

# MODUS OPERANDI OF TAX EVASION AS AN ELEMENT OF CRIMINALISTIC CHARACTERISTICS

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**Annotation.** Tax evasion as a criminal offense in the field of economic activity has a significant impact on the economy of Ukraine. In addition, during the Russian aggression against Ukraine, tax evasion seriously affects the security situation, since the actual non-receipt of funds to the state and local budgets reduces Ukraine's capabilities in defense and reformation during the Russian-Ukrainian war. For this purpose, the author conducted a study to find a place of modus operandi for tax evasion in the structure of criminalistic characteristics, establishing methods of such evasion in judicial practice.

A separate direction of the research was an attempt to identify modus operandi (ways) of tax evasion, since criminal law cannot determine such ways of tax evasion. Research into criminal legislation, judicial practice, as well as scientific recommendations on ways of tax evasion led to the fact that they had to be distinguished into legal and illegal. It was concluded that legal modus operandi (ways) of tax evasion take the form of tax optimization, tax planning, tax minimization or the use of offshore zones. These ways of tax evasion in general should not be considered from the point of view of criminal legislation and the investigation of tax evasion, fees (mandatory payments), if they do not contain other illegal forms or schemes.

A significant number of illegal methods of tax evasion demonstrated their importance for determining the method as an element of the criminalistics characteristics of this crime (Art. 212 of the Criminal Code of Ukraine). The presence of an established classification of illegal methods of tax evasion allowed the author to conclude that it is possible to form an appropriate investigation methodology, as well as micromethods taking into account these methods, which will be useful to the investigator and prosecutor in their activities in practice.

**Key words:** Criminalistics, criminalistic characteristics, crime investigation, modus operandi, tax evasion.

## 1. Introduction.

Tax evasion, fees (mandatory payments) is a criminal offense in the field of economic activity in Ukraine. During the Russian aggression, non-payment of taxes and the actual non-receipt of funds to the state and local budgets leads to an even more serious deterioration of economic indicators and raises questions about the survival of Ukraine as an independent, legal and democratic European state. That is why effective investigation of such cases and exposure of unreported methods and schemes of tax evasion will provide an opportunity to improve the situation in Ukraine and ensure its security and economic component. For this purpose, it is necessary to determine the criminalistic characteristics, establish the place of the method in the structure of the elements of the criminalistic characteristics for this criminal offense and identify relevant methods of tax evasion in Ukraine.

One of the most important judgments that reveal the content of the definition of the criminalistic characteristics of crimes (criminal offenses) is the position of O. Kolesnichenko and V. Konovalova. They defined it as a system of provisions on the criminalistically significant features of a crime of a given type, which reflects the natural connections among the specified features and serves to formulate versions and verify investigative versions to solve the tasks of the investigation [1, p. 16]. A similar definition was given by S. Matulienė, who linked the definition of the criminalistic

characteristics of a crime with the mechanism of committing a crime, – the system of criminalistic important features, developing that crime, its commitment mechanism and rules [2, p. 257]. A broader definition was given by a group of researchers who define criminalistic characterization as the final section of criminalistics, which synthesizes the provisions of criminalistic techniques and tactics and represents a system of scientific provisions and develops on their basis typical recommendations for the organization and implementation of the investigation and prevention of certain types and groups of crimes (T. Varfolomeeva, V. Goncharenko, V. Boyarov, S. Goncharenko, V. Popelyushko) [3, p. 361].

Taking into account similar views on the definition of the criminalistic characteristics of a crime and the interrelation of their elements, which makes it a valuable model for investigating the corresponding type of crime (criminal offense) and building its investigation methodology. V. Shepitko indicates that the purpose of the criminalistic characteristics is that it contributes to: 1) the development of individual investigation methods; 2) the construction of typical programs and models of crime investigation; 3) determining the direction of investigation of a specific crime. At the same time, among the main elements of the criminalistic characteristics, a set of features was identified that determine: 1) the method of the crime; 2) the place and circumstances; 3) the time of the crime; 4) the instrument and means; 5) the subject of the offense; 6) the identity of the victim; 7) the identity of the criminal; 8) typical traces of the crime. Agreeing with this approach, it is necessary to note not only the relationship of the named elements, but also their significance for such a criminalistic characteristics of the crime. It is not accidental, in our opinion, to determine the method of committing a crime in the first place among other elements. Such a conclusion is associated with the influence of the method of committing a crime (i.e., how it was committed) on how, in what order, by what algorithms and with what methods the process of its investigation can be carried out. Thus, the method of evading taxes, fees (mandatory payments) is an element that occupies a central place in the construction of a criminalistic characteristic and on which the construction of the overall methodology for investigating this type of criminal offense depends [4, p. 11].

## 2. Analysis of scientific publications.

The definition of the method of evasion of taxes, fees (mandatory payments) is based on determining its place as an element in the structure of criminalistic characteristics. This issue was addressed by O. Kolesnichenko, V. Konovalova [1, p. 16], V. Shepitko [4, p. 11], S. Matuliene [2, p. 257], T. Varfolomeeva, V. Goncharenko, V. Boyarov, S. Goncharenko and V. Popelyushko [3, p. 361]. The study of the method of evasion of taxes, fees (mandatory payments) as a criminal offense in the field of economic activity was carried out by many researchers who paid attention to the economic, tax, criminal law and criminalistic features of its assessment. Particular attention was paid to the methods of such evasion by V. Borysov, N. Netesa, V. Oleinichenko [5, p. 486-494], O. Pysarenko [6], A. Kharchuk, S. Korytnik [7, p. 153–156], M. Nashkerska [8, p. 258-263], O. Hryhorashchenko [9, p. 241–245], L. Kasyanenko and P. Kolomiyets [10, p. 253–258]. The analysis of these recent publications allowed the author to construct a classification of legal and illegal methods of tax evasion (avoidance), on the basis of which a criminalistic characteristic for this criminal offense and the methodics (micromethodics) of their investigation can be created.

**3. The aim of the work** is research of modus operandi of tax evasion in Ukrainian reality in counteraction of the crime (Russian aggression, long war, complicated economic situation, etc.). In this way the author paid attention to position of modus operandi in criminalistic characteristics of tax evasion.

## 4. Review and discussion.

A special place for investigation is occupied by the modus operandi of tax evasion. In the Criminal Code of Ukraine, tax evasion, duties (compulsory payments) is defined as “willful evasion of taxes,

duties (compulsory payments), which are part of the taxation system established by law, by an official of an enterprise, institution or organization of any type of ownership, or by any unincorporated entrepreneur, or by any other person liable to pay such taxes, duties or other compulsory payments, where such actions resulted in actual non-receipt of substantial amount of funds by budgets or targeted state funds" (Art. 212 of the Criminal Code of Ukraine). At the same time, the Criminal Code of Ukraine cannot provide all *modus operandi* of tax evasion, since their definition depends on the characteristics of the criminal's behavior, forms and types of activities of the legal entity, the general economic situation, etc.

Judicial interpretation acts provide an approximate list of *modus operandi* of such tax evasion (paragraph 13 of the Resolution of the Plenum of the Supreme Court of Ukraine "On Some Issues of Application of Legislation on Liability for Evasion of Taxes, Duties, and Other Mandatory Payments" dated 08.10.2004, # 15):

- 1) failure to submit documents related to their calculation and payment to budgets or state special-purpose funds (tax returns, calculations, accounting reports and balance sheets, etc.);
- 2) concealment of objects of taxation;
- 3) understatement of these objects;
- 4) understatement of the amounts of taxes, fees, and other mandatory payments;
- 5) concealment of the fact of loss of grounds for receiving tax benefits;
- 6) submission of false information or documents certifying the right of an individual to a tax credit or to a tax social benefit [11].

According to the materials of judicial practice, the list of *modus operandi* of tax evasion may be somewhat expanded. Thus, in 2014-2016, the preparation of false official financial and economic documents was recorded – contracts, freight invoices for the sale, shipment, supply of sugar with various enterprises, and later this false information on the basis of forged documents was included in the enterprise's income tax declarations submitted to the tax authority [12]. Also, based on the analysis of judicial practice, it is noted that the lack of registration as a taxpayer may be a *modus operandi* of tax evasion [6]. The Chairman of the Verkhovna Rada Committee on Finance, Tax and Customs Policy, People's Deputy Danylo Hetmantsev also reported on a specific *modus operandi* of tax evasion through the official sale of only part of the goods, and the rest – for cash through illegal networks without using a registrar of settlement operations [13].

Scientific research into tax evasion *modus operandi* also plays an important role in its investigation. Thus, V. Borysov, N. Netesa and V. Oleinichenko note that the generalization of the results of the study of case law materials under Art. 212 of the Criminal Code of Ukraine indicated that the most common *modus operandi* of tax evasion was the groundless inclusion of the amount of value added tax in the tax credit (50% of cases), overstatement of gross expenses (34%), understatement of tax liability (30.5%), conclusion of fictitious agreements (transactions) using fictitious documents (29%), absence of primary documents confirming the purchase of goods / services (14.5%), failure to include profit in the amounts of income (13.5%), entry of unreliable information into tax documents (13.5%), failure to transfer taxes to the budget (6.5%). A feature of their position is that the nature of the method of tax evasion is that it is based on deception (active deception – in the case of concealment or underestimation of objects of taxation by concluding fictitious agreements, distorting accounting, using fictitious documents, submitting false information certifying the right of an individual to a tax credit or to a tax social benefit; passive deception – in the case of tax evasion due to failure to submit tax returns, calculations, accounting reports and balance sheets within the established period, failure to reflect in reporting tax documents the profit, added value of works, products, services and other objects of taxation, failure to notify tax authorities of the fact of loss of grounds for receiving tax benefits) [5, p. 491-492].

Kharchuk A. and Korytnik S. indicate the existence of schemes and *modus operandi* of evading taxes and collecting other mandatory payments through the division of enterprises into categories

of “tax pits”, transitors and beneficiaries. At the same time, violators of the law artificially transfer tax obligations to “tax pits” (inactive firms), through which non-commodity transactions are carried out, and, as a result, draw up documents for the supply of non-existent goods or the provision of services and do not submit tax reports. Transitors “whiten” transactions for beneficiaries, having no employees, are engaged in many types of activities and do not receive real profit, all income is covered by expenses, that is, they minimize taxes [7, p. 154-155].

Some researchers draw attention to the fact that tax evasion can be quite legal. Obviously, the choice of the *modus operandi* of evasion has a significant impact on the recognition of the legality of such behavior. Thus, M. Nashkerska indicates that there may be optimization of taxation, which is associated with tax avoidance, which does not contradict the law [8, p. 260]. O. Hryhorashchenko demonstrates that tax evasion occurs without violating the law and is aimed at tax optimization, tax planning, tax minimization, including the use of the services of specialist consulting firms in the field of tax minimization through:

- 1) income shifting (with a high marginal rate of tax payments, the taxpayer seeks opportunities to shift income to a lower tax rate);
- 2) deferral of income (the payer tries to postpone payment through accounting manipulations and pay the tax at a time when inflationary processes in the country will affect the reduction of the real amount of tax compared to its nominal value);
- 3) tax arbitrage (when different entities deal with different tax rates – using its preferential taxation in cooperation with a non-resident company) [9, p. 242-243].

L. Kasyanenko and P. Kolomiyets also point to the «offshoreization» of the economy as a *modus operandi* of tax evasion that threatens tax security. They note that such «offshoreization» is carried out through the withdrawal of capital to countries with low taxation and to states included in the list of offshore zones [10, p. 253]. Despite *de facto* non-payment of taxes, such a *modus operandi* can be recognized as legal and will not be recognized as evasion within the meaning of Art. 212 of the Criminal Code of Ukraine.

## 5. Conclusions.

Analysis of criminal legislation, judicial practice and scientific approaches to the definition and classification of *modus operandi* (ways) of tax evasion lead to the fact that they need to be distinguished into legal and illegal. Legal *modus operandi* of tax evasion include: 1) tax optimization; 2) tax planning; 3) tax minimization; 4) the use of offshore zones. In this case, it is important to establish the legality of their activities, which is manifested through compliance with the provisions of tax and criminal legislation.

The author proposes to consider the following illegal methods of tax evasion: 1) lack of registration as a taxpayer; 2) use of non-commodity transactions (through “tax holes”); 3) use of illegal sales networks of goods; 4) lack of primary documents confirming the purchase of goods / services; 5) overstatement of gross expenses; 6) failure to include profit in the amounts of income; 7) failure to transfer taxes to the budget; 8) failure to submit documents related to their calculation and payment to budgets or state special-purpose funds (tax returns, calculations, accounting reports and balance sheets, etc.); 9) concealment of objects of taxation; 10) understatement of these objects; 11) understatement of the amounts of taxes, fees, other mandatory payments; 12) concealment of the fact of loss of grounds for receiving tax benefits; 13) submission of false information or documents certifying the right of an individual to a tax credit or a tax social benefit; 14) entering false information into tax documents; 15) conclusion of fictitious agreements (transactions) using fictitious documents.

Such a significant number of illegal *modus operandi* (ways) of tax evasion demonstrates their importance for determining the *modus operandi* as an element of the criminalistic characteristics of this crime (Art. 212 of the Criminal Code of Ukraine). When building a methodology for investigating tax evasion, given this classification of illegal *modus operandi* of committing them, it is possible to

build micro-methodics of investigation based on each *modus operandi* or create an algorithm of investigation that would be convenient for the investigator and prosecutor in their activities.

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