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LEGAL CONCEPT OF THE FISCAL STATE

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Abstract

The article shows that the concept of the Fiscal State belongs to the categorical-conceptual apparatus of the etatist doctrine of tax law. It is assigned to one of the key roles in the apologetics of this doctrine, and therefore the methodological approaches of this doctrine can't reliably reveal it. Thus, the authors of the article used the anthroposociocultural approach to the analysis of the legal concept of the Fiscal State. In particular, such components of this approach as historical and genetic methods in combination with the method of system-structural analysis. With their help, it was found that the historical and genetic origins of the legal construction of the "Fiscal State" date back to the late Antiquity.

The article demonstrates that at that period took place the Late Antique Civilizational Revolution, which resulted in displacement of the human centered mentality of the population of Republican Rome by the etatistic mentality. As a consequence, the Ancient Roman Republic was transformed into the Ancient Roman Empire, the citizens of the Roman Republic became the subjects of the Roman Empire, and their public needs transformed into the needs of the Roman Empire. The last phenomenon became the quintessence of the Roman Redistributive Revolution, which was initiated by the Roman Emperor Octavian August and completed by Roman Emperor Diocletian. The most concentrated legal consequence of the aforementioned social transformations, as proved in the article, was the emergence of the Fiscal State and the initiation of the historical tradition of its tax law.

The article concludes that the legal concept of the Fiscal State, as well as the phenomenon that gave rise to it, were proved by stable historical constructions. Even

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after two thousand years since their emergence as social facts, their fundamental values have remained unchanged. These include: the association of a Fiscal State with the Hegel's "procession of God on Earth" as the highest social justice; the perception of this State as ontologically independently rooted in the being subject, which is the core of society; interpretation of the tax as an attribute of the Fiscal State; identification of the sovereignty of the Fiscal State with its tax sovereignty. Consequently, the Fiscal State considers itself as a subject of redistribution of GDP and national income.

Keywords:

Fiscal State; tax as an attribute of a Fiscal State; tax sovereignty of the Fiscal State.

Introduction

Former professor of financial law at the Faculty of Law of the Chernivtsi University at the beginning of the 20th century, and later the generally acknowledged guru among researchers of the tax state J. A. Schumpeter summed up as a result of his scientific research on the aforementioned subject and the matrix of studying of the Tax State: «Since «state» and «tax» have so much to do with each other it is natural to try to penetrate the nature of the state from this point of view» [1: 108]. By this he deliberately or spontaneously formulated the most widespread during the XX - the beginning of the XXI century research paradigm of Tax State all over the world. This paradigm was based on the necessity of compulsory finding a formula for solving the fundamental tax contradiction between its economic efficiency and social justice. The same paradigm formed the basis of the tax policy of most civilized states of the world during the twentieth century. However, they failed to eliminate the contradiction between the *Scylla and Haribda* of taxation [2: 8-9].

One hundred years after J. A. Schumpeter, the lecturer of the financial law of the same faculty R. O. Havryliuk, for the first time in the field of financial law substantiated the historical limitations of the Schumpeterian paradigm of investigation of the Tax State [2: 346-399] and proved the necessity of applying to the cognition of the nature of the Tax State of the anthroposociocultural and the necessity approaches

to legal thinking * [2: 20-21]. The proposed by R. O. Havrylyuk approach is in the trend of an innovative view of the nature of law by the majority of lawyers of the world as a "multilateral phenomenon - historical, philosophical, psychological, social, political, economic and religious" [3, 4: 14-16, 5, 11-33, 6, 7] by its very nature and application. She drew attention to the undeniable fact that the etatist ideas on taxes and tax law have long been in antagonism with the new scientific knowledge about the phenomena that were produced in more than a hundred recent years by various sciences - humanitarian, economic, social, philosophical, etc. [8], [9], [10].

The author summed up that the conclusions of many representatives of these sciences, being diverse and even contradictory among themselves in explaining their separate phenomena of taxes and tax law, at the same time completely coincide in revealing the most important property of taxes and tax law - their redistributive nature for the creation of common goods, and not only ensuring the existence of a State that itself is one of those benefits [11], [12], [13]. R. O. Havryliuk rightly paid attention to the fact that the widespread presence in sub-state societies of the redistributive relations, which were essentially the tax relations, makes the etatist doctrine of tax law unsuitable for scientific explaining of the phenomenon of tax law, and limits the relative truthfulness by historical and socio-cultural boundaries of "Substantive States" [8: 226-450].

New level of scientific knowledge about taxes, tax law and the State, achieved at the beginning of the XXI century and compared with their level of the beginning of the twentieth century allowed R. O. Havrylyuk [14: 260, 513-765] and other scientists [15: 484, 496, 502, 502, 504] to see the evolution and transformation of the Schumpeterian Tax

* See: Ibid. P. 20-21. R.O.Havrylyuk was preceded to this conclusion by the largest tax reform in the modern history on both sides of the Atlantic Ocean, primarily in the United States and the United Kingdom. It was started by Ronald Reagan, 40th US President, on the proposal of Arthur Laffer, and soon it embraced the entire civilized world. The essence of this reform consisted in tax liberalization, reduction of tax rates, and as a consequence of the tax burden as a whole. It gave rise to an impressive cumulative effect. For example, in the United States from the beginning of its implementation until the 2008 recession, the longest period of economic growth without recession was observed, and GDP per capita increased by 72 percent. Similar tendencies have taken place in many other developed countries of the world. In the same place, where strategic tax liberalization has not taken place, the Tax States of the world have accelerated their own transformation into Fiscal States.

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State into Instrumental (Social) State, or Fiscal (Substantive) State. Paradoxically, however, the special studies of the legal nature of the modern Fiscal State, both domestic and foreign, are characterized by a fragmentary character. [14: 18-31] Although the need for systematic knowledge of its properties by various legal sciences is long overdue [16], [17], [18].

AIMS OF THE RESEARCH AND RESEARCH METHODS

The immediate *subject* of this article is an analysis of the legal nature of the modern Fiscal State of Ukraine.

The *purpose* of the article and its *objectives* at the same time is to find out the general causes and regularities of the emergence of this State, as well as the isolation and disclosure of its main legal properties. The subject, purpose and objectives of the study determined the *methodology of the article*, namely anthroposociocultural approach. It includes a whole range of philosophical, general scientific and special legal methods [19].

THE REASON AND REGULARITIES OF THE EMERGENCE OF THE FISCAL STATE OF UKRAINE

Constitution of Ukraine de jure denies the existence of a Fiscal State in Ukraine. In particular, Article 1 of the Constitution states: "Ukraine is a sovereign and independent, democratic, social and constitutional State" [20]. However, in a number of the following articles of the Constitution of Ukraine, there are direct and indirect indications on the attributes of the Fiscal States: Articles 13, 56, 62, 67, 74, 85 (three times), 92, 95, 96, 97, 98, 143. Those say, first of all, that all tax receipts are owned by the State. There is nothing surprising in that fact, since Fiscal States are characterized by paternalism as their functional property: "paternalism means the theory and practice of State's self-concealment of its own interests in the public interest of society as a whole" [2: 329, 21].

The Fiscal State of Ukraine is a concrete historical case of the existence of the World's Fiscal States as a separate species. It has not yet reached in all of its manifestations of mature, classical forms. In addition, it is impossible to distinguish between certain concrete historical facts, which of them are random, but which embody the manifestations of

regularities. Hence the knowledge of the underlying causes and the laws of its appearance and nature should begin with the determination of the reasons for the emergence of Fiscal States as a species in the past. This will allow us to consider its phenomenon in a historical perspective.

The irrefutable fact of the emergence of a Fiscal State in Europe was the Late Antique rebirth of The Roman Republic as a State in the Roman Empire [8: 276-302]. This was preceded by The Roman Revolution, which was, first of all, ideological and civilizational in general. [8: 375-450] "The quintessence of The Roman Civilizational Revolution resulted in displacement of the human centered mentality of the population of Republican Rome by the etatistician mentality" [19: 14]. As a result Roman Republic ceased to be a common cause of all citizens and for a certain period of time turned into a "No-Man" State, became a good piece of food primarily for the state bureaucracy. The latter did not hesitate to take advantage of this and seized the State first, [8: 284-287] and shortly thereafter, as a result of another - a redistributive coup - the tax law of individuals [8: 420-421]. So the Ancient Roman Empire arose, the first emperor of which was Octavian August. Along with the *eryrium* - the state treasury, inherited from the Republican Rome, Octavian August created in each imperial province the *fiscus* - the imperial treasury, in which all financial flows were redirected. At the head of each *fisc* the emperor *de jure* was appointed a special governor-procurator, but in reality [7] the emperor himself began to dispose of state revenue as his own [8: 429]. Over time, Emperor Claudius united all provincial *fiscs* into a *fisc* of the entire empire [22: 163]. Finally, Emperor Diocletian completed the process of forming a Fiscal State in the Ancient Rome. It finally turned the citizens of the Roman Empire into its subjects. As R. O. Havrilyuk notes, that specially investigated this problem: "Since then all the public has been reduced to state-owned and all the state-owned to the needs of the ruling power with the emperor at the head. It opened ... unlimited possibilities for such a government to make formally legal, but, nevertheless, unlawfully public in private. In particular, it has turned public financial resources into private financial resources" [8: 433]. "The rebirth of the public in its opposite, - she concludes, - forms the essence of the ancient imperial redistributive revolution", [8: 434] which ended with the emergence of a Fiscal State. As it was later discovered by a number of sciences, the algorithm of the emergence and assertion of the Ancient Roman Imperial Fiscal State,

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with the exception of certain features, repeated in most of the following cases of the emergence of Fiscal States [8: 433], [23], [24] [25].

First of all, during this process, there were profound changes in the minds of most individuals, as a result of which the latter evolved from the citizens making the state into the subjects of the state with a corresponding radical change in their social roles in the opposite. In turn, the consequences of such mental and ideological revolutions in societies became: the loss of values of *res publica* as a common cause and the replacement of those by values of *plebs* (the crowd), the quintessence of which is also the ancient Roman principle of *Bread and Sights*; loss of natural rooting of States as a common cause of society, narrowing the social support of the States to the state bureaucracy and its coercive institutions; the latter, having lost public control over themselves, seized and privatized the State; public needs in the public dimension were reduced to the needs of the State, and those, in turn, narrowed to the needs of the ruling elite and the apparatus of violence; has taken place a transition from the internal State - Society self-government to the professional management of them from the outside, by the administrative-bureaucratic apparatus, which opposed itself to society, expanded in geometric progression and devoured unlimited amounts of financial resources; the latter became the State property, and to ensure their replenishment there was developed a mandatory legal linking of taxpayers to the relevant taxation objects.

The domestic Fiscal State did not become an exception.

The lion's share of the above-mentioned fundamental transformations took place during Soviet times, in particular: mental and ideological revolutions in the Ukrainian society; the rebirth of a veritably public into the state-owned; bureaucratization of the State; the transition from self-government by society and the State to administrative-bureaucratic management of them [26: 4-12, 70-133]. The rise of an independent Ukrainian State not only did not interrupt the process of forming a Fiscal State in it, but also to some extent accelerated and exposed it, made it obvious to public perception. One of the most important features of the completion of this process in Ukraine was total corruption, including political one. It distorted the whole spectrum of public values and public services to the unidentified and deprived the newly born Ukrainian State of social support.

The problems of the "Ukrainian Fiscal State", "captured by its new bureaucracy and the institutions of state coercion," were widely

discussed in socio-political strata in the late 1990s. [27: 43-73] At that time, the experts of the World Bank, J. Hellman, G. Jones and D. Kaufman, drew attention to the paradox and the absurdity of the "privatization" in the so-called post-socialist countries of the political and regulatory functions of the State. They estimated the level of "capture of the Ukrainian State" by the oligarch as a "high" [28: 102]. Since then, no significant changes have taken place in this area of social life in Ukraine, and the total lumpenization of Ukraine has only increased in all of its essential manifestations. At the beginning of 2018, World Bank Vice President S. Muller voiced an assessment according to which in 2017 Ukraine became the poorest living standard European country, while the net assets of the three richest Ukrainians exceeded six percent of the national GDP. In the USA, the figure is four times lower - 1.4%. Moreover, the aforementioned relation with this indicator in Ukraine dates back to 2007 [29: 9]. Such a concentration of private property is abnormal in principle, blocking public development through depriving the latter of adequate financial support. According to the Institute of Economics and Forecasting of the National Academy of Sciences of Ukraine, in 2000-2017 non-residents "earned" for their services and brought out 88.5 Billion in USD from Ukraine [29].

Thus, a Fiscal State has emerged in Ukraine as an instrument for redistributing of a gigantic share of the social (in its instant legal nature) GDP and national income de jure to state ownership, but in reality to the property of clan-oligarchic ruling groups followed by inevitable privatization, in the literal sense, of a huge part of this property.

SYSTEM-FORMING PROPERTIES OF THE FISCAL STATE OF UKRAINE

For their more adequate cognition, we will use the methodological advice of J. A. Schumpeter, presented in the beginning of the article.

II.1. The capture of the tax law of society by the State. Special investigations of many sciences, dating from the second half of the nineteenth century to the present, have unequivocally proved that "*public* historically precedes *state*, it is substantially wider than state-owned and is not a product of the State, since the latter is nothing more than a concrete historical embodiment of the public" [19: 12]. The public has its

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own rooting in social human needs. The latter, in turn, are conditioned by the dual human nature - psycho-biological and social at the same time. Tax law as a social phenomenon is generated by the latter. Its age, as summarized by R.O. Havrilyuk, equals the age of human civilization, and the actual tax law is a party to human law in general [8: 129-153].

The emergence of the state as an instrument for solving society's common (public) problems and satisfying the same needs has not always resulted in the past, and now it entails the seizure of this State by the tax law of individuals and society as a whole. As an already indisputable textbook example of reciprocal tax law of individuals often impose a tax right of citizens of ancient Greek policies [8: 303-374]. In many modern developed countries of the world, where instrumental social states have been formed, tax law is also a public acquisition [30: 418, 434]. A classic example of such a State is Switzerland [30: 561-563], [31].

At the very beginning of the existence of the newest Ukrainian State, tax revenues in it also had the legal nature of the public achievements [11]. This was reflected even in the Constitution of Ukraine in 1996. [20 art 95] At the same time, the content of a number of other articles of the Constitution made it possible to qualify these revenues as state-owned (the specific list we mentioned at the beginning of this article), and the tax law as the State's law. Soon, the controversy of the official interpretation of the legal nature of tax revenues in Ukraine was removed - in the Tax Code of Ukraine tax law became legally and in fact only the State's law - an attribute of the State. [32 art. 9-10, 2: 243-247] Citizens of Ukraine and stateless persons residing in it were transformed into taxpayers, in other words, in the subjects of tax relations in the sense that the Ancient Roman Empire was the first to invest in this concept.

II.2. Tax (fiscal) sovereignty of the State. The prevailing in Ukraine, other post-Soviet countries, the positivist tradition of legal thinking proceeds from the fact that the State is a self-sufficient value that appears to society, including in the field of tax relations, in the form of supreme authority endowed with a priori and not derived from anyone or whatever right, solely in accordance with its nature and will, to establish and levy taxes in its own interest. From the standpoint of the above-mentioned methodological approach, this is precisely the quintessence of the tax sovereignty of the Fiscal State [33: 375-376]. This sovereignty is indivisible even with its own nation. Article 74 of the

Constitution of Ukraine expressly prohibits referendum on "taxes, budget and amnesty" [20].

If the external side of tax sovereignty of the Fiscal State is understood in itself, since it coincides with state sovereignty [27] as a phenomenon in general, then the inner side of this sovereignty is too specific - it manifests itself in the hierarchy of relations between the State and the taxpayer, and even more precisely, is attributive subordination of the second to the first, because relations between the Fiscal State and the taxpayer are regarded by this State as a relationship of power. For example, this is explicitly mentioned in the Tax Code of the Russian Federation [34: 4]. The Tax Code of Ukraine implements the same approach to understanding the nature of the internal tax sovereignty of the Fiscal State, but, as observers of the mentioned problem note "it is packaged in the form of a paternalistic product"[2: 260].

In fact, the realization by Fiscal State of the tax relations as hierarchical and authoritative conflicts with the true nature of the tax relationship which consists in the fact that these relations have a redistributive nature and are aimed at satisfying in society general or common to most individuals needs. The latter is unequivocally proven by many humanities and social sciences, including the science of tax law, which uses the anthroposociocultural approach to the tax law cognition [8: 29-152], [35: 150], [36], [37].

II.3. Another property of a fiscal state is the compulsory nature of the tax liability of the taxpayer. Positions of the representatives of two opposing cognitive traditions - positivist and anthroposociocultural - about the explanation of the reasons for the existence of this property of the fiscal state practically coincide. In its basis, they note, is not just a different, but the opposite nature of the tax law status of the state and its tax authorities, on the one hand, and taxpayers, on the other [33: 14-15]., [2: 280]. If, however, to investigate the rooting of the aforementioned property of the fiscal state even deeper, then it becomes clear that it is based on the opposite needs of the fiscal state and taxpayers.

Thus, according to Article 67 of the Constitution of Ukraine: "Everyone is obliged to pay taxes and fees in the order and amounts established by law" [20]. But the Constitution of Ukraine does not contain the counter legal obligation of the state to satisfy the public needs of its own citizens and stateless persons. The Tax Code of Ukraine also does not contain them. "Fiscal adequacy" is interpreted in it as "the

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establishment of taxes and fees, taking into account the need to achieve a balance between its expenditures and revenues". [32 art. 4 part 1] At the same time, neither in this provision nor in other provisions of the Tax Code does not refer to the satisfaction by the State of public needs of taxpayers. In addition, collected by way of taxation financial resources are permanently spent in considerable amounts by the institutions of the Fiscal State and its bureaucratic apparatus for non-public purposes. This, along with other reasons [38] generates a massive evasion of taxpayers from their payment, which even more targets the Fiscal State for the total introduction of coercive taxation policy.

II.4. One of the most adequate features of the Fiscal State is *the fiscal nature of its tax law*. The constitution of Ukraine does not directly refer to it from the same paternalistic considerations. It only states that: "All citizens annually submit the declaration of their property status and income for the last year to tax inspections [state bodies - P.P. and V.R.] at the place of residence in the manner prescribed by law". [20 art. 67] The law in this case - the Tax Code of Ukraine - in part 1 of Article 6 gives the following normative generic tax definition: "The tax is a mandatory, unconditional payment to the relevant budget, which is levied from the taxpayer in accordance with this Code". [32 art.6 part 1] R. O. Havrylyuk came to the conclusion, that "System analysis of the Tax Code of Ukraine convinces that the domestic legislator unambiguously, without any doubt, interprets the tax in the spirit of the etatist doctrine of tax law - as an extraction of the part of private property from the private owner and the transfer it to the State" [2: 293].

This unequivocal conclusion is also derived from the systematic interpretation of Article 14 "Definition of the concepts" of the Tax Code of Ukraine. Moreover, such an interpretation of the tax - as an individual unpaid transfer of part of the taxpayer's property to the State in the form of cash funds – is characterized the entire content of the Tax Code of Ukraine. Therefore, it is hardly possible to refute the conclusion of P. Kirchhoff that the Fiscal State is taxable in order to receive income from taxation. [39: 139-140]

II.5. The system-forming properties of the Fiscal State include the *asymmetry of its tax law*. It is determined and at the same time is multiplied by all previous properties of the Fiscal State. Outside this asymmetry of the Fiscal State is manifested in the tax legal personality of the State and

the tax liability of the taxpayer, which depend on each other, are reciprocated with each other and are in relations of struggle. That is, the tax law of the Fiscal State resists to the compulsory tax liability of the taxpayer and vice versa.

Fiscal State treats its right to tax as an attribute, in other words, as such a property which under no circumstances can pass to the taxpayer

The latter regards the compulsory obligation to pay taxes imposed on him by the Fiscal State from diametrically opposed approaches. "This obligation - as R.O. Havrilyuk has researched - is extremely burdensome, alien for the taxpayer, and is in constant antagonism with his real needs and interests" [2: 305].

Asymmetry of the tax law of the fiscal state of Ukraine also convinces its conceptualization in the Tax Code of Ukraine as a relationship of power and subordination. This convinces, in particular, with the comparative analysis of Article 16 "Taxpayer Obligations" and Article 17 "Taxpayer Rights". Here, the latter clearly derive from the first, and analysis of the content of these rights convinces that they are entirely subject only to the performance of the taxpayer's tax liability, which only emphasizes the asymmetry of the tax law of the Fiscal State.

Conclusions

Fiscal State is a separate type of Tax State. It arises as a result of peculiar social mutations of public-legal values in quasipublic-legal values, usually "state". The Fiscal State of Ukraine is not an exception. The preconditions for its emergence formed mostly in the bosom of Soviet society and ended up forming in the initial post-Soviet period of Ukraine's development. The Fiscal State of Ukraine is characterized by the following system-forming properties: the capture by it of the tax law of society; fiscal sovereignty of the State; compulsory nature of the tax liability of taxpayers; the fiscal nature of its tax law; asymmetry of the tax law of the State.

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