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VIOLATION OF TERMS OF REGISTRATION OF TAX INVOICES: FEATURES OF LEGAL LIABILITY

Institution of legal liability is an integral part of the legal system in each country, which performs both punitive and preventive function. Legal liability may be implemented not only by means of state compulsion, but also by the party on the basis of the contract, which was independently concluded by this party and its counterpart. In this paper, the author identified challenging issues and features of legal liability of taxpayers (entities) for violation of the terms of registration of tax invoices in the Unified Register of Tax Invoices and made appropriate conclusions. The specific feature of the indicated offence is reflected by its objective aspect (inactivity) and subjective aspect (existence or absence of fault). Analysis of norms of current legislation indicated that violation of the term of registration of tax invoices leads to liability of both a seller and a purchaser.

Keywords: Tax Code of Ukraine, value added tax (VAT), system of e-administration of VAT, registration of tax invoices, sanctions, legal liability, economic and legal liability.

Introduction

Institution of legal liability is an integral part of the legal system in each country, which performs both punitive and preventive function. The former is applied as punishment for already committed offence by the entity during implementation of financial and economic activities. And the latter function exists in the form of specific activities of the State or is caused by the parties of the agreement (contract) and is a guarantee of proper performance of the commitment.

Since 2015, the system of electronic administration (SEA) of value added tax (VAT) for value added tax payers and obligatory registration of tax invoices (regardless of the amount of business operations) were implemented in Ukraine, and liability for violation of terms of registration of tax invoices was stipulated. In addition, for value added tax payers, the system of monitoring of compliance of tax invoices/ adjustment calculations with the criteria of risk level assessment that is sufficient to suspend registration of tax invoice/ adjustment calculation in the Unified Register of Tax Invoices (SM CRLA, System) was introduced in Ukraine since 01.07.2017.

Given that the introduced System in some way affects observation of the terms of registration of tax invoices by a taxpayer – a purchaser (draws up the tax invoice), and accordingly, the possibility for a tax payer – purchaser (recipient) to include the tax amount to tax credit, it is necessary to determine the issues and features of legal liability for violations of terms of registration of tax invoices, including the cases of suspension of their registration.

Research into given problem has not been carried out so far.

Legal liability reflects the specifics of any legal phenomena, such as the formal certainty and procedural order of implementation, therefore, it is part and parcel of an offence. Committing an offence entails legal liability in the form of application of measures of state compulsion to an offender. Legal liability is implemented within the limits of security of protective legal relations between the State, represented by its special organs and an entity, who violated requirements of legal regulations and who is made responsible for bearing certain losses of personal, organizational or material nature.

Along with this, legal liability may be performed not only by means of State compulsion, but also by the party on the basis of the agreement, which was independently concluded by this party and its counterpart.

The goal of this article is to establish problematic issues and features of legal liability of taxpayers (entities) for violation of terms of tax invoices' registration in the Unified Register of Tax Invoices (URTI) and to draw appropriate conclusions.

Presentation of basic material

The base, which regulates the organization of work on the levy and payment of taxes, the grounds for making responsible for committing tax offences, including violation of the terms of registration of tax invoices is provisions of Tax Code (Tax Code of Ukraine)¹.

Thus, since 01.01.2011, under clause 11 of subsection 2 of Section XX Transitional Provisions of the Tax Code¹, registration of tax invoices by payers of value added tax – sellers in the Unified Register of Tax Invoices was introduced for payers of this tax, whose amount of value added tax in one tax invoice is the following: more than UAH 1 million – since January 1, 2011; more than UAH 500 thousand – since April 1, 2011; more than UAH 100,000 – since July 1, 2011; more than UAH 10,000 – since January 1, 2012. A tax invoice, in which the amount of value added tax does not exceed UAH 10,000, will not be included in the URTI. That is, from January 1, 2011, tax invoices, in which the amount of VAT was over UAH 10,000 were subject to registration.

However, since 01.01.2015 (taking into account the amendments made by Law of Ukraine № 71-VIII of 28.12.2014 On Making Amendments to the Tax Code of Ukraine and certain legislative acts of Ukraine regarding the tax reform (Act No. 71-VIII))², after the introduction of the system of electronic administration (SEA), all tax invoices (regardless of the amount of business operations), issued (drawn up) after 01.01.2015 r. are subject to mandatory registration in the Unified Register.

In addition, with the introduction in force of the SEA and obligatory registration of tax invoices, changes that involve liability for violation of the terms of registration of tax invoices (Art. 120¹ of the Tax Code¹) were introduced to the Tax Code. Before this, penalties were not imposed for violation of the terms of registration of tax invoices.

In this case, the possibility of imposing penalties for violations of the terms of registration of tax invoices in the URTI was limited by clause 39 of subsection 2 of section XX of Transitional provisions of the Tax Code³ (for tax invoices, which were drawn up in the period from July 1 to September 30, 2015 inclusive, deadlines of registration in the Unified Register of tax invoices, established in clause 201.10 of article 201 of this Code, do not apply) and clause 120¹.3 of article 120¹ of the Tax Code¹ (Order of imposing of penalties, stipulated by this article, shall be approved by the central body of executive power, which provides formation and implements the State tax and customs policy).

Along with this, this Order was never approved, instead, the indicated norm was excluded and does not exist in the edition of Tax Code¹ since 01.01.2016, which is why it is from 01.01.2016 that the regulatory authorities have the possibility of imposing penalties, provided by clause 120¹.1 of article 120¹ of the Code¹, for violations of terms of registration of tax invoices.

1. According to clause 201.10 of article 201 of the Tax Code¹, taking into account the amendments, made by the Law of Ukraine No. 1797-VIII of 21.12.2016 “On Amendments to the Tax Code of Ukraine regarding improvement of investment climate in Ukraine” (Law No. 1797-VIII)⁴, registration of tax invoices and/or adjustments calculations to tax invoices in the URTI should be made considering deadlines: for tax invoices/adjustment calculations to tax invoices, drawn up from the 1st to the 15th calendar day (inclusive) of the calendar month; – until the last day (inclusive) of the calendar month, in which they are drawn up; for tax invoices/adjustment calculations to tax invoices, drawn up from the 16th day to the last calendar day (inclusive) of the calendar month, – till the 15th calendar days (inclusive) of the calendar month, following the month, in which they are drawn up. In the case of violation of such terms, penalties are applied in accordance with this Code.

Prior to this time (before 01.01.2017), tax invoices and/adjustment calculations to tax invoices were registered in the URTI within 15 calendar days, following the date of appearance of tax obligations, reflected in their respective tax invoices and/or adjustment calculations.

¹ Податковий кодекс України 2010 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/2755-17>> (2017, грудень, 10).

² Закон про внесення змін до Податкового кодексу України та деяких законодавчих актів України щодо податкової реформи 2014 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon2.rada.gov.ua/laws/show/71-19>> (2017, грудень, 10).

³ Податковий кодекс України 2010 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/2755-17>> (2017, грудень, 10).

⁴ Закон про внесення змін до Податкового кодексу України щодо покращення інвестиційного клімату в Україні 2016 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/1797-19>> (2017, грудень, 10).

It is also stipulated that a taxpayer has the right to register a tax invoice and/or the calculation of adjustment in the URTI, in which the total amount of tax does not exceed the amount, calculated in accordance with clause 200¹.3 of article 200¹ of this Code within 365 calendar days that follow the date of occurrence of tax obligations, reflected in the respective tax invoices and/or adjustment calculations.

Under clause 120¹.1 of Article 120¹ of the Tax Code¹ (as in 01.11.2017), violation of the deadline, stipulated by article 201 of this Code, by payers of VAT, for registration of a tax invoice and/or adjustment calculation to the tax invoice in the URTI (in addition to the tax invoice that is not given to the recipient (purchaser), drawn up for the supply of goods/services for operations that are exempt from taxation or taxed at a zero rate) entails the imposition of a fine in the amount of 10%, 20%, 30% and 40% of the amount of value added tax as specified in such tax invoices/adjustment calculations according to the period of delay of registration (up to 15 calendar days; from 16 to 30 calendar days; from 31 to 60 calendar days; from 61 to 365 calendar days) on a payer of value added tax, which, according to the requirements of articles 192 and 201 of this Code, is liable for such registration.

In the case of suspension of registration of a tax invoice/ adjustment calculation in the URTI in accordance with clause 201.16 of article 201 of this Code, the penalty provided by this clause does not apply to the period of suspension of such registration till making a decision on resuming the registration of such tax invoices/adjustment calculations under clauses 201.16.4, 201.16 of article 201 of this Code.

Thus, in the case of registration of tax invoices in the URTI with violation of terms by a taxpayer, the penalties, determined in accordance with clause 120¹.1 of article 120¹ Code are imposed on this taxpayer depending on the term of delay.

In turn, subclauses 201.16.4 of clause 201.16 of article 201 of the Code² stipulate that a tax invoice/calculation of adjustments, registration of which in the Unified Register of Tax Invoices was suspended, is registered on the day when one of the following events takes place: a) a decision on registration of a tax invoice/ adjustment calculations in the Unified Register of Tax Invoices was made; b) the court decision on the registration of the relevant tax invoice/adjustment calculation in the Unified Register of Tax Invoices took legal force.

That is, if a tax invoice was drawn up and registered in due terms, but its registration was suspended, and was actually registered after the deadline on the basis of the relevant decision on resumption of its registration, in this case, penalties will not be imposed.

However, there may be cases when registration of a tax invoice was suspended, but a payer for certain reasons (e.g. tax invoice was drawn up by mistake) filed neither explanations, nor documents concerning resumption of the registration of a tax invoice. In turn, the regulatory authorities did not make any relevant decision (on registration or refusal of registration of such a tax invoice). In this case, how will the need for (possibility of) imposing penalties for violations of the terms of registration of tax invoices be determined and, respectively, from what day will the following terms be calculated?

A similar situation regards imposing penalties for violations of the terms of registration of tax invoices in the case of making decision to refuse the registration of a tax invoice by the regulatory authorities, because the Tax Code does not determine how the terms are calculated in this case.

The above mentioned will lead to some misunderstandings between the regulatory authorities (the Main departments of SFC in regions), which execute control of compliance with the terms of registration and, respectively, make decisions on imposing penalties, and the taxpayers.

It is logical to begin calculation of terms of delay after 365 days, stipulated by the Tax Code³ (subclause 201.16.2 of clause 201.16 of article 201), for filing explanations and/or documents for making decision about the registration or refusal of registration of a tax invoice.

2. In addition, clause 120¹.2 of article 120¹ of the Code¹ stipulates that absence of registration of a tax invoice in the URTI within the deadline under article 201 of the Code (except for a tax invoice that is available to the recipient (purchaser), drawn up for the supply of goods/services for transactions which are exempt from tax or that is taxed at a zero rate), which is indicated in tax decision notice, made on the basis

¹ Податковий кодекс України 2010 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/2755-17>> (2017, грудень, 10).

² Податковий кодекс України 2010 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/2755-17>> (2017, грудень, 10).

³ Податковий кодекс України 2010 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/2755-17>> (2017, грудень, 10).

on the results of audit of the regulatory authorities entails imposition of a taxpayer to a fine of 50 percent of the amount of value added tax liability, specified in this tax invoice, or of the amount of value added tax, calculated for operation of the supply of goods/services, if a tax invoice for such an operation is not drawn up. In case of suspension of registration of a tax invoice in the Unified Register in accordance with clause 201.16 of article 201 of the Code, penalties, provided by the specified cause, do not apply to the period of suspension of such registration till adoption of the correspondent decision on resumption of registration of such tax invoices under subclause 201.16.4 of clause 201.16 of article 201 of the Code.

Absence of registration of a tax invoice and/or adjustment calculation to a tax invoice in the URTI, referred to in the first paragraph of this clause, after 10 calendar days following the day of receipt of a tax decision notice by a taxpayer, entails the imposition of a taxpayer to a fine of 50 percent of the amount of value added tax liability, specified in this tax invoice and/or adjustment calculation to the tax invoice or of the amount of value added tax, calculated for the operation of supply of goods/services, if a tax invoice for this operation is not drawn up.

In case of registration of a tax invoice and/or adjustment calculation to the tax invoice, mentioned in the first paragraph of this clause, in the URTI within 10 calendar days following the day of receipt of the tax notification-decision by a taxpayer, penalties, provided by the second paragraph of this clause and clause 120¹.1 of this article, do not apply.

However, it is not clear what the legislator implied in paragraph 1 of clause 120¹.2 of article 120¹ of the Code¹ by the reference of a tax invoice to the tax notification-decision, since, firstly, the tax decision notice is drawn up by the regulatory authorities in case of determination of monetary obligations (in the cases, stipulated by the Tax Code); secondly, the tax decision notice contains no such basis for compiling as does a tax invoice (article 58 of the Tax Code¹).

In other words, in this case it is possible to argue that penalties, stipulated by paragraph 1 and paragraph 2 of clause 120¹.2 of article 120¹ of the Code¹, is invalid and can hardly be used.

In turn, it would be more justified and correct to stipulate that under paragraph 1 of clause 120¹.2 of article 120¹ of the Code¹, liability in the form of penalty is imposed if a tax invoice is not registered in the URTI within more than 365 days (regardless of whether it was drawn up for a certain business operation or not).

In this case, it would be more logical to speak about the liability, defined by paragraph 2 of clause 120¹.2 of art. 120¹ of the Code¹ in the form of a fine for absence of registration of a tax invoice in the URTI after the end of 10 calendar days following the day of receipt of the tax decision notice by a taxpayer. That is, if a taxpayer was imposed to the penalty, provided by paragraph 1 of clause 120¹.2 of art. 120¹ of the Code, but no measures, regarding compiling and/or registration of a tax invoice within 10 days, were taken, in this case he would have additional liability.

3. Under clause 201.10 of article 201 of the Tax Code², during execution of operations on delivery of goods/services, a taxpayer – a seller of goods/services is obliged in the established time to draw up a tax invoice, register it in the URTI and submit it to the purchaser at his requirement. Tax invoice, drawn up and registered in the URTI by a taxpayer, which carries out operations of supply of goods/services, for the purchaser of such goods/services, serves as a basis for calculation of amounts of tax, related to tax credit.

Changes to the Tax Code, which were introduced by Law No. 71-VIII³, restricted the rights of taxpayers (purchasers) on formation of tax credit in case of refusal of a seller of goods/services to submit the tax invoice or in case of violation by him of the order of its submission and/or the order of its registration (absence of registration) in the URTI (article 201 of the Tax Code).

While a purchaser of such goods/services had the right to supplement a tax declaration for accounting period with a complaint (Supplement 8) about this supplier, which was the basis to include tax amounts to tax credit (this right upheld during a certain period and under certain conditions), since 01.01.2015, the specified rate (clause 201.10 article 201 of the Code¹) provides only the possibility for a purchaser

¹ Податковий кодекс України 2010 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/2755-17>> (2017, грудень, 10).

² Податковий кодекс України 2010 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/2755-17>> (2017, грудень, 10).

³ Закон про внесення змін до Податкового кодексу України та деяких законодавчих актів України щодо податкової реформи 2014 (Верховна Рада України). Офіційний сайт Верховної Ради України. <<http://zakon2.rada.gov.ua/laws/show/71-19>> (2017, грудень, 10).

to supplement a tax declaration for accounting period with a complaint about such supplier without the right to include the tax amounts to tax credit.

Absence of registration of a tax invoice in the URTI or suspension of its registration (refusal of registration) are tax liabilities, which in any case should be reflected in reports for relevant accounting period, and paid taxes for a supplier. In turn, for a purchaser, it is the lack of possibility of including the appropriate amounts to tax credit and, respectively, determination of decreased tax amount payable to the budget, the need for account replenishment at SEA of VAT for further issuing and registration of tax invoices.

In a sense it leads to shifting the burden of responsibility for the actions of others and the principle of personal liability is violated. Keeping tax records is the liability of each individual taxpayer. Such a payer bears independent liability for violation of the rules of tax accounting. Taking into account the principle of personal responsibility, there are no grounds for deprivation of an honest taxpayer of the right for tax credit of VAT, in connection with non-fulfillment by other taxpayers (suppliers) of the obligation to respect proper implementation and maintenance of tax records, laid on them by the law.

In this case, the so-called risk theory, where the basis for liability is not a fault but risk, finds its best reflection. The essence of it is the fact that a fault is not a necessary element of liability. According to supporters of this theory, anyone, who decided to be involved in a certain activity, should bear the damage risk that can be caused by this activity¹.

However, this does not exclude the possibility of applying and imposing on a supplier of penalties as a compensation for a decrease in working capital due to excessive tax payment and the need to top up of e-account in the SEA of VAT, in the case if in the contract (drawn up in accordance with the current legislation of Ukraine), the parties envisage liability of a supplier (for example: penalties; waiver of payment for goods and/or return of goods) for not registering of a tax invoice within a certain term (such term may be considerably shorter than it is stipulated by the Tax Code).

For violation of contract discipline, in other words, for non-fulfillment or improper fulfillment of contractual obligations, the parties may bear property liability, which is determined by the terms of a particular contract. Since in this situation the parties to the contract of supply (buying – selling) are actually business entities and, consequently, participants of economic relations, the general principles of liability for violations in the sphere of economy, taking into account the peculiarities of concluding agreements, are applied to them². It should be noted that the sanctions, which find their place in this contract and are a guarantee of fulfillment of obligations, have not only of property, but also of organizational and legal nature.

Thus, a supplier of goods (works, services) can bear extra liability (commercial and legal) in the form of imposing penalties for violation of the terms of the contract concerning timely registration of tax invoices and, respectively, ensure the right of a purchaser for tax credit. In this case, bringing to responsibility for correspondent violation (violation of terms of registration or absence of the registration of tax invoices in the URTI) can be performed not only by means of State compulsion, but also by the party on the basis of the agreement, that was independently concluded by this party and its counterpart.

However, violation of terms of registration of tax invoices can take place not due to a fault of a taxpayer, who drew up a tax invoice, but due to suspension of registration (making a decision on refusal of registration by regulatory authorities) of such a tax invoice. In this case, in case of getting a decision of regulatory authorities to refuse the registration of a tax invoice, a taxpayer has the right to appeal this decision in court³. Therefore, one should not reject the possibility that by private lawsuits to overturn decisions on refusal of registration of a tax invoice, some taxpayers will claim requirements for compensation of incurred losses (lost benefits (refusal of a purchaser to obtain goods (cancellation of contracts), or compensation of penalty sanctions, paid for the benefit of a purchaser, in the absence of a timely registered tax invoice). In this case, liability will be shifted to regulatory authorities and the State as a whole (in the form of budgetary losses).

¹ Терьохін, С. (2004). Відповідальність за порушення комерційних контрактів. *Підприємництво, господарство і право*, 7, 28-30. [in Ukrainian].

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Conclusions

1. A specific feature of existence of regulatory-legal provision of administration of value added tax in Ukraine has been and still is legal collisions of separate provisions of legislative documents, which leads to disputes between regulatory authorities and taxpayers.

2. Violation of terms of registration of tax invoices (including absence of their registration) in the URTI leads to liability both of a seller and a purchaser, because:

– regardless of whether such a tax invoice is registered in violation of the terms or is not registered at all, the seller of goods (works, services), who drew up (issued) the tax invoice is not absolved from the obligation regarding inclusion of the amount of value added tax in accordance of this tax invoice to composition of tax liabilities within the respective accounting period, and also bears liability in the form of penalties;

– a purchaser of the goods in the absence of registration of a tax invoice is deprived of the right to include amounts of value added tax to tax credit, which is a liability in a sense.

3. The feature of the specified offence is reflected by its objective side, which is expressed in inactivity of a taxpayer (a seller), as well as the subjective party, which implies existence of a fault on the part of the seller (violation of terms of registration of a tax invoice or absence of registration) and absence of this fault on the part of the purchaser, which in some ways is liable (deprivation of the right to form tax credit; reduction of the limit for issuing and registration of tax invoices; reduction of working capital at the expense of necessity to top up the account of SEA VAT for registration of tax invoices), i.e. the basis of liability is not a fault, but a risk.

4. Liability of entities (taxpayers) for not complying with the terms of the registration of tax invoices (or absence of their registration) in the URTI can be economic and legal. Bringing to responsibility for a relevant offence can be performed not only by means of State compulsion, but also by the party on the basis of the contract, which was independently drawn by the party and its counterpart, taking into account that indicated liability is economic-legal. In this case, this is almost the only tax offence, for which economic and legal liability can be provided.

5. By individual lawsuits to overturn decisions on refusal of registration of a tax invoice, some taxpayers can claim the compensation of incurred losses (lost benefits (refusal of the purchaser from obtaining the goods (cancellation of contracts), or compensation of penalties, paid for the benefit of the purchaser, in the absence of a timely registered tax invoice). In this case, liability will be shifted to regulatory authorities.

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