax liabilities for value-added tax on the supply of goods/services is the date that falls on the tax period during which any of the events that occurred earlier:

- date of crediting funds from the buyer/customer to the taxpayer's bank account as payment for goods/services to be supplied, and in case of the supply of goods/services for cash - date of posting funds at the taxpayer's cash desk, and in case of absence - date of cash collection in the banking institution that serves the taxpayer;

- the date of shipment of goods, and in the case of export of goods - the date of registration of the customs declaration certifying the fact of crossing the customs border of Ukraine, issued in accordance with customs legislation, and for services - the date of registration of the document certifying the supply of services by the taxpayer.

Therefore, in the event of the first second event, without receiving funds for the goods/services, the taxpayer must pay value-added tax, as the law recognizes the date of the tax liability as a circumstance that has nothing to do with the actual payment, which is a legal fiction. Value-added tax, which is an indirect tax, in this case, becomes direct because both the legal and the actual taxpayer, in this case, will coincide. The introduction of such fiction cannot be justified by the reference to the fact that a taxpayer who did not receive payment for the goods/services provided intended to transfer them free of charge or received payment in a covert form. That is, this provision of the Tax Code of Ukraine violates the principle of balance of private and public interests in the field of taxation, as well as the principle of taking into account the actual ability to pay taxes.

A similar provision is contained in paragraph 216.2. Article 216 of the Tax Code of Ukraine, according to which the date of occurrence of the tax liability for spoiled, destroyed, lost excisable goods (products) is the date of drawing up the relevant act. At this point, the lost goods (product), the location of which the taxpayer cannot establish. Tax liability for lost excisable goods (products) does not arise if:

a) the taxpayer has documented these losses and provided the supervisory authorities with the necessary evidence that the relevant excisable goods (products) were lost due to an accident, fire, flood, or other force majeure, and its use in the customs territory of Ukraine is impossible;

b) excisable goods (products) are lost due to evaporation in the process of production, processing, recycling, storage, or transportation of such goods (products) or for other reasons related to the natural result. This requirement is applied in case of loss of excisable goods (products) within the limits of losses, which are approved in the manner determined by the Cabinet of Ministers of Ukraine.

Fiction in this norm is manifested in two points: first, in the equation of the legislator excessive shortage of excisable goods (products) in the excise warehouse to its hidden sale, and secondly, in the statement that the date of detection of excessive shortages corresponds to the date of sale). As noted by D.M. Shchokin, on a similar provision of the Tax Code of the Russian Federation, this position of the legislator turns the excise tax into a direct tax on excessive losses of alcohol[[23]](#footnote-23). In this case, we can see the manifestation of such a feature of legal fiction as the formalization of law.

Thus, in tax law, presumptions and legal fictions are used as a means of formalizing certain mechanisms, in order to establish additional control by the state over certain objects and subjects of taxation. On the one hand, these methods of legislative technique bring stability to the legal regulation of tax relations, make the tax law system simpler and more economical, serve as an important means of limiting the negative discretion of regulatory and other authorities, help protect taxpayers' rights, overcome uncertainty in tax law enforcement. On the other hand, the excessive use of presumptions and fictions in the tax legislation by the legislator indicates a loss of certainty of the tax legislation.

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