

# DUE ROUTE FOR JUDICIAL CONTROL OF THE VALIDITY OF THE TAX SEIZURE

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**Annotation.** The pertinence of the research arises from the fact that in Ukrainian judicial case-law, at this point, the understanding has been established that the tax authority may, at its discretion, apply to the court to confirm the validity of the tax seizure both (at its discretion) under a special (urgent) judicial procedure (duration of less than 96 hours), and under the general rules of administrative proceedings (duration of which is about 60 days). There are also disagreements regarding the legal significance of the taxpayer's disagreement with the fact that they committed a tax offense, which is the basis for the tax seizure of their property, for the possibility of confirming its validity under a special (urgent) judicial procedure.

Having considered these issues, the author maintains that the short period of court resolution of applications on judicial review of tax seizure is compensated by the taxpayer's right to further appeal the tax seizure applied to them, even after its declaration to be justified. If the justification of the tax seizure was to be confirmed within several months (according to the rules of general administrative proceedings), this measure would be completely deprived of its effect.

Equally unacceptable as the article indicates is the point of view according to which the tax authority may, at its discretion, apply to the court for a judicial review of the tax seizure both under a special (urgent) judicial procedure or under the rules of general proceedings. In particular, this is due to the fact that the special (urgent) judicial procedure was devised particularly for a purpose of judicial review of tax seizure and, therefore, has a priority over the general proceedings. Additionally, the rules of general proceedings are not designed to ensure confirmation of the validity of the tax seizure within 96 hours from the moment of its application, while the absence of a court decision within this period on recognizing the seizure as justified is a basis for its termination (Article 94 (94.19) (94.19.1) of the Tax Code of Ukraine). In light of this, the author assumes that the optimal solution is to supplement the relevant provisions of the legislation on administrative proceedings with a rule that the tax authority must apply initially through a special (urgent) judicial procedure to confirm the validity of its tax seizure.

**Key words:** administrative proceedings, judicial review of the tax seizure, special (urgent) judicial procedure, tax law, tax seizure

## 1. Introduction.

Whenever obvious signs of tax evasion or other serious tax offenses arise, in order to ensure that taxpayers fulfill their obligations under the tax law it is customary for tax authorities to take drastic response measures, which are accompanied by significant interference with the taxpayer's exercise rights. One of such measures aimed at ensuring the repayment of tax debt is the tax seizure. This measure provides for either a ban on the taxpayer from exercising the rights to alienate or use their property (full administrative seizure), or the need for mandatory prior permission from the chief of the tax authority for the taxpayer to carry out any transaction with the seized property. In order to prevent and quickly cancel the groundless tax seizure, the legislation of Ukraine imposes on the tax authority the obligation to apply to the administrative court for confirmation of the validity of the tax seizure. The procedural law provides for a special (urgent) procedure for considering this application. However, in judicial case-law, at this point, the understanding has been established that the tax

authority may, at its discretion, apply to the court to confirm the validity of the tax seizure both (at its discretion) under a special (urgent) judicial procedure (duration of less than 96 hours), and under the general rules of administrative proceedings (duration of which is about 60 days). There are also disagreements regarding the legal significance of the taxpayer's disagreement with the fact that they committed a tax offense, which is the basis for the tax seizure of their property, for the possibility of confirming its validity under a special (urgent) judicial procedure. Finding optimal solutions to these issues of the due route of judicial control of the validity of the tax seizure is particularly important for the effectiveness of this measure.

## **2. Analysis of scientific publications.**

Tax seizure is extensively studied in the scientific literature. Most of attention is paid to its essence, the limits of restriction of taxpayer rights, the procedure for making a decision on tax seizure. The matter of the route for judicial control of the validity of tax seizure, despite the significance of the relevant set of issues, is not studied thoroughly enough. The above-described jurisprudence and gaps in the legislation are commented on in the works of a small circle of scientists, including O Bilous, I. Zheltobriukh, O. Zhmudinskyi and S. Kolb. Recognizing their significant input, it is to be believed that this topic requires further discussion.

## **3. The purpose of the work.**

The purpose of the study is to determine a due route for judicial control of the validity of the tax seizure.

## **4. Review and discussion.**

At the starting point of the research, it is to be noted that the tax seizure of is an exceptional way to ensure that the taxpayer fulfills their obligations (Article 94 (94.1) of the Tax Code of Ukraine). The seizure may be imposed on any property of a taxpayer. The provisions of Article 94 (94.5) of the Tax Code of Ukraine stipulate that the seizure of property may be:

- (a) full – provides for a ban on the taxpayer from exercising the rights of disposal or use of his property;
- (b) conditional – provides for the need for mandatory prior permission from the chief of the tax authority for the taxpayer to carry out any transaction with the relevant property [1].

Administrative seizure of taxpayer property is applied if one of the following circumstances is found:

- the taxpayer violates the rules for the alienation of property subject to tax lien;
- the taxpayer refuses to conduct a documentary or actual inspection if there are legal grounds for its conduct or to allow officials of the tax authority to do so;
- an individual who has a tax debt travels abroad;
- a taxpayer who has received a tax notice or has a tax debt takes actions to transfer property outside Ukraine, conceal it or transfer it to other persons, etc. (Article 94 (94.2) of the Tax Code of Ukraine) [1].

The most common and problematic circumstance in legal practice, causing tax seizure, is the refusal of a taxpayer to conduct a documentary audit or actual inspection providing that there are legal grounds for it or to allow officials of the tax authority to do so.

In cases on unlawfulness of decisions on tax seizure, the lawfulness of the denial of tax inspection (audit) or allowing tax authority officials to carry it out as well as the proper confirmation of these facts by tax authority officials are often central issues.

Thus, according to the content of Article 81 (81.1) (5) of the Tax Code of Ukraine, the basis for tax authority officials from conducting a documentary on-site or actual inspection is the failure of these officials to submit or send the following documents:

- (1) a referral for an inspection, which indicates the date of issue, the name of the tax authority, the details of the order to conduct the inspection, the name and details of the entity or object being inspected, the purpose, type of inspection, grounds, start date and duration of the inspection, position and surname of the official who is to conduct the inspection (the referral is valid if there is a sealed signature of an authorized person of the tax authority);
- (2) copies of the order to conduct the inspection, which indicates the date of its issue, the name of tax authority, the name and details of the subject and, in the case of conducting the inspection in another place – the address of the object being inspected, the purpose, type of inspection, grounds for conducting the inspection, the start date and duration of the inspection, the period of activity to be inspected (the order is valid if signed by an authorized person of the tax authority);
- (3) service ID cards of the persons specified in the inspection order [1].

In other words, as aptly summarized by O. Zhmudinskyi, the legislation establishes cases when a taxpayer may exercise the right to deny access to officials of the controlling body to an inspection, including failure to present or send documents stipulated by law or their preparation in violation of the requirements for their content and design [2, p. 191]. In particular, according to the opinion of the Supreme Court, if during the inspection the official ID card of the tax authority official is not shown to the taxpayer authorized representative or persons who actually carry out transactions, the tax authority officials specified in the referral do not have the right to a documentary on-site or actual inspection, even if they have a certificate of belonging to officials of tax authorities. In this case, the tax seizure was deemed ill-founded (Supreme Court Resolution of April 23, 2021 in case No. 808/1031/17) [3].

Equally important for lawfulness of a taxpayer's denial of an inspection by tax authority officials as grounds for tax seizure is proper confirmation of the relevant facts.

The provisions of Article 81 (81.2) (1) of the Tax Code of Ukraine in this context state that in the event of a taxpayer's refusal to allow officials of the tax authority to conduct an inspection, they shall immediately draw up and register, at the place of the inspection no later than the next working day, in 2 copies, an act certifying the fact of refusal, indicating the stated reasons for the refusal, one copy of which shall be handed over to the taxpayer for signature immediately after its drawing up [1].

Conversely, the failure of the tax authority to confirm the existence of a duly certified refusal of the taxpayer to allow an inspection as a necessary condition for imposing a tax seizure indicates the absence of grounds for this measure [4].

Having considered the above, it can be stated that the condition for the lawfulness of the tax seizure is the existence of circumstances that serve as the grounds for it the factual and legal dimension of which, including the lawfulness of certain actions of the tax authority and the taxpayer, must be fully verified.

Moving on to the examining of legislative provisions determining the procedure for making a decision on the application of tax seizure, it is to be noted that the chief of the tax authority makes a decision on the application of seizure. However, solely on the basis of a court decision (upon the request of the tax authority), funds in the taxpayer's account/electronic wallet could be seized (Article 94 (94.6) of the Tax Code of Ukraine) [1].

The court joins the procedure for the tax seizure of taxpayer's property other than their funds in the account after the chief of the tax authority makes a decision on a tax seizure.

Thus, according to Article 94 (94.10) of the Tax Code of Ukraine, the validity of the decision to apply the seizure within 96 hours must be verified by the court. This period cannot be extended administratively, except in cases where the owner of the property on which the seizure was imposed has not been established (discovered). In these cases, such property is under administrative arrest for the period specified by law for recognizing it as ownerless, or if the property is perishable, for the maximum period specified by law [1].

The supervisory authority must apply to the administrative court to confirm the validity of the tax seizure within 24 hours from the date of the decision on a tax seizure or from the date of identification (discovery) of the owner of the relevant property.

Application to the administrative court within 24 hours from the date of the decision to apply the administrative seizure or from the date of identification (identification) of the owner of the relevant property to which it is placed under the regime of administrative seizure (Article 283 (2) of the Code of Administrative Proceedings of Ukraine) [5].

In case of failure to comply with this deadline, the court shall notify the applicant and grant him a period, but not more than 24 hours, to eliminate the deficiencies. Failure to comply with the court's requirements within the established period shall entail the return of the application and the documents attached to it to the applicant. The return of the application is not an obstacle to re-applying to the court after eliminating its shortcomings, but no later than within 48 hours from the moment of establishing the circumstances that lead to the application to the court (Part 3 of Article 283 of the Code of Civil Procedure of Ukraine) [5].

At the same time, if the materials submitted to the court indicate a dispute over the right, the court shall refuse to open proceedings on the application by a ruling (Article 283(4)(2) of the Code of Administrative Proceedings of Ukraine). Refusal to open proceedings on the application makes it impossible for the applicant to file the same application again (Article 283(5) of the Code of Administrative Proceedings of Ukraine). In other words, the applicant's failure to meet such a deadline for filing the application and the inability to renew it indicates the existence of grounds for leaving the application for confirmation of the validity of the tax seizure without consideration [6]. At the same time, the applicant in this case has the right to file the same claims with the court in the general procedure (Article 283(5) of the Code of Administrative Proceedings of Ukraine) [5].

To deepen the understanding of the essence of a dispute over rights as an obstacle to an application for confirmation of the validity of the tax seizure under a special (urgent) judicial procedure, it seems necessary to look into the judicial case-law on this issue in the context of a taxpayer's refusal or denial of access by tax authority officials to an inspection as a basis for seizure.

Thus, the Supreme Court of Ukraine in the case no. 640/17091/21 indicated that the taxpayer's appeal of the order to conduct an inspection is a denial of the circumstances that led to the tax authority's application with a corresponding application, but is not a dispute of law within the meaning of Article 283(4)(2) of the Tax Code of Ukraine and does not prevent the consideration of the application for confirmation of the validity of the tax seizure. At the same time, according to the well-established opinion of the Supreme Court of Ukraine, when considering applications for judicial review of the tax seizure, the administrative court assesses the validity of the decision of the tax authority on the tax seizure by verifying the grounds for making the relevant decision and the correctness of the legal assessment of the taxpayer's actions, which became the basis for making such a decision. In particular, in this category of cases, the validity of the reasons for the taxpayer's refusal to allow tax authority officials to conduct a tax audit is included in the subject of proof. Moreover, the court emphasized that in the event of a court decision confirming the validity of the tax seizure, the taxpayer is not deprived of the opportunity to file an application for its termination if the order to conduct the inspection is subsequently recognized as illegal (Supreme Court Resolution of February 23, 2023 in case No 640/17091/21) [7].

This means that, in addition to verifying the validity of the decision to seize property in accordance with the requirements of the law, the decision of the head (his deputy or authorized person) of the supervisory authority to seize property may be appealed by the taxpayer in administrative or judicial proceedings. In all cases where a higher-level supervisory authority or a court cancels the decision to seize property, the higher-level supervisory authority conducts an official investigation into the reasons for the head (his deputy or authorized person) of the supervisory authority to seize property and makes a decision to hold the guilty parties accountable in accordance with the law (Article 94 (94.11) of the Tax Code of Ukraine) [1].

Also, the taxpayer has the right to compensation for losses and non-pecuniary damage caused by the supervisory authority as a result of the unlawful seizure of property of such taxpayer, at the expense

of state budget funds provided for supervisory authorities in accordance with the law. The decision on such compensation is made by the court (Article 94 (94.13) of the Tax Code of Ukraine) [1].

Thus, the ways to protect a taxpayer from an unlawful decision to impose tax seizure on their property are: (1) proving its unlawfulness within its judicial review; (2) administrative review/appeal and judicial appeal of the decision on tax seizure; (3) applying to the court for compensation for losses and non-pecuniary damage caused by the tax authority as a result of the unlawful application of tax seizure.

However, in the scientific literature, there are disagreements regarding the place of the special procedure for judicial review of the tax seizure among the judicial procedures. For instance, in the case no. 380/22535/24, the Supreme Court of Ukraine concluded that the tax authority has the right/obligation in any case to apply to the court through general procedure with request to confirm the validity of the tax seizure. The special procedure provided for in Article 283 of the Code of Administrative Proceedings of Ukraine is considered by the Supreme Court to be an alternative to the general procedure for considering these cases [8]. This conclusion is to some extent based on what was set out in the Judgment of the Supreme Court of 26 June 2020. in the case no. 280/2993/19 and according to which the tax authority, when applying to the administrative court, independently determines the procedure for such an appeal: whether it is a general procedure or in accordance with Article 283 of the Code of Administrative Proceedings of Ukraine for the purpose of urgent consideration, which must be indicated in the request [9]. At the same time, it should be noted that the uncertainty of the method of fulfilling by the tax authority of its task to confirm the validity of the tax seizure indicates that its discretion on this issue is unlimited, which may endanger the public interest, creating conditions for corruption abuses and impunity for negligence of tax authorities' officials.

Moreover, a part of the scientific and professional community, contrary to the recent conclusion of the Supreme Court of Ukraine, is inclined to believe that appealing a predicate decision of a tax authority (in particular, an order to conduct a tax audit) indicates the existence of a dispute over the right between the parties and makes it impossible to confirm the validity of the tax seizure under an urgent procedure.

In particular, judges of the Supreme Court of Ukraine O. Bilous and I. Zheltobriukh pointed out that the presence of objections by a private entity regarding the validity of the use of 'interfering' powers by a public authority, which are objectified in the legal methods of counteraction in the sphere of the exercise of powers tax authorities, indicates the emergence of additional elements (complications) of the dispute (the presence of a 'dispute about law' within the meaning of Article 283(1) of the Code of Administrative Proceedings of Ukraine), and therefore the latter cannot be resolved using a 'special' ('non-contentious') form of judicial proceedings, since in such a case the procedural limitations of the consideration, due to urgency, cannot prevail over the observance of proper guarantees of judicial protection, which are provided by general proceedings, and determine the essence of the right to judicial protection and the full fulfillment of the tasks of administrative justice [10]. Adhering to the same view, S. Kolb suggests that a 'leveling' solution to this problem would be to create a similar 'protective mechanism' for business entities in the form of considering categories of administrative cases regarding taxpayers' appeals of inspection orders in separate proceedings, or even to combine these two inextricably linked concepts (the right to inspect and the right to apply coercive measures) into one separate proceeding [11, p. 260].

## 5. Conclusions/

Sharing to some extent the above beliefs, I nevertheless tend to believe that the short period of court resolution of applications on judicial review of tax seizure is compensated by the taxpayer's right to further appeal the tax seizure applied to them, even after its declaration as justified. If the justification of the tax seizure was to be confirmed within several months (according to the rules of general administrative proceedings), this measure would be completely deprived of its effect.

Equally unacceptable is the point of view according to which the tax authority may, at its discretion, apply to the court for a judicial review of the tax seizure both under a special (urgent) judicial procedure or under the rules of general proceedings. This approach to interpreting the relevant provisions of tax legislation and the legislation on administrative proceedings appears to be manifestly ill-founded. In



particular, this is due to the fact that the special (urgent) judicial procedure was devised particularly for a purpose of judicial review of tax seizure and, therefore, has a priority over the general proceedings. Additionally, the rules of general proceedings are not designed to ensure confirmation of the validity of the tax seizure within 96 hours from the moment of its application, while the absence of a court decision within this period on recognizing the seizure as justified is a basis for its termination (Article 94 (94.19) (94.19.1) of the Tax Code of Ukraine). Moreover, while government authorities act only on the basis, within the powers and in the manner provided for by the Constitution and laws of Ukraine, tax legislation does not have any provision that would exempt the tax authority from exercising its powers to ensure judicial review of the decision on tax seizure within 96 hours (Article 94 (94.10) of the Tax Code of Ukraine). In light of this, it seems to be the optimal solution to supplement the relevant provisions of the legislation on administrative proceedings with a rule that the tax authority must apply initially through a special (urgent) judicial procedure to confirm the validity of its tax seizure.

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