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VIOLATION OF THE PRINCIPLE OF EQUALITY IN THE CONTEXT OF TAXATION OF REAL ESTATE, OTHER THAN LAND PLOT

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SUMMARY

In the article the author explores the essence of the principle of equality of taxation and the correlation of this principle with other principles of taxation, in particular the principles of justice, the universality of taxation and the prohibition of discrimination. The combination of formal and substantive equality is studied in detail, which is the leading interpretation of the principle of equality. This combination allows for fair "equality of opportunities", according to which all individuals should be provided with equal opportunity to compete with other members of society and with sufficient chances of success. In addition, the author provides a specific example of the tax legislation of Ukraine, which violates the principle of equality and the prohibition of discrimination and analyzes the relevant judicial practice.

Key words: principles of taxation, principle of equality, prohibition of discrimination, tax on property other than land.

НАРУШЕНИЕ ПРИНЦИПА РАВЕНСТВА В КОНТЕКСТЕ НАЛОГООБЛОЖЕНИЯ НАЛОГОМ НА НЕДВИЖИМОЕ ИМУЩЕСТВО, ОТЛИЧНОЕ ОТ ЗЕМЕЛЬНОГО УЧАСТКА

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АННОТАЦИЯ

В статье автор исследует сущность принципа равенства налогообложения и взаимосвязь этого принципа с другими принципами налогообложения, в частности принципами справедливости, всеобщности налогообложения и запрета дискриминации. Подробно исследуется сочетание формального и субстантивного равенства, что является ведущей интерпретацией принципа равенства. Именно такое сочетание позволяет обеспечить «справедливое равенство возможностей», согласно которому всем лицам должна быть обеспечена равная возможность конкурировать с другими членами общества с достаточными шансами на успех. Кроме того, автор приводит конкретный пример налогового законодательства Украины, которое нарушает принцип равенства и запрета дискриминации, и анализирует релевантную судебную практику.

Ключевые слова: принципы налогообложения, принцип равенства, запрет дискриминации, налог на имущество, отличное от земельного участка.

Formulation of the problem. Today there is a weak focus on the principles of taxation, including the principle of equality, enshrined in Article 4 of the Tax Code of Ukraine. This is due to the lack of awareness that the principle of equality plays a fundamental role in adopting all norms of the tax law, acts as a universal criterion for their compliance with generally accepted legal values and contributes to preserving the balance between private and public needs and interests.

The purpose of this article is to study the essence of the principle of equality

of taxation enshrined in Article 4 of the Tax Code of Ukraine and to analyse its adherence to other norms of tax legislation.

Methods and used materials. The article includes academic works of S.M. Bondar, R.O. Havryliuk, H.A. Hadzhyev, H. Gribnau, M.P. Kucheriavenko, V.S. Nersesiants, S.Yu. Ponomarov and others. The basis of the research is the dialectical method of cognition. According to this method, the principle of equality of taxation is considered in the process of its development and implementation in specific



tax law relations. The system analysis method identifies and considers various aspects of the principle of equality of taxation and the legal mechanism of its operation. The corresponding place in the research is taken by the comparative law method used in studying the principle in terms of Ukrainian and foreign tax legislation.

Presentation of the main material. Hans Gribnau reveals the principle of equality as follows: “All persons, regardless of their circumstances, shall not be treated equally before the law, as though they are (exactly) the same. However, all persons shall be treated equally in equal circumstances” [1].

The essence of the principle of equality was represented in the dissenting opinion of judge Tanaka in the *South-East Africa case* considered by the UN International Court of Justice in 1966 [2, p. 41]. The judge noted: “The principle of equality before the law does not mean complete equality of persons without taking into account their individual characteristics and specific circumstances. The principle of equality means relative equality, i.e. what is equal is to be treated equally and what is different is to be treated differently”. Different treatment to unequal matters in spite of their inequality is not only permitted but also required [3].

M.P. Kucheriavenko points out several components of the principle of equality, these are:

1) *equality of all taxpayers* equalizes the burden of taxation;

2) *equilibrium* maintains the structure of the economy, correlation of subdivisions, and related branches, eliminates disproportions and provides a progressive, balanced development;

3) *equal tension* serves as a tax feature of the whole national tax system extending to all elements of the tax object [4, p. 130].

According to D.V. Vinnytskyi, the principle of legal equality can be expressed in two cases: firstly, in establishing general and equal guarantees of the protection of individuals in the context of tax procedures; secondly, in equal responsibility for tax offenses [5, p. 189].

In the scientific literature, there is a distinction between the principle of legal equality and the principle

of equality. According to H.A. Hadzhiiev and S.H. Pepeliaiev, while the principle of legal equality aims at adherence to formal equality of taxpayers, the principle of equality is aimed at taking into account the unequal circumstances of taxpayers, without violating of their formal equality, and ensuring compliance with informal equality [6, p. 309; 7, p. 75]. Sometimes the principles are distinguished as the principle of formal equality of taxpayers and the principle of equal tax burden [5; 8].

The concept of formal (legal) equality is revealed through four interrelated principles, these are: equality before the law; equality before the court, equality of human and civil rights and freedoms; equality of human duties and civic responsibilities [2, p. 42]. In addition, the idea of formal equality is supplemented by the idea of substantive equality expressed through equality of opportunity, equality in access to opportunities and equivalence of results. In other words, the idea of substantive equality is to eliminate not only legal but also factual obstacles exercising the rights by individuals. The model of substantive (factual) equality is realized by two basic principles, these are: the differentiation of legal regulation and the positive discrimination.

The combination of formal and substantive equality is currently the leading interpretation of the principle of equality ensuring “fair equality of opportunity” according to which all persons should have equal opportunity to compete with other members of society including sufficient chances of success [2, p. 43].

According to N.K. Shaptali, this distinction is justified because formal equality involves equal rights and obligations of taxpayers, prohibits any discrimination depending on the form of ownership, legal form of economic activity, and place of origin of the capital; at the same time, the equality of tax burden is aimed at achieving informal equality taking into full consideration the factual state of the taxpayers’ property which determines its real solvency [9, p. 66]. That is, the violation of the principle of “equality of all persons before the law and the prevention of any manifestations of tax discrimination” is the application of unequal legal regulation to the subjects that have

the same generic, sociological, or legal characteristics but can be divided into certain subspecies of such features.

Subparagraph 4.1.2 of paragraph 4.1 of Article 4 of the Tax Code of Ukraine ensures equal treatment of all taxpayers regardless of social, racial, national, religious affiliation, form of ownership of a legal entity, citizenship of an individual, place of origin of the capital. According to V.S. Nersesians, these criteria should be a general equal measure that is an important component of the principle of formal equality and essential properties of law. Moreover, the equal measure includes other components of the legal principle of formal equality – freedom and justice. Therefore, the equal measure is an equal measure of freedom and justice [10, p. 30].

The scholar emphasizes that the principle of formal equality should be treated as the unity of three essential properties (characteristics) of law which provide for a common equal level of regulation, freedom and justice. In addition, the indicated essential properties of law can be characterized as three modes of a single substance, as three interrelated meanings of a sense: one property without other properties cannot exist. The common equal measure is the equal measure of freedom and justice, at the same time, freedom and justice are impossible out and without equality (common equal measure). Moreover, V.S. Nersesians considers that their interrelation in the legal form of human relationships includes as follows:

1) the formal equality of the participants (subjects) of this type (form) of relationships (in fact, different people are equalized with a single measure and a common form);

2) their formal freedom (their formal independence from each other and, at the same time, the submission to a single norm acting according to the general type);

3) formal justice in their interrelations (the norm of regulation that is general, abstract, and equal to all of them; the measure and the form of permissions, prohibitions which excludes someone’s privilege). Equality (common equal measure) implies and includes freedom and justice, at the same time, freedom



includes equal measure and justice, and justice includes equal measure and freedoms [11, p. 8].

According to T.M. Zatulina, equality is implemented not as an equal tax payment but as economic equality. Equality of all persons before the law is the most important feature of constitutionalism and the rule-of-law state. The provision on equality of the constitutional status of an individual is fixed in all democratic constitutions. Thus, equality is implemented not as a tax payment paid equally but as economic equality of taxpayers [12, p. 18].

According to O.V. Khrabrov, the principle of generality and equality determines that all subjects of tax relations are equal before the law, and the state has no right to introduce unjustified claims, benefits, preferences, or uneven tax regime related to the same relations and situations [13, p. 131].

According to R.O. Havryliuk, maintaining tax benefits for separate objects or subjects of taxation established by the state and accepted by society does not contradict the constitutional principle of legal equality of all taxpayers. In accordance with the letter and spirit of the Constitution of Ukraine the principle of equality in taxation requires a consideration of the practical ability of the subject of taxation to pay tax based on the legal principles of justice and proportionality [14].

The principles of generality and equality provided for in subparagraphs 4.1.1–4.1.2 of paragraph 4.1 of Article 4 of the Tax Code of Ukraine were formed on the basis of legal criteria of the identity of taxpayers but they are not absolute and they are limited by the necessity to follow the requirements of the characteristics of their economic differentiation enshrined in the principle of social justice (subparagraph 4.1.6 of paragraph 4.1 of Article 4 of the Tax Code of Ukraine) and neutrality of taxation (subparagraph 4.1.8 of paragraph 4.1 of Article 4 of the Tax Code of Ukraine).

However, in the process of law-making the above-mentioned is ignored that leads to a violation of the principles of equality, generality, and justice making it impossible to apply such a rule in a competent way. For example, a detailed analysis of Article 266 of Sec-

tion 12 “Property Tax” of the Tax Code of Ukraine shows that the legal regulation of real estate tax, other than land plot faces numerous violations of the principle of equality of all taxpayers and the principle of preventing any manifestations of tax discrimination.

Pursuant to subparagraph 266.1.1 of paragraph 266.1 of Article 266 of the Tax Code of Ukraine, taxpayers are individuals and legal entities, as well as non-residents, which own residential property. Subparagraph 266.1.2 of paragraph 266.1 of Article 266 of the Tax Code of Ukraine establishes the procedure for determining taxpayers of real estate, other than land plot, in case of joint property ownership.

Pursuant to subparagraph 266.1.2 of paragraph 266.1 of Article 266 of the Tax Code of Ukraine, determination of taxpayers in case if the objects of joint shared or joint common residential/non-residential real estate owned by several individuals reads as follows:

a) if the object of residential/non-residential real estate is owned by several individuals in joint share ownership, the taxable persons shall be each of the said individuals corresponding to the part they own;

b) if the object of residential/non-residential real estate is owned by several individuals in joint common ownership but is not naturally parted, the taxable person shall be one of the said individuals determined by their agreement, unless otherwise prescribed by law;

c) if the object of residential/non-residential real estate is owned by several individuals in joint common ownership and is naturally parted, the taxable persons shall be each of the said individuals corresponding to the part they own.

That is, if the object of residential real estate is in joint share ownership, the tax burden on tax payment is divided among each individual corresponding to the part they own; if the object of residential real estate is in joint common ownership, the tax burden on tax payment relies only on one of the co-owners.

The concept of joint ownership is disclosed in Chapter 26 of the Civil Code of Ukraine. After analysing the norms of Article 355 of the Civil Code of Ukraine we can conclude that the joint ownership right is distinguished in

a separate legal category due to the large number of eligible subjects in relation to a particular property.

The Civil Code of Ukraine distinguishes between two types of joint ownership rights: 1) joint common ownership right; 2) joint share ownership right. Pursuant to part 1 of Article 356 of the Civil Code of Ukraine, ownership of two or more individuals with identification of shares of each of them in the ownership right shall be a joint share ownership. Pursuant to part 1 of Article 368 of the Civil Code of Ukraine, joint ownership of two or more individuals without determination of their shares in the ownership right shall be a joint common ownership.

Having systematically analysed the norms of Chapter 26 of the Civil Code of Ukraine, we can conclude that the main difference between joint share and joint common ownership is the presence or absence of a certain share of co-owners in the joint ownership. However, this difference appears at the stage of division or allotment of the joint ownership of co-owners. Pursuant to the provisions of Articles 367 and 372 of the Civil Code of Ukraine, the right of joint share ownership and joint common ownership shall be terminated in case of division or allotment of a share from the joint ownership. In this case every individual shall have the right to a share of the private ownership which becomes a separate object of the ownership right. The object of joint ownership shall be terminated, and the former co-owners shall have the rights and obligations to allotment of a share in kind. The co-owners of joint common or joint share ownership shall have the equal rights to own and use such property until its division or allotment.

Pursuant to Article 358 of the Civil Code of Ukraine, the joint share ownership right shall be exercised by co-owners upon their consent. The co-owners may agree upon the procedure of owning and using the property under their joint share ownership. Pursuant to Article 369 of the Civil Code of Ukraine, the co-owners of the property under joint common ownership shall own and use this property jointly, unless otherwise specified in the agreement between them.



In view of the above, the shares of the co-owners are conventional and have no effect on the composition and structure of the joint ownership until division or allotment of the property under joint share ownership.

Differences in the legal regime of various types of joint ownership appear during division or allotment of joint common ownership as follows:

co-owners of the joint common property shall have the equal right to a share. (Articles 370, 372 of the Civil Code of Ukraine);

each of the co-owners shall have the right to allot and divide that part of the joint share property in kind which corresponds to their share in the joint share property (Article 358 of the Civil Code of Ukraine).

That is, the legal status of the property in the joint share ownership and joint common property is equal until its division or allotment. Thus, the co-owners of the real estate object, that is in joint common ownership until division or allotment of the joint ownership, have an equal legal link to the property on the basis of the corresponding legal title and endowed with the same rights to own and use.

However, the “single taxpayer” approach under joint common ownership leads to the failure of other real estate property owners, non-taxpayers, to implement the tax benefits provided for in subparagraph 266.4.1 of paragraph 266.1 of Article 266 of the Tax Code of Ukraine, according to which the tax base of the object(s) of residential real estate, as well as the share thereof, owned by individual – taxpayer, shall be reduced:

- a) for apartment(s) regardless of their quantity – by 60 sq. metres;
- b) for residential building(s) regardless of their quantity – by 120 sq. metres;
- c) for different types of residential real estate, as well as the share thereof (in case of simultaneous ownership of apartment(s) and residential building(s), as well as the share thereof, by taxpayer) – by 180 sq. metres.

The above-mentioned norm provides the taxpayer with an appropriate benefit. That is, in case of joint share ownership the benefit is implemented by each of the co-owners; in case of joint common ownership the benefit is imple-

mented only by one joint owner – taxpayer. At the same time, the co-owners’ set of rights to the ownership and use of property under the joint common and joint share ownership rights are equal until its division or allotment.

The application of the above-mentioned approaches to the implementation of benefits by co-owners according to the type of joint ownership and taking into account the equivalence of their legal of such property testifies not only to direct discrimination under the Tax Code of Ukraine but also to the violation of the constitutional provision of equality before the law of all property rights holders (part four of Article 13 of the Constitution of Ukraine).

In addition, the problem of the implementation of this benefit is also related to the identification of the taxpayer in the presence of joint ownership.

At the same time, the Tax Code of Ukraine establishes a special rule for determining the taxpayer obliged to pay the real estate tax of commonly owned property.

The Tax Code of Ukraine provides for two ways of determining the taxpayer obliged to pay the real estate tax of commonly owned property:

- 1) the taxpayer is determined under the agreement between the co-owners;
- 2) the taxpayer is determined by the court.

Taking into account the above-mentioned, there are no powers of the controlling authority in terms of the taxpayers’ identification for the real estate object under the joint common ownership right that is expressly provided for by the Tax Code of Ukraine. If the co-owners do not determine the taxpayer, the judicial authorities shall be entitled to the appropriate powers. At the same time, a tax assessment notice of the determined taxpayer and the amount of tax shall be lawful if the judicial procedure takes place at the time of adoption of the corresponding tax assessment notice.

In addition, the relevant court practice has developed in favour of the taxpayers due to the law enforcement matter of part b) of subparagraph 266.1.2 of Article 266 of the Tax Code of Ukraine.

Judgment of the Dnipro Administrative Court of Appeal as of November

29, 2017 in the case № 808/463/17 held as follows: “The co-owners owning the corresponding real estate did not reach consent to a real estate tax payment. The tax payment procedure was not determined by the court. The intended use and maintenance of industrial premises were not changed. Taking into account the above-mentioned, the Court of Appeals agrees with the judgment of the Court of First Instance that the defendant does not have any legal grounds for charging the real estate tax, other than land plot”.

Judgment of the Zaporizhia District Administrative Court as of July 31, 2017 in the case № 808/585/17 expressed as follows: “The Court found that according to the procedure established by law the tax inspectorate has not been informed on reaching an agreement between the co-owners of the above-mentioned real estate in the determination of the taxpayer of real estate tax, other than land plot. The Court has not been received a court judgment on the determination of the taxpayer of real estate tax, other than land plot of the above-mentioned objects of real estate. In the light of the above, the Court concludes that the tax liability of PERSON_1 on real estate, other than land plot is illegal. Therefore, there are all grounds to invalidate the tax liability and to revoke the contested tax assessment notices”.

Thus, in order to eliminate the violation of the principle enshrined in subparagraph 4.1.2 of paragraph 4.1 of Article 4 of the Tax Code of Ukraine, Article 266 of the Tax Code of Ukraine requires the following changes and additions:

1) part b) of subparagraph 266.1.2 of paragraph 266.1 of Article 266 of the Tax Code of Ukraine should be supplemented with the following sentence: “If the co-owners do not reach consent to the determination of the taxpayer in a judicial/extrajudicial procedure, the title-holder shall be determined as the taxpayer according to the data of the State Register of Property Rights to Real Estate and their Encumbrances. In case of several title-holders the tax liability shall be divided among them in equal shares”;

2) subparagraph 266.1.4 of paragraph 266.1 of Article 266 of the Tax Code of Ukraine should be



supplemented with the seventh paragraph as follows: "If the object of residential real estate is owned by individuals on the right of joint common ownership, the right to implement such reduction shall be granted to each co-owner in equal shares.

Aimed at implementing such reduction, in presence of the title-holders not recorded in the State Register of Property Rights to Real Estate and their Encumbrances, the taxpayer shall have the right to apply once with the appropriate application to the controlling authority at the place of registration. The application should be attached with the copies of documents confirming the status of the joint common ownership".

Conclusions. Thus, the principle of equality of taxation consists of several interrelations revealing its essence, these are: 1) equality of all taxpayers equalizes the burden of taxation; 2) equilibrium maintains the structure of the economy, correlation of subdivisions, and related branches, eliminates disproportions and provides a progressive, balanced development; 3) equal tension serves as a tax feature of the whole national tax system extending to all elements of the tax object. In addition, equality implies and includes freedom and justice; freedom includes equal measure and justice; justice includes equal measure and freedoms. Thus, violating the principle of equality of taxation entails a violation of other principles of taxation such as the prohibition of discrimination, generality, justice, etc.

Therefore, the violation of the rights of other owners, non-taxpayers, of the real estate object of joint common ownership is manifested in the inapplicability of tax benefit provided for in subparagraph 266.4.1 of paragraph 266.1 of Article 266 of the Tax Code of Ukraine. Therefore, we consider that if the object of residential real estate is owned by individuals in joint common ownership, the right to implementing such reduction should be granted to each co-owner in equal shares.

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