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ON THE QUESTION OF THE USE OF EVALUATIVE CONCEPTS IN TAX LAW

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The article analyzes current issues regarding the use of valuation concepts in tax law. In particular, scientific approaches to the specification of valuation concepts in tax law, which they receive in the normative order or in judicial practice, are considered. In addition, it is emphasized about the specification of valuation concepts in the legal interpretation practice of controlling authorities and in subordinate legal acts of the Ministry of Finance of Ukraine and controlling authorities, which receives its fixation in subordinate legal acts of tax legislation, letters, general and individual tax consultations.

It was found that the use of norms with evaluative concepts in the texts of tax regulations is determined by a number of objective and subjective factors. It is highlighted that the peculiarities of the evaluation concepts are that: 1) they are either not explained at all in the legislation, or find only a partial interpretation in it; 2) they are specified by the law enforcer himself; 3) they are specified on the basis of discretion.

Taking into account the peculiarities of discretion in tax and legal regulation, it is emphasized that quite often there are situations in which formally undefined concepts are used. It was established that evaluative concepts are necessary in the presence of an objective need to establish certain limits of discretion for the subject of law enforcement. Valuation concepts are an objectively necessary component of tax-legal norms and occupy an important place in the conceptual-categorical apparatus of tax law. As an example, the evaluative concepts that are components of the concepts of «tax» and «fee» were analyzed. In this case, among the evaluation concepts, «unconditional payment to the relevant budget» and «special benefit» were singled out and analyzed.

The author's conclusion was made that in some cases there is a need for a thorough clarification of valuation concepts in tax law using additional sources. It is noted that today the issue of the meaning and place of valuation concepts in tax law is open for discussion and requires further scientific research.

Keywords: specification; evaluative concepts; tax law; enforcement; discretion.

Formulation of the problem. In the modern conceptual and categorical apparatus of tax law of Ukraine, many concepts, categories and terms are quite difficult to understand. At the same time, among the scientific community, the discussion of its separate component – valuation concepts, the application of

which is widespread in tax legislation, has intensified. However, it is worth noting that today there is no unified approach to the definition and use of valuation concepts in tax law. It encourages scientific inquiry and analysis.

Analysis of research and publications. Theoretical studies and analysis of current legislation on issues related to the use of valuation concepts in tax law are relevant, especially in the modern conditions of the economic and legal development of our society. The basis for the preparation of the article was the provisions of the national legislation of Ukraine, the theoretical work of scientists and practitioners who, from a modern standpoint, evaluate the peculiarities of the use of valuation concepts, in particular in tax law, among them N. Getmantseva, O. Glukhyi, E. Kisiliuk, T. Kolomoyets, V. Kosovych, K. Kutsovol, M. Kucheryavenko, P. Lyutikov, O. Mamalui, G. Moiseyenko, O. Salmanova, O. Smaglyuk, E. Smychok and others.

The purpose of the article. Analyze current issues regarding the use of valuation concepts in tax law.

Main material presentation. Evaluative concepts are relatively defined concepts that generalize the legally significant phenomena of reality, they are characterized by the unity of objective and subjective principles that reflect the statics and dynamics of their content [1, p. 75].

In order to apply evaluative concepts, according to V. Kosovych, it is first necessary to determine their sufficient and necessary features, which occurs by concretization, in particular in two ways: – by pointing to specific facts of objective reality that are covered by them. The vast majority of evaluative concepts are specified in a similar way <...> ; – specification of evaluative concepts can occur with the help of general judgments that detail them. <...> In the case of the application of evaluative norms, a conclusion about the social significance of individual, real facts of social life can be made only taking into account the specific situation on the basis of the content of the evaluative concept learned in the process of law enforcement [2, p. 8].

G. Moiseyenko emphasizes that the specification of evaluative concepts by stating the cases covered by them or by establishing their features is possible only in the provisions of the normative legal act that contains the relevant evaluative concept (or in cases defined by law in normative acts of higher legal force or such the most legal force, if there is a reference to it). Courts are not authorized to specify valuation concepts, but can only interpret them [3, p. 185].

Regarding valuation concepts in tax law, as E. Smychok notes, they can receive their specification or attempts at specification in: a) regulatory order; b) judicial practice. In his opinion, it should be noted separately about the specification of valuation concepts in the legal interpretation practice of controlling bodies and in subordinate legal acts of the Ministry of Finance of Ukraine and controlling authorities, which is recorded in subordinate legal acts of tax legislation, letters, general and individual tax consultations [4, p. 83].

When establishing the content and scope of evaluative concepts, including those with the same name, it is difficult to give an unambiguous interpretation, because when different offenses are committed in each proceeding, they must be established taking into account specific circumstances. However, as E. Kisiliuk and O. Smagliuk point out, the general approaches, factors that must be taken into account when defining these concepts should be the same [5, p. 169].

At the same time, as E. Smychok notes, the peculiarity of the evaluative concepts introduced by the court is their operation in the context of a practical case, which shows the individual nature of the concepts formed in this way, in contrast to the evaluative concepts that are mentioned in the legal norms and endowed with general features. At the same time, the evaluative concept developed by the court within one case does not limit its effect only to this case, but provides the basis for adapting it to general use in the

future, if the necessary conditions are present. The above shows that the relevant evaluative concept transforms its nature over time from an individual phenomenon to a general phenomenon [6, p. 161].

According to K. Kutsovol, the legislator, if possible, should use concepts and terms, the definitions of which are directly provided in special articles «Definition of Terms» or other articles, normative legal acts. If there is no comprehensive list of characteristics that explain this concept, then it is mainly evaluative [7, p. 28].

Considering the research conducted by scientists, today there is a need to recognize the following. If in some cases evaluative concepts are necessary, then in others they are extremely undesirable. When using them, it is important to remember their negative side. Since the evaluative concepts are specified by the law enforcement officer, a subjective approach to the assessment of the specific circumstances of the case is inevitable. The presence of an exhaustive or at least an exemplary list can neutralize the undesirable consequences of a subjective approach to the assessment of facts. A rule of law with evaluative concepts should be used if it is not possible to explain it in another way, since it is a rule that has not been specified by the rule-making authorities for an objective reason (due to the impossibility of using another legal construction) [8, p. 36].

As T. Kolomojets, P. Lyutikov and O. Glukhyi rightly note, the use of norms with evaluative concepts in the texts of tax regulations is determined by a number of factors: 1) objective – the need for effective legal regulation of social relations, where it is impossible to use formalized concepts; 2) subjective – inability and/or unwillingness to select the necessary components of legal technique and formulate a formalized concept of law [9, p. 18].

O. Salmanova analyzed the characteristics of the legal features of evaluative concepts and found out that the first legal feature of evaluative concepts is that they are either not explained at all in the legislation, or find only a partial interpretation in it. In her opinion, evaluative concepts are concepts not defined by law. It is also stated that the legislator most often resorts to the incomplete expression of his opinion in a legal prescription in order to cover a certain group of social relations with this prescription. The second legal feature of evaluative concepts is that they are specified by the law enforcer himself. Moreover, the processes of legally enforceable specification of evaluative concepts and the application of their legal norms-bearers coincide in time. The essence of the third legal feature of evaluative concepts is their specification on the basis of discretion. If discretion is understood as the relative freedom granted by law in the adoption of certain decisions by the law enforcer in order to most adequately reflect in them the features of specific situations, then when applying norms with evaluative concepts, such discretion is inevitable [10, p. 63].

M. Kucheryavenko, analyzing the peculiarities of discretion in tax and legal regulation, emphasizes that quite often there are situations in which formally undefined concepts are used, that is, those that involve the possibility, and sometimes the obligation, of freedom of choice when determining their content. If discretion is associated with the possibility of several options for the development of events, a legal assessment of the situation, which are based on current legislation and are legal, then the concept of assessment involves choosing the only correct option of assessment or decision based on the rule of law [11, p. 39].

As O. Mamalui rightly points out, the principle of presumption of legality of the taxpayer's decisions is intended to ensure the realization of the taxpayer's rights and interests in the event of legal uncertainty. He also notes that if gaps in the law and legal conflicts are certainly negative phenomena in legal regulation, then evaluative concepts cannot be so categorically evaluated. Evaluative concepts are necessary if there is an objective need to establish certain limits of discretion for the subject of law enforcement. This approach is based on the social conditioning of social relations [12, p. 256].

In turn, O. Glukhyi proved that valuation concepts are an objectively necessary component of tax and legal norms. Therefore, they occupy an important place in the conceptual apparatus of tax law and reflect the general features of this sub-branch of financial law, namely: the imperative of legal regulation of

tax relations, the almost complete lack of freedom of taxpayers in matters of interpretation of tax-legal norms at their discretion, the economic content of regulated relations. At the same time, in contrast to civil law, valuation concepts, although contained in tax law, are not specific to it. These concepts significantly complicate the processes of harmonization and informatization of domestic tax legislation, since their open structure always requires the intervention of the consciousness of the subject of tax relations for their comparison with the circumstances of the tax case and further practical implementation [13, p. 12–13]. For example, the legislator defines that a tax is a mandatory, unconditional payment to the relevant budget or to a single account that is managed by taxpayers in accordance with the Tax Code of Ukraine, and a fee (fee, contribution) is a mandatory payment to the relevant budget or to a single account managed by fee payers, with the condition that they receive a special benefit, including as a result of the commission of legally significant actions for the benefit of such persons by state authorities, local self-government authorities, other authorized authorities and persons (clauses 6.1–6.2 of Article 6 of the Tax Code of Ukraine) [14]. We believe that in this case the evaluative concepts will be «unconditional payment to the relevant budget» and «special benefit», which, as the tax legislation indicates, occur in the conceptual and categorical apparatus of tax law. It should be noted that the term «unconditional» in dictionary literature is explained as: a) not connected with restrictive conditions; b) the one that does not cause doubts [15, p. 68].

At the same time, as V. Borysenko points out, the unconditional nature of the tax means that the payment of the tax is not connected with any counter-actions on the part of the state. Income to the budget of the appropriate level is another feature of the tax. According to the budget classification, taxes are distributed between budgets and funds. Tax revenues are distributed between budgets taking into account the relevant norms of the Budget Code of Ukraine [16, p. 222–223].

As for «special benefit», let's focus on the fact that benefit is something that gives good consequences, some kind of profit; convenience in something, favorable conditions; that which creates convenience for a person [15, p. 124]. It is the payment of the fee that provides the payer with a certain benefit. However, receiving a special benefit or committing any legally significant actions for the benefit of such payers is not associated with the payment of the military levy, on the contrary, today it is an unconditional mandatory payment. Therefore, in the opinion of A. Krutova, O. Nesterenko and I. Korobkina, there is every reason to claim that, according to its content, the military levy should be classified as a tax and renamed the military tax [17, p. 22–23].

Conclusions. Having analyzed scientific approaches and norms of tax legislation regarding the use of evaluative concepts in tax law, we note that in some cases there is a need for their thorough clarification using additional sources. We believe that today the issue of the meaning and place of evaluative concepts in tax law is open for discussion and requires further scientific research.

REFERENCES

1. Hetmantseva N. (2017). *Vplyv otsinochnykh poniat na dohovirne rehuliuвання trudovykh vidnosyn* [The influence of evaluative concepts on the contractual regulation of labor relations]. *Pidpriemnytstvo, hospodarstvo i pravo* [Entrepreneurship, economy and law]. No. 5. P. 72–75. [In Ukrainian].
2. Kosovych V. (2017). *Tekhniko-tekhnologichni pravyla zastosuvannya otsinochnykh poniat* [Technical and technological rules of application of evaluation concepts]. *Visnyk Lvivskoho universytetu. Seriiia yurydychna* [Bulletin of Lviv University. Legal series]. Issue 65. P. 3–12. [In Ukrainian].
3. Moiseienko H. V. (2017). *Otsinochni poniattia v administratyvnomu sudochynstvi* [Evaluative concepts in administrative proceedings]. *Kandydatska dysertatsiia* [Candidate's dissertation]. Zaporizhzhia: Zaporizkyi natsionalnyi universytet. 222 p. [In Ukrainian].
4. Smychok Ye. M. (2020). *Sudova doktryna rozumnoi ekonomichnoi prychny* [Judicial doctrine of reasonable economic reason]. *Vcheni zapysky TNU imeni V.I. Vernadskoho. Seriiia: yurydychni nauky* [Academic notes of TNU named after V. I. Vernadskyi. Series: legal sciences]. No. 5, vol. 31 (70). P. 82–88. [In Ukrainian].

5. Kisiliuk E. M., Smahliuk O. V. (2018). *Osoblyvosti zastosuvannia otsinochnykh poniat u kryminalnomu zakonodavstvi Ukrainy* [Peculiarities of the application of evaluative concepts in the criminal legislation of Ukraine]. *Yurydychnyi visnyk [Legal Bulletin]*. No. 1. P. 166–170. [In Ukrainian].
6. Smychok Ye. M. (2021). *Otsinochni poniattia yak prychna formuvannia sudovykh doktryn u podatkovomu pravi* [Valuation concepts as a reason for the formation of judicial doctrines in tax law]. *Pravovi novely. Naukovyi yurydychnyi zhurnal [Legal novels. Scientific legal journal]*. No. 13. P. 160–166. [In Ukrainian].
7. Kutsovol K. V. (2023). *Otsinochni poniattia u pravi sotsialnoho zabezpechennia Ukrainy* [Evaluative concepts in the law of social security of Ukraine]. *Dysertatsiia doktora filosofii [Dissertation of Doctor of Philosophy]*. Kyiv: Kyivskiy natsionalnyi universytet im. Tarasa Shevchenka. 212 p. [In Ukrainian].
8. Yaroshenko O. M. (2022). *Trudove pravo Ukrainy: pidruchnyk* [Labor Law of Ukraine: a textbook]. Kharkiv. 376 p. Retrieved from: <https://mon.gov.ua/storage/app/media/news/2022/07/27/Trudove.pravo.Ukrayiny.26.07.2022.pdf> (accessed 15.09.2023). [In Ukrainian].
9. Kolomoiets T. O. (ed.). (2014). *Pryntsypy dii otsinnykh poniat u vitchyznianomu podatkovomu pravi* [The principles of evaluation concepts in domestic tax law]. *Finansove pravo [Finance law]*. No. 3 (29). P. 17–20. [In Ukrainian].
10. Salmanova O. Yu. (2015). *Problemy vykorystannia otsinochnykh poniat v administratyvno-deliktnomu zakonodavstvi* [Problems of using evaluative concepts in administrative-delict legislation]. *Pravo i bezpeka [Law and security]*. No. 3 (58). P. 62–67. [In Ukrainian].
11. Kucheriavenko M. P. (2017). *Osoblyvosti rozsudu v podatkovopravovomu rehuliuванні* [Features of discretion in tax and legal regulation]. *Journal «ScienceRise: Juridical Science»*. No. 1. P. 37–41. [In Ukrainian].
12. Mamalui O. O. (2020). *Materialni pravozastosovni pryntsypy realizatsii podatkovykh vidnosyn* [Material principles of enforcement of tax relations]. *Yurydychnyi naukovyi elektronnyi zhurnal [Legal scientific electronic journal]*. No. 3. P. 254–256. [In Ukrainian].
13. Hlukhyi O. H. (2013). *Otsinochni poniattia v podatkovomu pravi Ukrainy* [Evaluative concepts in the tax law of Ukraine]. *Avtoreferat kandydatskoi dysertatsii [Abstract of thesis candidate's dissertation]*. Zaporizhzhia: Zaporizkyyi natsionalnyi universytet. 20 p. [In Ukrainian].
14. Verkhovna Rada of Ukraine (2010, December 2). *Podatkovyi kodeks Ukrainy* [Tax Code of Ukraine]. *Vidomosti Verkhovnoi Rady Ukrainy [Information of the Verkhovna Rada of Ukraine]* (2011). No. 13–14, No. 15–16, No. 17. [In Ukrainian].
15. Kunch Z. Y. (2007). *Universalnyi slovnyk ukrainskoi movy* [The universal dictionary of the Ukrainian language]. Ternopil: Navchalna knyha – Bohdan. 848 p. [In Ukrainian].
16. Borysenko V. V. (2014). *Poniattia ta oznaky mistsevykh podatkov ta zboriv za zakonodavstvom Ukrainy* [Concepts and signs of local taxes and fees under the legislation of Ukraine]. *Naukovyi visnyk Akademii munitsypalnoho upravlinnia. Seriya «Pravo» [Scientific Bulletin of the Academy of Municipal Administration. Law series]*. Issue 2. P. 221–226. [In Ukrainian].
17. Krutova A. S. (ed.). (2015). *Osoblyvosti narakhuvannia ta obliku viiskovoho zboru* [Peculiarities of calculation and accounting of military duty]. *Peculiarities of calculation and accounting of military duty [Economic strategy and prospects for the development of trade and services]*. Issue 1. P. 19–29. Retrieved from: http://nbuv.gov.ua/UJRN/esprstp_2015_1_4 (accessed 21.09.2023). [In Ukrainian].

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ДО ПИТАННЯ ПРО ВИКОРИСТАННЯ ОЦІННИХ ПОНЯТЬ У ПОДАТКОВОМУ ПРАВІ

У статті проаналізовано актуальні питання щодо використання оцінних понять у податковому праві. Зокрема, розглянуто наукові підходи щодо конкретизації оцінних понять у податковому праві, яку вони отримують в нормативному порядку або у судовій практиці. Крім того, підкреслено конкретизацію оцінних понять у правотлумачній практиці контролюючих органів та в підзаконних нормативно-правових актах Міністерства фінансів України і контролюючих органів, що отримує свою фіксацію в підзаконних актах податкового законодавства, листах, узагальнювальних та індивідуальних податкових консультаціях.

З'ясовано, що використання у текстах податкових нормативно-правових актів норми з оцінними поняттями зумовлено низкою об'єктивних та суб'єктивних чинників. Виокремлено, що особливостями оцінних понять є те, що: 1) вони або взагалі не роз'яснюються в законодавстві, або знаходять у ньому лише часткову інтерпретацію; 2) вони конкретизуються самим правозастосувачем; 3) вони конкретизуються на основі розсуду.

Зважаючи на особливості розсуду в податково-правовому регулюванні, підкреслено, що доволі часто виникають ситуації, за яких використовуються формально невизначені поняття. Констатовано, що оцінні поняття є необхідними за наявності об'єктивної потреби встановлення певних меж розсуду для суб'єкта правозастосування. Оцінні поняття є об'єктивно необхідною складовою частиною податково-правових норм та посідають важливе місце в понятійно-категоріальному апараті податкового права. Як приклад проаналізовано оцінні поняття, що є складовими частинами поняття «податок» та «збір». В цьому випадку серед оцінних понять виокремлено та проаналізовано «безумовний платіж до відповідного бюджету» та «спеціальну вигоду».

Зроблено авторський висновок про те, що в окремих випадках наявна потреба ґрунтовного роз'яснення оцінних понять у податковому праві з використанням додаткових джерел. Зауважено, що сьогодні питання щодо значення та місця оцінних понять у податковому праві є відкритим для обговорення та потребує подальшого наукового дослідження.

Ключові слова: конкретизація; оцінні поняття; податкове право; правозастосування; розсуд.