

U.D.C.: 343. 359. 2 (477)



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**ABOUT COMMITTER OF CRIMINAL TAX EVASION**

*Annotation*

*There is a question who from the workers of company, institution or organization should be prosecuted for criminal tax evasion of obligatory payments that are included in the system of taxation. A conclusion is that such person is an employee who is responsible for the implementation of collective formation tax policy regulated by the normative acts and local documents. Specifics of the classification of criminal tax, charges, other obligatory payments evasion that are related to the incrimination of a qualification feature “by prior collusion of a group of people” to the workers of company, institution, organization are examined.*

Subjects of taxes, charges and other obligatory payments evasion in item 212 of Criminal Code of Ukraine are workers of a company, institution, organization, regardless of the form of ownership, person who occupies with entrepreneurial activity without creation of juridical person and any other person who must pay taxes, charges and other obligatory payments. Thus in a doctrine and practice one of the most debatable question is about determination of circle of enterprises', establishments', organizations' workers who must bear criminal responsibility for the perpetration of the examined crime as committers. So V. Lisenko understands administrative functions which has a worker – subject of the criminal tax evasion, duties from an extra charge and payment of taxes, other payments, and other duties which follow from the item 9 of Law of Ukraine “About the system of taxation” [1]. However this norm fixed such duties which in general depend upon the payers of obligatory payments (including juridical persons) and nothing is talked about the fact who exactly of workers of enterprises, institutions

and organizations, and how must provide their implementation. Therefore O. Zadorozhniy admits an inaccuracy. He refers on the item 9 of Law “About the system of taxation” as on the source of duties of the enterprise’s head and payment of taxes and presentation of the tax accounting chief accountant [2]. Organization as a whole is a participant of tax legal relationships, but not its separate workers who within the limits of the service capacity take part in realization of tax capacity of collective formation.

The purpose of this article is to find out the circle of those workers of enterprises, establishments and organizations who must be acknowledged to be the subjects of the criminal tax evasion, and advancement of suggestions directed on perfection of penal law application practice.

At first it is necessity to point out the impropriety of the separation as an independent category of crime’s subjects, foreseen by item 212 of Criminal Code (next to the leaders of enterprises, chief accountants and persons who carry out their obligations), public or official

servants of bookkeeping [3]. L. Brich and V. Navrockiy notice right that the deputies of the leaders and “public servants of bookkeeping” can be acknowledged the subjects of tax evasion only on the condition of the fact that the functions of first persons are fixed on them in the set order [4]. As well as the Lviv scientists, I consider that not all workers of enterprises who process the documents and who are related to the conduct of the tax accounting must be examined as executors of crime foreseen by item 212 of Criminal Code. In behalf of such approach is that fact that duties to know tax business and to provide enumeration of the taxes and charges an enterprise lays exactly on a chief accountant. (Book of qualifying descriptions of workers’ professions) [5]

There is an idea in literature that a chief accountant can be made answerable by item 212 and item 367 of Criminal Code only in that case if his duties, in obedience to the post instruction, include tax accounting, drafting and presentation of the tax reporting [6]. By certain base for this statement can serve the regulation of the mentioned Book of qualifying descriptions of workers’ professions in which it is said that a chief accountant provides enumeration taxes and charges foreseen by legislation on a concordance with the proprietor (by a leader) of enterprise. In my opinion, deciding this question whether a worker of enterprise, establishment or organization is a criminal deviation subject, from payment of tax or official negligence (in the case of violation of norms of tax legislation through a carelessness), it follows to orient on his post instruction and on position of current tax legislation, to nurse not from the formal name of positions of worker after a manning table, but from character of executable by him duties, maintenance and volume of the plenary powers given to him in the field of taxation.

*A model in the examined aspect is a conviction by part 2 of item 212 and part 2 of item 366 of Criminal Code of chief accountant’s deputy of public corporation in “Druzhkovsk ore management” X., as*

*a result of illegal conduct of which in a period from July, 1, 2000 to June, 30, 2001 budget did not receive 52593 Uah of income tax. In concordance with the existing distribution of work connected with taxation X had such official duties: calculation of gross receipts and gross charges; conduct of book-keeping and tax account; calculation and forming of income tax of enterprises; drafting of declarations on this tax. A deciding value for confession of X. the subject of tax evasion was that fact that tax declarations which contained untruthful information, X. did not simply make as a worker who is responsible for the incumbent part of work, but also signed public corporation instead of chief accountant, as in concordance with an order in an enterprise she had a right to sign the documents of the tax accounting [7].*

By companions in a crime, foreseen by item 212 of Criminal Code, can be acknowledged persons who: conduct current account of financially economic activity or cash operations; an extra charge in concordance with distributing of work volume on the large enterprise of separate types of taxes and charges; processing of the documents related to taxation. For example, enterprise can oblige a branch which in concordance with a current legislation can be unregistered as a taxpayer, independently make a tax declaration and in certain terms send it to a main enterprise. The last includes these declarations, got from a branch, in the erected declaration and gives this declaration to the tax organ.

However leader and chief accountant of the separated subsection of juridical person can carry criminal responsibility by item 212 of Criminal Code without reference on an item 27 of Criminal Code on condition that tax legislation acknowledges this subsection like the independent payer of that or other tax. So, in accordance with the item 2 of Law of Ukraine “About taxation of enterprises’ income” (in the release of Law from Mays, 22, 1997 with changes) the payers of this tax are branches, separations, other are separated subsections of taxpayer who do not have status of juridical person and who are located on the

territory of other than taxpayer territorial society. Not so simply is decided a question about criminal legal status of chiefs of the separated subsection in the field of taxation in the case of taxpayer's acceptance of decision about the payment of the consolidated tax. On the one hand, a transition in payment of the consolidated income tax of enterprises means that main enterprise and its separated subsection are examined as the unique taxpayer; on other hand, separated subsection by the set form gives to tax agency by its location the calculation of tax obligations from payment of the consolidated tax, that, as for me, can serve as an argument in behalf of confession of proper chiefs of the separated subsection of juridical person by the committers of crime, foreseen by item 212 of Criminal Code.

That's why the Plenum's position of Supreme Court of Ukraine which in paragraph 7 of decision from October, 8, 2004, № 15 "About some questions of legislation application about responsibility for tax evasion, charges, other obligatory payments", spoke out for avowal of the criminal avoiding a subject of tax payments including proper official persons of branches, separations, other separated subsections which do not have status of juridical person. Also this fact doesn't allow to be agree with attributing to the payers of taxes and charges only juridical and physical persons (an item 4 of Laws "About the system of taxation", item 4 of projects of the Internal revenue code of Ukraine).

In paragraph 7 of Plenum's decision of Supreme Court of Ukraine from March, 26, 1999 № 5 "About some questions of application of legislation about responsibility for tax evasion, charges, other obligatory payments", subjects of tax evasion are other official persons who have authority to sign financially economic documents. The separate pointing on official persons who have authority to sign financially economic documents, without the specification of its character, resulted that position of Plenum of Supreme Court of Ukraine on question about the circle of subjects of the criminal of tax evasion

did not differ in the best side from elucidation which was contained in the decision of Plenum of Supreme Court of Russian Federation from July, 4, 1997 № 8 "About some questions of criminal legislation application by Russian Federation's courts about responsibility for tax evasion". According to the paragraph 10 of this decision, after the item 199 of Criminal Code of Russian Federation, to the responsibility could be brought not only leader of organization, chief (senior) accountant and persons who carry out their duties but also other office workers of organization – taxpayer who put in the book-keeping documents beforehand twisted data about profits and charges or hide other objects of taxation.

Considering the Plenum's position of Supreme Court of Russian Federation, some Russian criminal lawyers relate the other office workers of organization as the committers of the criminal tax evasion to ordinary employees of book-keeping and even cashiers, commodity experts, forwarders. Formally, such determination of the circle of persons who are able to bear criminal responsibility for tax evasion not as accomplices but as committers, did not conflict with the requirements of Criminal Code of Russian Federation, but at the same time did not take into account the remoteness of primary documents twisting from the submission to the supervisory agencies of tax accounting, decision of what is authorized to be accepted by the guidance of organization only. I consider that twisting of primary and registered documents is a conduct which according to the criminal legal content isn't outside the scope of terms creation, necessary for the subsequent accomplishing of the criminal tax evasion, otherwise speaking, it is a conduct which does not put the system of taxation as object of criminal legal guard in the state of direct danger of its harm infliction.

As a financially economic document includes primary documents about economic operations (profitable or expense cash warrant, profitable, expense or commodity transport

invoice, act of purchase, account-invoice, etc.), the subjects of tax crimes should have been acknowledged those workers of organizations who are responsible only for preparatory functions in the field of taxation and who don't bear responsibility for financial activity of juridical person as a whole. Thus, determining the circle of subjects of the criminal tax and charges evaluation, it is necessary to orient on powers connected with implementation of the tax obligations fixed on a juridical person (it separated subsection). So only those workers who have plenary powers can take measures directed on tax payments avoiding and only they can execute the objective side of tax crime.

In the decision of Plenum Supreme Court of Ukraine from March, 26, 1999 № 5 must be brought a certain clarification which would put an end extended explanation of subject's signs of the criminal tax evasion [8]. In paragraph 7 of decision of Plenum Supreme Court of Ukraine from October, 8, 2004 № 15 the subject of crime, foreseen by item 212 of Criminal Code, it is suggested to acknowledge including other (except leaders and persons who carry out their duties) official persons whom is given the right to sign financial documents. Pointing not on financially economic but on financial documents is a step forward, but also this explanation can not be applied on perfection, taking into account an existent difference between such varieties of financial documents as book-keeping and tax documents.

I consider that workers who carry out the realization of tax capability of juridical person are successfully enough marked, in p. 15.4.2 of p. 15.4 of item 15 of Law from December, 21 in 2000 with changes "About the order of redemption of taxpayers' obligations before budgets and state special purpose funds". Here it is talked about the public servants of juridical persons authorized according to the legislation (adding from myself – and local documents) to count, to tighten and bring in budget taxes, charges (obligatory payments), and also conduct the fiscal

accounting. At the same time I draw attention to the fact that this Law sets no requirements for the position of person who gives (delivers) a tax return in the office of tax agency, so it can be another public servant, not only the leader, chief accountant of enterprise, establishment, organizations or person who carries out their plenary powers related to taxation. It is about in the letter of State tax administration of Ukraine from September, 5, 2007 № 17525/7/28-0917/32 "About the observance of effective legislation" [9].

It follows that in the renewed Plenum's explanation of Supreme Court of Ukraine devoted to the determination of official persons' circle of juridical persons and their separated subsections who able to bear criminal responsibility as committers after item 212 of Criminal Code, must not appear the duty of presentation to the supervisory authorities documents of tax accounting. Together with that the indicated explanation must orient more clear law enforcement organs on establishment of plenary powers of persons connected with implementation by enterprises, establishments, organizations of fixed tax obligations.

A solid argument in behalf of the said suggestions, to my opinion, is a change of position of Plenum of Supreme Court of Russian Federation which in the decision from December, 28, 2006, № 64 "About practice of application of criminal legislation courts about responsibility for tax crimes" to the subjects of crime, foreseen by item 199 of Criminal Code of Russian Federation, suggests to take the leader of organization – taxpayer, chief accountant (accountant in default in the state of position of chief accountant) only, whose duties include signing of accounting documents that are given to the tax agencies, providing of complete and timely payment of taxes and other persons, if they are specially authorized by the management of organization on accomplishing of the mentioned actions. It is also marked that other workers of organization (for example those whose duties

include processing of primary documents of record-keeping), who assisted intentionally in the commission of tax crime, must be brought to responsibility on the basis of parts of items 33, 199 of Criminal Code of Russian Federation as accomplices of crime.

On the criminal legal estimation of assumed violations of tax legislation by the worker of enterprise, establishment or organization influences that circumstance that part 2 of item 212 of Criminal Code of Ukraine foresees such characterizing sign as a commission of crime on a previous concert by the group of persons. Legislative description of group of persons who operates on a previous concert as one of forms of group implication is pointed in part 2 of item 28 of Criminal Code in which, in spite of part 1 of this item, the type of accomplices is not specified. I express a supposition that exactly this legislative vagueness and maybe inconsistency gave an opportunity to

V. Ostanin to make a conclusion about that by part 2 of item 212 of Criminal Code as tax evasion on a previous concert, evasions must be qualified “in which took part two or more persons who are provided with the signs of the subject of this crime, both in quality of accomplice and with distributing of roles” [10]. I divide the point of view of S. Shapchenko who had carefully analyzed part 2 of item 28 of Criminal Code and proved convincingly that at the commission of crime on a previous concert by the group of persons at least two persons must operate as accomplices [11]. The essence of implication consists in accomplishing of each of persons who operates jointly such actions which form the objective side of the concrete crime; the objective side of the crime is executed by the incorporated efforts two or more persons, who can operate simultaneously or consistently committing criminally punishable act fully or partly. In addition, offered by V. Ostanin extended explanation of characterizing sign “on a previous concert of the group of persons” does not conform to explanation which is traditionally given by

Plenum of the Supreme Court of Ukraine in this category of criminal cases. Evaluation of tax, charges, other obligatory payments is considered committed on a previous concert of the group of persons if there took part two or more persons who preliminary, before perpetration of the crime agreed not to pay obligatory payments to the budgets or special purpose state funds or pay them not fully (paragraph 18 of decision of Plenum of the Supreme Court of Ukraine from October, 8, 2004 № 15). By this sign can be characterized, for example, actions of official persons of the same enterprise, establishment, organizations on which has the responsibility for the rightness of calculation and tax payments and for authenticity of the proper accounting.

According to the paragraph 24 of Statute about organization of record-keeping and accounting in Ukraine, Cabinet of ministers of Ukraine ratified decision from April, 3, 1993 № 250 (Position lost power on the basis of decision of Government from February, 28, 2000 № 419 [12]), it was forbidden to the chief accountant of enterprise to accept documents for implementation on the operations that contradict the requirements of normative acts, violate contractual and financial discipline, harm the state, proprietors, other juridical persons and citizens. About such documents a chief accountant let the leader of enterprise or establishment know in writing form, and accepted them to implementation and account only after his written order. A leader fully bore responsibility for implementation of these operations. It follows that in the case of fully implementation of this norm of by-law, the chief accountant of enterprise or specialist who carried out his duties must not answer in the order of criminal pursuit for violation of tax legislation.

In Law from July, 16, 1999 “About a record-keeping and financial reporting in Ukraine” a position about setting (by writing confirmation of order) the responsibility from a person who conducts a record-keeping on enterprise, on his leader is absent. As in a current book-keeping and tax legislation the problem of differentiating

of criminal responsibility of leaders and book-keeping workers is not decided (and can not and must not be decided), qualification of the illegal acts of enterprises' accountants related to taxation must take into account, at first, fastened in item 41 of Criminal Code of Ukraine general rules of criminal legal institute of implementation of order, secondly, specific of his application in the analyzed category of criminal cases, represented in paragraph 9 of decision of Plenum of Supreme Court of Ukraine from October, 8, 2004 № 15. Here it is explained that actions of leaders of enterprises, establishments, organizations, who gave the inferior official personal an order to sign or to give to the tax organs unreliable (falsified) reports, balances, declarations, calculations, or not to pay in general or pay not fully taxes, charges, other obligatory payments, and also the actions of official persons who executed such illegal order or indication, must be characterized by item 212 of Criminal Code – as tax, charges, other obligatory payments evasion committed on a previous concert by the group of persons.

The study of law enforcement practice shows that typical for the juridical persons of different legal forms tandem of “leader-book-keeper”, which predetermines qualification of committed by part 2 of item 212 of Criminal Code on a sign “on a previous concert by the group of persons”, can be not effective in the plan of bringing to the criminal responsibility for avoiding of tax payments from two principal reasons.

At first, because in the behavior of the worker of enterprise, establishment, organization, from whom the leader of enterprise hides, meaningful from the point of right taxation circumstances, intention, obligatory sign of subjective side of crime, foreseen by item 212 of Criminal Code is not set. For example, an accountant can know nothing about agreements carried out a director for cash and as a result not to represent them in documents related to the calculation and of tax payments. I would

not do, as it does, for example, V. Pivovarov, to name similar explanations of accountant only by excuses which conflict with the requirements of legislation in relation to functions and limits of the set responsibility of chief accountant [13].

I. Kucherov marks that in that case when a tax crime is accomplished by the leader of enterprise independently, he usually does not inform an accountant about committed financially economic operations and utilizes the profit yield got in their result on own discretion, without handing it over to the cash desk [14]. Without wishing to inform an accountant about intention to avoid payment of taxes, a leader for drafting of accounting can give him fictitious documents that also will have the investigation improper implementation by the enterprise of tax obligations.

Secondly, the reason of absence of “leader - book-keeper” tandem can be that accountant, having intention which is directed on tax evasion, for achievement of the criminal purpose aims wants to use the incompetence of leader of enterprise. The accountant who is responsible for clear and legitimate work of the enterprise, not always is a specialist in tax legislation, and that is why quite often actually not able to check up the rightness of information resulted in documents which are given to the tax agencies. Conviction of the leader of enterprise who was not able to understand to the nicety the book-keeping and tax account and to provide competent management and in the actions of whom absents the intellectual sign intention for the commission of crime, foreseen by item 212 of Criminal Code, is groundless. The conscious twisting of truth directed on tax evasion, about what it goes in the analyzed criminal legal norm, mustn't be equated with responsibility of the leader for the illegal acts of the inferiors, that can be considered after the item 367 of Criminal Code as official negligence.

*According to the part 3 of item 148-2 and part 2 of item 172 of Criminal Code 1960, Kalininskiy district court of Donetsk (sentence from March, 22 in 2001) characterized action of chief accountant of private enterprise "Spectrum" X., who in the period from October, 1, 1998 to April, 21, 1999 by the concealment of taxation object which arose up as a result of conducting of barter deal, and groundless overstating of tax credit, avoided payment of VAT to the amount of over 47 thousands of Uah. A court considered the conduct of director of private enterprise "Spectrum" Y., who did not have skills of book-keeping and tax account and who signed tax returns from VAT, depending upon professionalism of chief accountant, as indifference which entailed heavy consequences (part 2 of item 167 Criminal Code in 1960). In opinion of court, Y. however as the leader of enterprise did not control properly the implementation of official duties by the inferior X., and did not foresee the harmful consequences of own official conduct, though could and had to foresee the infliction of harm to the state interests as the tax evasion.*

Criminal legal estimation, given by the court to the conduct of Y., seems correct but not enough explained. Despite the fixed in a doctrine requirement about the specification of accusation in the criminal cases about responsibility for negligence (official negligence) in the analyzed sentence, it is absent an indication on those normative acts and other documents which made Y. as the leader of enterprise responsible for the control of the official actions of accountant X., related to the charge of tax obligations of enterprise, besides for this non-fulfillment of this duty Y. was condemned.

The study of cases' materials shows that similar situations are widespread in the modern economic practice. Therefore T. Dmitrenko's opinion looks too categorical. According to him an accountant is not able to bear independent responsibility for the commission of tax crime and intention which is directed on tax evasion

can be charged only by the leader of enterprise [15]. This position T. Dmitrenko explains in such way. Tax evasion is the sphere of distributing of ownership between the state and businessman, which the chief accountant of enterprise as hired worker is shut out to. In addition nobody authorizes the accountant to control the legality of the first person's orders (the leader); bringing of the twisted information in primary must be examined only by the leader will.

E. Kulakov has a convincing refutation of such position. This scientist selects the terms, at presence of which a person can be acknowledged as the subject of crime, foreseen by item 199 of Criminal Code of Russian Federation: presence of taxation object; duty of person to conduct the proper account of present objects of taxation, give the current documents related to tax payment to the tax agencies; duty to pay a tax from present objects. On the enterprises of different legal forms duties are fixed directly on the leader and chief accountant, and that is why these persons must be made answerable for tax evasion [16]. I consider that powers of chief accountant of the enterprise in the field of taxation are considerable enough and he is capable, deceiving the leader in a question about implementation of obligations of enterprise to budgets and state special purpose funds, accomplish independently criminal tax evasion or accomplish this act jointly with the leader. Other case that accountant can be simply not interested in it, being hired worker and not turning to personally account from accomplishing of criminally punishable act. At the same time from the point of view of the possible independent accomplishing by the accountant of the intentional tax evasion does not cost to eliminate a vital situations, when this worker

“cross up” the leader of enterprise, wishing, for example, to compromise him, inflict troubles, take revenge or hold a leading position. If a chief accountant can be only an accomplice, but not committer of tax crime, qualification of his actions in similar situations seems problematic. As you know the cause doesn't influence on qualification of tax, charges, and other obligatory payments evasion. Eventually the criminal legal estimation of official face conduct depends not on that fact whether he is interested in avoiding of tax payments, and on his concrete role in the commission of tax crime, implementation of objective side.

The conducted research allows to make the next conclusions.

At first, the subjects of tax, charges, other obligatory payments evasion should be those workers of enterprises, establishments, organizations, who are responsible for financial activity of juridical person and who takes into account executable official duties and who regulate normative acts and local documents, called to carry out the tax capability of collective formation. Optimum denotation of this category of subjects of tax crime is seemed such formulation which is expedient to replace paragraph 2 item 7 of decision of Plenum of Supreme Court of Ukraine VSU from October, 8, 2004 № 15: “1) official persons of juridical persons and their separated subsections which do not have status of juridical persons, who in accordance with a current legislation and local documents are authorized to provide budgets with taxes, charges and other obligatory payments, to sign the documents of the tax accounting, deal with the bank account and sign calculation documents”.

Secondly, the simple order of forming and signing of the tax accounting results in the fact that to the criminal avoiding of tax payments by enterprise, establishment, organizations, refer both the leader of organization and its chief accountant. However the fact of the general signing of the tax accounting by these official persons doesn't always testify that “leader - chief accountant” tandem as grounds for qualification of the committed crime by part 2 of item 212 of Criminal Code of Ukraine on a sign “on a previous concert by the group of persons”. Criminal agreement between a leader and chief accountant substantially strengthens the public danger of the committing of tax evasion, as it allows to guilty to use all methods of concealment and twisting of elements of taxation, to bring in untruthful information in different documents, related to the taxation, but not only in the tax accounting. Thus, fixed in part 2 of item 212 of Criminal Code of Ukraine such crime as tax, charges, other obligatory payments evasion committed on a previous concert is socially grounded.

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