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LEGAL NATURE OF THE TAX CREDIT IN THE MECHANISM OF VALUE ADDED TAX ADMINISTRATION

Summary. *In the article the author shows that a tax credit, for all intents and purposes, corresponds to such economic and legal instrument as a tax benefit, in particular, a tax discount, and from the viewpoint of the theory of authority it constitutes an agreed tax right.*

Key words: *tax credit, value added tax administration, tax discount, tax benefit.*

Introduction. A key role in the mechanism for implementation of the state tax policy, the purpose of which is to ensure replenishment of the revenue part of the state budget from different sources to cover costs related to the performance of the state functions, belongs to economic agents — VAT payers (hereinafter — taxpayers). The special role of such taxpayers with due attention to their activities by the state arises primarily from their participation in the mechanism of VAT administration which includes, in particular, the use by taxpayers of the tax credit in determining the tax base and, accordingly, assessment of its legality.

Supervisory authorities' and taxpayers' interest in the above credit may be explained by the importance thereof when forming the tax base, since the size of the tax credit is one of the two key conditions of creation of a taxpayer's legal tax obligation or tax right. Pursuant to the provisions of the tax law (Article 200 of the Tax Code of Ukraine), the amount of VAT payer's principal tax obligation implying the payment of VAT to the state budget is the difference between the amount of tax obligation (total amount of VAT received (assessed) by the taxpayer during the reporting (tax) period) and the amount of the tax credit of such reporting (tax) period. In the event where the difference is positive, *legal tax obligation* to pay due tax amount to the budget arises for a tax payer. Otherwise, when the difference is negative, the *tax right* to the *VAT refund* provided by the law arises for a VAT payer. Article 14 of the Tax Code of Ukraine states that the object of this right is a refund of VAT negative value on the basis of confirmed lawful VAT refund from the budget as a result of the taxpayer audit, including automatic VAT refund procedure and according to criteria specified in section V of the above Code [1].

Thus, the key for emergence of the VAT payer's right to refund from the budget is the amount calculated according to the rules that determine the amount of tax credit for the said taxpayer.

According to Article 14 of the Tax Code of Ukraine, a tax credit shall be the amount by which the VAT payer may reduce the tax obligation of the reporting (tax) period as specified in Chapter V of the above Code.

Based on the legal definition of a tax credit and legal consequences for a taxpayer, we may conclude that such a credit, on the one hand, serves as a motivating and compensative tool that ensures the right to reduction in the amount of tax obligation and to refund from the state budget in order to compensate a "loss-making" financial and economic activity, on the other hand, it serves as an agreed tax right.

Following D. Hetmantseva's concept regarding advisable separation of agreed and non-agreed tax obligations [2], we will try to clear up legal nature of the tax credit as a function carrier in the mechanism for determining the amount of the VAT payer's tax obligation, as well as the right the emergence and enjoyment of which are determined by a set of conditions and approval procedures.

The study of tax practice and laws in the field of VAT administration prompts suggestions that, firstly, the term "tax credit" introduced by the legislator is inconsistent with the subject matter; secondly, the existing mechanism for coordinating the right to tax credit gives rise to a tax conflict between the taxpayer and the state (represented by government authorities).

With the purpose of proving the first part of our hypothesis suggested in this paper, we will consider the essence of the term "tax credit", which in theory and practice is ambiguous and controversial.

Statement of the base material. It is generally recognized that the category of "credit", with its initial economic nature, was initially given its statutory expression in the

rules of private law, becoming a legal institution for regulation of relevant (credit) economic relations between citizens, business entities. At the same time, development of public relations in the public sector (including financial) resulted in emergence of new public legal credit relations that have industry-specific characteristics (e.g., administrative, financial, criminal), but remain on the basis of private law.

Accordingly, state and local credit relations are of key importance in the area of public finance, and legal norms of their regulation have created legal institution in the financial law — institution of public (state, local) credit.

Comparison of the tax credit with civil and state (public) credit indicates that the former is inconsistent with the nature of credit relations (neither private nor public), and therefore, may not be termed like this. Let's consider the following comparison results.

Common features for civil and financial credit, in contrast to a tax credit, are as follows:

a) it is a voluntary method of fund raising to monetary funds (public or private, respectively);

b) these are contractual relations;

c) participants of such relations are a self-sufficient lender and a borrower (they are owners of a certain amount of funds and freely dispose of it; they operate on the basis of self-sufficiency and self-financing; they are economically liable for their obligations. Without the above-mentioned, they will be unable to acquire the status of either the lender or the borrower. To become a creditor, an economic agent must accumulate a certain amount of available funds which may be freely disposed. To become a borrower, an economic agent must arrange conditions for accumulation in the future of a sufficient amount of available funds for debt repayment);

d) these are debt relations in which the debt obligation arises for the borrower, and the debt right arises for the lender;

e) the subject of credit relations is transfer (receipt) of money into debt, which constitutes the basic form of the right to credit;

f) voluntary entry into a relations by both the lender and the borrower, as well as their equality (credit should be mutually beneficial);

g) maturity;

h) repayment (credit relations do not change the owner of values in relation to which they arise. The lender remains the owner of the value transferred, and the borrower receives it only for temporary use and must return it later to the owner. Immutability of the owner in credit relations requires their express and effective legalization to protect the interests of the owner. If such protection is not provided by legal means, the credit relations lose their determinative features and turn into something other than a credit. In this respect, the interests of the lender have higher priority for legal protection than those of the borrower;

i) purpose-oriented;

j) payment of interest (as a rule);

k) executed in writing in the form of an agreement;

l) subject of the agreement are monetary funds.

As for the concept of a tax credit in the mechanism of VAT administration, it should be noted that academic literature [3, p. 23] specifies active and passive form of such credit. *An active form* of a tax credit is considered to be its use by the state as a form of *a tax benefit* when a taxpayer is allowed to use tax funds for certain purposes important for the state (in this case, the amount of tax is not transferred to the state budget, but remain at the disposal of the taxpayer); *passive form* is considered to be delay of refund by the state to a taxpayer of amounts of tax transferred to the budget by the latter, in this case, a taxpayer is considered to be a creditor, and the state — a debtor.

At the same time, we cannot agree with such interpretation of the tax credit from both economic and legal points of view. Since economic purpose of the credit implies obtaining benefits (primarily material and monetary benefits) by the lender and not providing certain benefits (including reduction of tax burden, etc.). In its turn, the use of delay as a form of the credit provision is possible only in the context of payment for works, goods and services, which is obviously not typical for tax relations in determining the tax base.

Moreover, from legal viewpoint, participants in the tax credit have no status of a lender or borrower, and are not entitled to change in the same relations the status of a lender with the status of a borrower (as shown by the above experts); procedural form of the tax credit does not imply conclusion of the credit agreement; tax credit relations do not involve actual transfer of funds from the lender to the borrower, repayment, payment of interest on the loan by the borrower, etc.

Statutory provisions state that in the case of tax credit provision the state represented by its fiscal authorities serves as the debtor (borrower). Such authorities unilaterally (authoritatively) set up terms of delay, repayment, etc. In fact, it turns out that the debtor (borrower) regulates the terms of debt repayment on its own. As noted above, one of the credit criteria is the equality of its participants which cannot apply to the tax credit, as the parties thereof are a VAT payer and a government entity represented by fiscal authorities, and therefore, the status of the parties is not equal from the date of the tax credit to the date of its refund from the budget.

In addition, we will specify other characteristics of the tax credit determined by law, which show its non-credit content.

First, the law imposes requirements for a legal entity that may seek the tax credit: only a VAT payer may be participant of tax credit relations.

Second, the right to allocate tax amounts to a tax credit arises in the case of the following transactions:

a) acquisition or manufacture of goods (including in the case of importation into the customs territory of Ukraine) and services;

b) acquisition (building, construction, creation) of fixed assets, including in the case of their importation into the customs territory of Ukraine (including in connection with acquisition and / or importation of such assets as a contribution to statutory fund and / or transfer of assets to the balance of the taxpayer authorized to keep records of joint activity results);

c) receiving services provided by a non-resident in the customs territory of Ukraine, and in the case of a receiving services which place of delivery is the customs territory of Ukraine;

d) importation of fixed assets into the customs territory of Ukraine under operational/financial leasing agreements.

The right to the tax credit arises irrespective of whether such products / services and fixed assets began to be used in taxable transactions in the context of the taxpayer's business activities during the reporting tax period and whether the taxpayer has carried out taxable transactions during such reporting tax period (Article 198, paragraph 198.3 of the Tax Code of Ukraine) [1].

The taxpayer may, on the basis of accounting statement, include into the tax credit (based on the tax base determined in accordance with Article 189, paragraph 189.1 of the Tax Code of Ukraine) the amounts of tax paid (assessed) in the value of goods / services, fixed assets that were not included in the tax credit during acquisition or production of such goods / services, fixed assets, and / or were the basis of tax obligations pursuant to the article above, if such goods / services, fixed assets begin to be used in taxable transactions in the context of business activities, including conversion of non-productive fixed assets into production fixed assets.

At the same time, in accordance with Article 198, paragraph 198.6, sub- paragraph 1 of the Tax Code of Ukraine, it is forbidden to assign to the tax credit the amounts of tax paid (assessed) in connection with the purchase of goods / services which are not confirmed by tax invoices (or confirmed by tax invoices drawn up in violation of Article 201 of the Tax Code of Ukraine), or not confirmed by customs declarations and other documents specified in Article 201, paragraph 201.11 of the Tax Code of Ukraine.

It should be noted that the law provides for several main forms of exercising the right to the tax credit, namely (Article 200, paragraph 200.4 of the Tax Code of Ukraine): a) by reducing the tax debt from the tax which arose in the previous reporting (tax) period (including installment or deferred debt pursuant to the above Code) to the extent not exceeding the amount calculated pursuant to Article 200–1, paragraph 200–1.3 of the above Code at the time of receipt of the tax return by a supervisory authority; b) in the absence of tax debt, by entering to the tax credit of the next reporting (tax) period; c) by obtaining a refund from the budget at the request of the payer at the amount of tax actually paid by the recipient of goods / services during previous and reporting tax periods to suppliers of goods / services, or to the state budget of Ukraine to the extent not exceeding the amount calculated pursuant to Article 200–1, paragraph 200–1.3 of the above Code at the time of receipt of a tax return by a supervisory authority, to the current account of the taxpayer and / or towards the payment of financial obligations; d) by repayment of such a taxpayer's tax debt at the expense of other payments paid to the state budget.

Conclusion. Thus, we can conclude that for all intents and purposes the tax credit corresponds to such economic and legal instrument as a tax benefit, in particular, a tax discount. At the same time, procedure for the use of this credit allows us to consider the right to obtain it as an agreed tax right.

Empirical evidence of the conclusion may include, in particular, past experience of the national legislator who in 2003 introduced the institution of tax credit for taxation of personal income (Article 5 of the Law of Ukraine "On personal income tax"), but later (according to the Tax Code of Ukraine) replaced it with the institution of "tax discount". At present, applicable law (Article 14, paragraph 14.1.170 of the Tax Code of Ukraine) reflects quite accurately the essence of tax discount which implies the documented amount of costs incurred by the taxpayer — resident in connection with acquisition of goods (works, services) from residents — natural or legal persons during the reporting year, by which *it is allowed to reduce* total annual taxable income earned by the results of the financial year in the form of wages, as provided by the Tax Code of Ukraine. Therefore, authorized (permitted) right to reduce VAT payer' tax obligation is the basis of the tax credit applicable today in the mechanism of VAT administration, which confirms its beneficial nature.

Thus, legal terminology used in the VAT administration requires to be improved. As a result of legal analysis, we offer to replace the concept of tax credit with the term "tax discount" which in essence and content corresponds more closely to its purpose in the procedure for determining the tax base and the amount of the VAT payer' tax obligation. To this end, we propose to amend relevant provisions of the Tax Code of Ukraine by replacing the word "tax credit" with the words "tax discount" in appropriate cases.

References

1. Tax Code of Ukraine dated 01 August 2016 No. 2755-VI, Holos Ukrayiny 229–230, dated 04 December 2010.
2. Hetmantsev D. "On tax obligation of the taxpayer." Chasopys of Kyiv University of Law 4 (2013): 134–137.
3. Panchuk A. "Genesis of the category "tax credit."" Visnyk of Kyiv National Economic University 4 (2011): 23–31.