

# S J L S

## SILESIAN JOURNAL OF LEGAL STUDIES



Faculty of Law and Administration, University of Silesia

INDEX  COPERNICUS  
INTERNATIONAL

CONTENTS  
VOL.

9



WYDAWNICTWO  
UNIwersytetu Śląskiego  
KATOWICE 2017

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# CHALLENGES IN ROLLING OUT THE FRAMEWORK OF CATEGORIES AND CONCEPTS OF THE TAX CODE OF UKRAINE IN TERMS OF THE “TAX LIABILITY” CATEGORY

## INTRODUCTION

Tax liability is one of the primary taxation law categories. It was originally implemented by the Law of Ukraine “On Value Added Tax” and later spread to all specific legal types of tax by the Law of Ukraine “On the Procedure for Paying off Taxpayers’ Obligations to Budgets and State Trust Funds”. Academics are divided in their approach to the term “tax liability”, which has, in turn, affected the further development of this category in the tax legislation of Ukraine<sup>1</sup>.

The systematisation of tax legislation and the adoption of the Tax Code of Ukraine led to a narrow use of this category and its partial substitution by other inadequate concepts. The result of such unjustified and inconsistent activities by the legislator increased the complication and extended the taxation-legal terminology and the contradictions between the General and Special Parts of the Tax Code of Ukraine. Therefore, the studies of the legal nature and the content of tax liability still remain relevant.

## 1. TAX LIABILITY IN PRINCIPLE AND LEGISLATION

The usefulness of this concept in fiscal legislation is denied by a number of leading academics. Specifically, N.P. Kucheryavenko states that the exclusive position of the state as the organiser and supervisor of tax legal matters and the holder of fiscal revenues suggests a tax obligation, but not liability. In the academic’s opinion, the term “liability” is characteristic of a non-mandatory legal regulation, when it comes to a certain equality of the parties, their countervailing powers and liabilities. Still, tax relations hardly call for a relationship of equality, or the terms of contracts or agreements<sup>2</sup>.

A similar approach is shared by a number of Russian academics. In particular, according to A.V. Demin, the term “liability” has a strong private-law nature and is based on the freely expressed will of the person in some way (at one’s own discretion) to implement one’s legal personality within a non-mandatory legal regulation. Thus, liability is a specific type of legal obligation that is voluntarily assumed by a person participating

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<sup>1</sup> I.I. BABIN, *Tax Law of Ukraine*, Chernivtsi 2012, pp. 190–200.

<sup>2</sup> N.P. KUCHERYAVENKO, *Course of Tax Law*, [in:] *Doctrine of the Tax: Volume III*, Kharkiv 2005, p. 375.

in non-mandatory legal relations, namely, contractual. The creation and administration of a tax obligation, as A.V. Demin notes, do not depend on the willingness (discretion, will) of the taxpayer, but result directly from the law. The imperative method of fiscal regulation does not provide for granting a remission of taxation at the discretion of any of the participants of tax relations, and the taxpayer is certainly not entitled to refuse to execute his/her tax obligations<sup>3</sup>.

The authors of the Tax Code of Ukraine, either taking into consideration the opinion of the authoritative scholars, or blindly following the provisions of the Tax Code of the Russian Federation (which uses the term “tax obligation” and not “tax liability”), tried to reject the term “tax liability” by substituting it with the term “tax obligation”. However, either the efforts turned out to be non-systemic, or the substitution of notions with different semantic content was not possible (in the authors’ opinion, probably the latter), but these attempts were unsuccessful and instead of a logically coherent, readable text of the Tax Code of Ukraine (which, given the quite bulky and hard to understand tax legislation, is extremely important), we have uncertain terminology and several quite different terms representing one and the same phenomenon. Thus, the text of Tax Code of Ukraine contains and simultaneously uses such terms as “tax obligation”, “tax liability”, “financial obligation” and “tax amount”.

## **2. “TAX LIABILITY” AND “TAX OBLIGATION”: THE PARITY OF CATEGORIES**

The introduction of the term “tax liability” into tax law raises several questions. Firstly, what is the difference between the duties of taxpayers set out in Article 16 of the Tax Code of Ukraine and the tax obligation set out in a dedicated Article 36 of this Code. Paragraph 36.1 of Article 36 of the Tax Code of Ukraine determines that the tax obligation of the taxpayer is the recognised obligation to calculate and/or declare the amount of tax or fee pursuant to the procedure and within the time limit defined by this Code, along with laws on customs matters. However, duties of a similar content are stated in the list provided for in Article 16 of the Tax Code of Ukraine.

Relying upon classification of the duties of the taxpayers suggested by S.G. Pepelyaev, the duties listed in Article 16 of the Tax Code of Ukraine can be classified into three groups: 1) organisational duties (to register at the tax authority, to submit the necessary information to the competent authorities...); 2) the obligation to pay taxes (independently and correctly calculate the amount of tax payments, pay them timely and in full, repay the tax debt); 3) accounting and reporting obligations (to maintain records in a timely manner, to prepare and file accounts, to make necessary changes, to keep the documents for a specified period, and to file documents and explanations with the tax authority...)<sup>4</sup>. According to this classification, the tax obligation defined by Article 36 of the Tax Code of Ukraine belongs to the second group (the obligation to pay taxes). A distinctive feature of the tax obligation, according to the legislator, in accordance with paragraph 36.3 of Article 36 of the Tax Code of Ukraine, is the fact that the tax obligation is unconditional and takes precedent over other non-tax obligations

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<sup>3</sup> A.V. DEMIN, *Tax Law in Russia*, Moscow 2006, pp. 251–252.

<sup>4</sup> S.G. PEPELYAEV, *Tax Law*, Moscow 2003, pp. 166–177.

of taxpayers, except in cases provided by the law. Principally, the use of the pronoun “other” in this norm is doubtful, as it relates the tax obligations of the taxpayer to non-tax obligations. Therefore, without this pronoun, this provision of law would look like: a tax obligation is unconditional and takes precedent over non-tax obligations of taxpayers, except in cases provided by law.

Secondly, we agree with the views of N.P. Kucheryavenko that the “implementation of certain taxpayers’ obligations becomes possible only in conditions of successive, changing each other stages... It is obvious that the implementation of the obligation to pay the tax is not possible without the registration of taxpayers (provision of information on taxpayers in a unified register), without accounting events as to the tax entities. Moreover, it is impossible to imagine the obligation of a tax report without the implementation of the duties of the two previous groups”<sup>5</sup>. This means that the obligations of taxpayers are closely related, cause each other, and providing the advantage to any taxpayer’s obligation means violating the integrity, consistency and effectiveness of the system of obligations of taxpayers.

According to the authors of the academic-practical commentary to the Tax Code of Ukraine, one of the advantages of the current edition of the Tax Code of Ukraine is its formalisation, i.e. the consistency of the terminology of the tax legislation with the provisions of the Constitution of Ukraine<sup>6</sup>. In particular, this refers to the dissociation of such categories as taxation and revenue, and the withdrawal of the term “mandatory payment”, not specified by the Constitution of Ukraine, from tax legislation.

To be consistent and to use the tax law terminology of the Constitution of Ukraine, it is necessary to use the term “responsibility to pay the taxes and fees” (Article 67 of the Constitution). However, the problem of using the term “tax obligation” instead of “tax liability” is not only in the introduction of a new term into tax legislation, which is actually synonymous with the concept of “responsibility to pay taxes and fees”, but in the fact that the concepts of “tax obligation” (an obligation to pay taxes and fees) and “tax liability” are quite different tax and legal categories. If the tax liability reflects only the estate side of tax relations, and its essence is reduced to the responsibility to transfer a certain amount of money from taxpayers to public entities (state and/or the territorial community), then the obligation to pay taxes and charges (tax liability) is a complex concept with a much wider content; it covers all the duties of taxpayers in any tax legal relations, displays not only the property aspect, but also the organisational aspect of tax relations. After all, the science of tax law is a sufficiently reasoned judgment about the nature of the organisational and property character of tax relations. Thus, the substitution of tax liability by tax obligation is a restriction of the meaning of the latter, and creates the need for further differentiation of the tax duties and the obligations to pay taxes and fees.

### **3. TAX LIABILITY AND TAX LEGAL MATTERS**

As for the rejection of the term “tax liability” in tax legislation, the conclusions of A.I. Khudyakov, specifically investigating the problem, are of a certain interest. The aca-

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<sup>5</sup> N.P. KUCHERYAVENKO, *Course of Tax Law*, [in:] *Doctrine of the Tax: Volume III*, Kharkiv 2005, p. 157.

<sup>6</sup> M.J. AZAROV, *Scientific and Practical Comments of Tax Code of Ukraine: Volume 1. 2<sup>nd</sup> ext. and rev. ed.*, Kyiv 2011, pp. 35–36.

democratic noted that, for ideological and political justification in the field of taxation, the government is more profitable to use the category of “tax obligation”, which refers only to one side of the legal relationship of tax, namely, the taxpayer. The other side, the state, is in a so-called legal vacuum, having a vague (and therefore unlimited) set of rights and without any responsibility<sup>7</sup>.

The validity of this statement is proved by the content of Articles 16–17 and 20–21 of the Tax Code of Ukraine. We believe that it is the very explanation of the negative attitude of the academics and lawmakers to the term “tax liability” rather than its “private-law nature”. Their anxiety to transfer non-mandatory elements into tax law, namely the term “liability”, is groundless, because tax liability is a special kind of obligation that is not the same as a civil obligation. Obligations are not the prerogative of civil law, they are an inter-branch structure that is characteristic of any property relations that mediate the movement of financial benefits. The essence of financial legal relationships, including tax, is that they are property relations, and the imperative nature of the tax legal matters, as well as the imperative grounds of their origin, does not exclude the possibility of using the term “liability”.

The method of tax law may not contain significant differences from the method of financial law, as the term “liability” is used quite widely in other parts of financial law. For example, in Article 2 of the Budget Code of Ukraine, the term “budget liability” is used. It should also be noted that the concept of liability is used in financial law in the definition of government debt (Article 2 of the Budget Code of Ukraine). At the same time, liabilities have their own characteristics in different branches of law. The legislator, using these or other legal structures, must necessarily take into account the specifics of the legal regulation sphere.

The problem, in our opinion, should lie not in the possibility or impossibility of using the term “tax liability”, but in the content of this concept, i.e. its meaning. In Section 14.1.156 of Article 14 of the Tax Code of Ukraine, tax liability is defined as the amount of money that the taxpayer, including a tax agent, should pay to the respective budget as a tax or fee on the basis of the procedure and the line defined by the tax legislation (including the amount of assets determined by the taxpayer in the tax bill and not paid in time defined by law). A similar definition is contained in paragraph 1.6 of Article 1 of Law of Ukraine “On Value Added Tax”, where tax liability means the total sum of tax received (charged) by the taxpayer during the reporting (tax) period, determined in accordance with this Law. Paragraph 1.2 of Article 1 of Law of Ukraine “On the Procedure for Paying off Taxpayers’ Obligations to Budgets and State Trust Funds” defined the tax liability as the taxpayer’s obligation to pay a respective amount of assets into the respective budgets or state trust funds pursuant to the procedure and within the time limit defined by this Law or other laws of Ukraine.

We believe that the concept of “tax liability” should be used to refer to tax legal matters in which the tax authority has the right to demand, and the taxpayer is obliged to carry out, actions to transfer a certain amount of assets to the budget. It is, in this sense, used in the Tax Code of Ukraine for certain types of legal structures of the tax. Therefore, a more accurate definition is contained in the Law of Ukraine “On the Procedure for Paying off Taxpayers’ Obligations to Budgets and State Trust Funds”.

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<sup>7</sup> A.I. KHUDIYAKOV, *Financial Law of the Republic of Kazakhstan: Special Part*, Almaty 2002, p. 161.

## 4. DYNAMICS OF TAX LIABILITY

The tax obligation arises, changes and terminates on the grounds specified by the tax legislation. The general basis of occurrence is the presence of the taxpayer's tax object and the end of the tax period, after which the amount of tax is to be calculated and paid. At the same time, special bases may be formed for each tax; they are independent legal facts forming a complex set of facts. As for the accountant tax calculated by the tax authorities, the basis for it is a tax notice sent out to the taxpayer<sup>8</sup>.

The tax legislation of Ukraine provides for the payment in instalments and the deferment of tax liabilities (Article 100 of the Tax Code of Ukraine). Instalments and deferred tax liability are a postponement of the payment by the taxpayer's tax obligation at interest based on 120% of the annual standard National Bank of Ukraine interest rate, acting on the date of the tax liability occurring, or on the day of its (or part thereof) of repayment, depending on the higher rate, for each calendar day of delay. The basis for instalments of the tax obligation of the taxpayer is as follows: the taxpayer is to provide sufficient proof of the existence of circumstances as listed by the Cabinet of Ministers of Ukraine and indicating the existence of a threat of, or increasing the tax debt of the taxpayer, as well as the feasibility study suggesting the possibility of repayment of the tax liability and/or increasing tax revenues to the budget as a result of using instalments, during which there is a change of production or marketing management policies of such taxpayer. Deferred tax liability (including separately the amount of penalty (financial) sanctions) is repaid in equal instalments, beginning from the month that comes after the month in which the decision granting the use of instalments is issued. The basis for deferring the tax liability of the taxpayer is as follows: the taxpayer is to provide sufficient proof of the existence of evidence, a list of which is determined by the Cabinet of Ministers of Ukraine, indicating the presence of force majeure circumstances that led to the threat of, or the accumulation of tax delinquency of the taxpayer, as well as a feasibility study suggesting the possibility of repaying the tax liability and/or increasing the tax revenues to the budget as a result of using a deferral, during which there is a change of production or marketing management policies of the taxpayer. Deferred tax is repaid in equal instalments starting from any month specified by the relevant supervisory authority or local government, but not later than the end of a 12-calendar-month period from the date of occurrence of the tax liability, or a one-time payment.

As a general rule, a tax liability subsequently terminates after its proper execution, when the tax is paid by the taxpayer in due time and in full. Among other reasons for the termination of a tax liability, identified by the tax legislation of Ukraine, are: 1) the liquidation of the legal unit; 2) the death of an individual, his/her recognition as disabled or missing; 3) a person losing the status of a taxpayer as defined by the Code; 4) the cancellation of a tax obligation in the way stipulated by the legislation (Article 37 of the Tax Code of Ukraine). For example, Article 44 of the Tax Code of the Russian Federation provides for the following grounds for the termination of a tax obligation: 1) payment of the tax (fee) by the taxpayer; 2) the occurrence of other circumstances with which the tax legislation connects the termination of tax obligations; 3) the death of

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<sup>8</sup> I.I. BABIN, *Juridical Structure of Tax*, Chernivtsi 2008, pp. 158–160.

the taxpayer, or his/her recognition as dead; 4) the liquidation of the taxpayer institution after the liquidator makes all payments to the budgets (off-budget funds).

However, the death of an individual taxpayer or the liquidation of the taxpayer's institution is hardly to be the basis of a tax liability ceasing. In this situation, the ground that stops the tax liability a tax payment from the funds and property of the heirs / liquidator; in the event of a failure to perform the tax obligations, a tax write-off takes place, which is, respectively, in accordance with Articles 97–101 of the Tax Code of Ukraine.

The forfeiting of taxpayer category as a basis for the cessation of tax liability, as suggested by N.P. Kucheryavenko, and its introduction into the tax legislation, is also doubtful. So, N.P. Kucheryavenko writes: “These circumstances distinguish the specific tax group, the implementation of obligations of which is based on the concept of the taxpayer as a special subject. Such kinds of payments include, for example, the vehicle and other machines and mechanisms possession tax. The peculiarity of these circumstances that stop the performance of tax obligations is the fact that the taxpayer continues to exist as an obligated person, but the forfeit of or change in the individual taxpayer category forecloses the tax obligation in a particular type of payment. An individual taxpayer may be obliged to make a range of tax payments, but the loss of the vehicle causes his lack of responsibilities for accounting, payment and reporting as to the vehicle possession tax. Moreover, such obligations are actually connected not only with the presence of the vehicle, but with its use, abstinence from which can lead to non-performance of tax obligations”<sup>9</sup>.

We believe that the term “tax liability cessation” should be applied to a tax liability that has eventuated and exists. Tax liability is limited in the set of regular taxes by the distinct time frame, namely, the tax period. The loss of the object of taxation during the tax period does not give rise to the tax liability of the taxpayer for this tax in the future, but with respect to the actual tax period it will continue to exist and must be fulfilled by the taxpayer. In our opinion, the circumstances that discharge the tax liability, except for its execution by the taxpayer, are also: tax withholding by a fiscal agent; tax enforcement; the write-off of tax debt if it turns to be uncollectable; tax payment in the event of the death of an individual, or the liquidation or reorganisation of a legal entity by its legal successor; offset of overpaid tax amount and an accelerated obligation against future payments.

An interesting borrowing from the Tax Code of the Russian Federation is provided for in the Tax Code of Ukraine, namely the possibility of “suspending the execution of the tax liability”. For example, if the property of a disabled or missing person is not enough to ensure the execution of the monetary obligations of that individual, as well as for payment of accrued penalty (financial) sanctions, the payable taxation is written off in accordance with the procedure established by the central body of the State Tax Service. In the event of rescission by a court, the recognition of individual missing or the renewal of the civil capacity of an individual earlier recognised as disabled, the financial obligations of the individual will resume with regard to written off taxes. The penalty (financial) sanctions in such a case will not be paid for the period from the date of the court decision on the recognition of an individual as disabled or missing until the day of the court decision on the renewal of the civil capacity of an individual.

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<sup>9</sup> N.P. KUCHERYAVENKO, *Course of Tax Law*, [in:] *Doctrine of the Tax: Volume III*, Kharkiv 2005, p. 403.



## CONCLUSION

Summarising all the above, the following should be noted. The systematisation and codification of tax legislation is an essential part of its development. The aim of codification is not simply to compile the tax legislation into a single legislative act, but to coordinate and develop unified fiscal and legal terms, to eliminate gaps and conflicts in the legal regulation. An important element of such a codification is using the positive experience of foreign countries and the scientific research of experts. In the Tax Code of Ukraine one can see a lot of borrowings from the Tax Code of the Russian Federation, in particular, as to tax liabilities and their dynamics. Drawing on the provisions of the Tax Code of the Russian Federation, the authors of the Tax Code of Ukraine should have analysed their application. After all, the Tax Code of the Russian Federation is also far from the mark, and many of its provisions are subject to criticism by academics, including the definition of tax liability, and the basis for its origin, change and cessation.

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